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Inquiry into Religious Educational Institutions and Anti-Discrimination Laws

Submission

The direction proposed by the ALRC Discussion Paper, if reflected in legislation, would lead to Australia being in breach of its obligations under *The International Covenant on Civil and Political Rights (ICCPR)*, to which Australia is a signatory. Consequently any legislation reflecting such a breach would be vulnerable to challenge in the High Court.

The central reason for this contention is that the propositions B and C in particular, and potentially D, of the Consultation Paper would impose limits on the right to freedom of religion, as articulated in Article 18 of the *ICCPR*, well beyond limitations "necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others"; and would fail to respect the liberty of parents "to ensure the religious and moral education of their children in conformity with their own convictions".

The basis for limitations suggested within the Consultation Paper falls short of the standard of "fundamental rights and freedoms" required by Article 18 (3) ICCPR.

The only permissible limitations to the rights articulated in that Article are those which would be "necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others".

As the "fundamental rights and freedoms of others" are those which are established by the seven core international rights treaties, then the limitations proposed by Propositions B and C, and potentially D, cannot be supported as they are not based on such fundamental rights and freedoms.

It is to be noted that the consultation paper says, in paragraph 24, that "Article 18 (3) expressly contemplates" limitations on the right to manifest faith. It notably and misleadingly fails to include the word "**only**" which is used in subsection (3).

> *3. 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.*

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The presence of that word establishes that the onus is on those who propose limits to justify why any limits should be imposed, not on those who seek to manifest their religion to justify why they should be allowed to exercise their explicit rights.

Yet the Consultation Paper includes nothing which even attempts to identify what constitutes a "fundamental right or freedom" which would justify limiting the explicit rights established by Article 18.

The Consultation Paper notes in paragraph 9, rather ingenuously, that the "ALRC is not tasked with assessing the relative importance of religion and equality". Yet in fact the plain English meaning of *"may be subject **only** to such limitations ..... as are necessary to protect ... fundamental rights and freedoms of others"* requires exactly that an assessment must be made as to whether various considerations meet the standard required to be deemed "fundamental rights and freedoms."

The false premise inherent in the Consultation Paper

The Consultation Paper appears based on the premise that there is a general right to be free from discrimination established within international human rights treaties which would be sufficient to justify a burden on the rights established by ICCPR Article 18. Yet this is not true.

This error is most clearly given expression in paragraph 10 of the Consultation Paper which falsely equates the internationally-recognised right to freedom of religion with "freedom from discrimination". This false equivalence underlies much of the faulty reasoning of the Paper thereafter.

Similarly Paragraph 20 conflates issues of "equality and non-discrimination" arising from state or commonwealth legislation and other sources, with recognised fundamental human rights, such as the right to freedom of religion articulated in Article 18 ICCPR.

The conflation occurs in an obscure manner, in that footnote 18 (within paragraph 20) makes reference to various international rights agreements, such as the *ICCPR*, as if they establish "equality and non-discrimination" as a fundamental human right. But on closer inspection of the references, it is evident that this is NOT the case.

For instance, footnote 18 refers to "ICCPR arts 2, 3, 26".

Examining these articles, it is noted that Articles 2 and 3 are clear in requiring states to ensure

> "to all individuals within its territory and subject to its jurisdiction ***the rights recognized in the present Covenant***, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

and in asserting

> "the equal right of men and women to the enjoyment of all civil and political ***rights set forth in the present Covenant***." (my emphasis).

They do require that the ***rights recognised within the Covenant*** are available to all without discrimination. They do not establish a general right to be free from discrimination.

Article 26

> *All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.* ***In this respect****, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

The words "in this respect" in Article 26 confine the Article to mean that discrimination on any ground mentioned must not impair a person's equality before the law and access to the equal protection of the law. It requires the legal system of a country to be structured and conducted on a non-discriminatory basis.

Article 26 does not establish a general right to be free from discrimination in other aspects of society or life.

The simultaneous inclusion in the *ICCPR* of both Articles 18 and 26 clearly implies that it is expected that they are not mutually exclusive. Rather it is entirely reasonable to conclude that the framers of *ICCPR* did not believe that giving effect to Article 18, including subsections (1) and (4), would constitute discrimination in terms of Article 26.

In the Universal Declaration of Human Rights, Article 2 and Article 7 follow the same pattern as the *IPPCR*. Both refer to discrimination which would impair people's access to the rights articulated ***within the Declaration***.

UDHR Article 2

> *Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.*

UDHR Article 7

> *All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.*

There is no basis for arguing that the UDHR establishes a general right to freedom from discrimination.

Considering others of the key Human Rights treaties, it is clear that

- the *International Convention on the Elimination of All Forms of Racial Discrimination* (*CERD*)
- the *Convention on the Elimination of All Forms of Discrimination against Women-* (*CEDAW*)
- the *Convention on the Rights of Persons with Disabilities-* (*CRPD*)

each establish rights to be free from specific forms of discrimination. Yet none of them creates or asserts a general right to freedom from discrimination, contrary to the apparent assumption underlying the ALRC Consultation Paper.

While clearly freedom from discrimination more generally can be seen as a desirable goal, and one which is the subject of legislation in Australian jurisdictions, there is no case to support the view that freedom from discrimination generally constitutes one of the "fundamental rights or freedoms" referred to by Article 18 (3) *ICCPR*.

It should also be noted that the various pieces of Australian legislation in this field are inconsistent with each other; provide protection for people with some attributes but not for those with some others; and contain many exceptions which permit what might otherwise be viewed as discrimination by many people.

Given these realities, it is clear that even within Australian legislation there is no general right to freedom from discrimination.

Certainly there is nothing within any of the seven key Human Rights treaties that would support the view that an applicant for employment to a religious school who is not a co-religionist of the specific school community would have a "right" to be employed by that school.

Nor is there anything within any of those key Human Rights treaties that would support the view that a person, having been appointed to the role of teacher within a religious school, would have a "right" to teach children in that school personal views or beliefs which are contrary to the teachings of the religious school to which parents have entrusted the religious and moral education of their children.

Yet the rights established as a right by Article 18 (4) ICCPR are explicit. To give effect to parental rights in relation to the moral and religious education of their children, the delegation of that responsibility to a teacher is a matter in which the right of the parents' is unquestioned and is to be respected by states.

Conclusion

In the context of these observations, it has to be concluded that the rights established by Article 18 *ICCPR* cannot legally be limited on the insufficient basis asserted within the ALRC Consultation paper in the ways and to the extent proposed.

While the Terms of Reference which the ALRC has been given presume a particular outcome, the Commission has no choice but to advise the Commonwealth that there are no "fundamental rights or freedoms" involved which would permit the curtailment of the rights explicitly established within Article 18 *ICCPR* in the manner and to the extent envisaged by those Terms of Reference.

Religious Freedom Review 2018

It is also noted that in 2018 the Expert Panel established to examine and report on whether Australian law adequately protects the human right to freedom of religion presented its report.

The Review canvassed, with widespread consultation and expert input, the range of issues currently before this inquiry.

After thorough examination of the issues and the relevant Human Rights obligations in this field, the report made these recommendations in relation to employment in religious schools.

1.246 *The Panel agreed that faith-based schools should have some discretion to discriminate in the hiring of teachers and other staff on the basis of religious belief, sexual orientation, gender identity, or marital or relationship status for the reasons outlined above. This enables schools positively to select staff and contractors that adhere to the religion and its practices in order to foster or protect the religious ethos of the school.*

Employment in religious schools

RFR Recommendation 5

The Commonwealth should amend the Sex Discrimination Act 1984 to provide that religious schools can discriminate in relation to the employment of staff, and the engagement of contractors, on the basis of sexual orientation, gender identity or relationship status provided that:

(a) the discrimination is founded in the precepts of the religion

(b) the school has a publicly available policy outlining its position in relation to the matter and explaining how the policy will be enforced, and

(c) the school provides a copy of the policy in writing to employees and contractors and prospective employees and contractors.

RFR Recommendation 6

Jurisdictions should abolish any exceptions to anti-discrimination laws that provide for discrimination by religious schools in employment on the basis of race, disability, pregnancy or intersex status. Further, jurisdictions should ensure that any exceptions for religious schools do not permit discrimination against an existing employee solely on the basis that the employee has entered into a marriage.

These recommendations reflect Australia's obligation to respect freedom of religion far better than the Commonwealth government policy encapsulated in the Terms of Reference for this current enquiry.

Simply put, without the right to ensure that teachers in a religious school will teach and support the religion which is the reason for the existence of the school, the rights of parents to freedom of religion would be effectively extinguished.

I urge the Commission to advise the Commonwealth Government that paragraph 1.246 and Recommendations 5 and 6 of the Religious Freedom Review, being consistent with Australia's international obligations, be adopted in preference to the stated Commonwealth government policy encapsulated in the Terms of Reference for this inquiry.

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