

24 February 2023

Dear Commissioner

IPA Response to Australian Law Reform Commission *Religious Educational Institutions and Anti-Discrimination Laws: Consultation Paper (2023)*

Freedom of religion is a core Australian value which has enriched the lives of Australians at an individual level and benefited society as a whole. The freedom to hold, express, and act on religious beliefs is an inalienable human right and integral to the dignity of the individual.

Religion has also enriched Australian life as a shared source of ethics, meaning, and wisdom. It has also enriched Australian life through the provision of services, such as through the establishment of faith-based schools and educational institutions.

The toleration of religious belief which makes the formation and maintenance of these institutions possible is under threat from the kinds of reform the Australian Law Reform Commission proposed in its *Religious Educational Institutions and Anti-Discrimination Laws Consultation Paper* ('the Consultation Paper').

In the IPA's 2019 research report, *Religious Liberty and its Challenges in Australia Today*, the IPA pointed out that while exemptions in anti-discrimination laws for faith-based bodies were unreliable protections for religious freedoms, they were valuable:

Exemptions for religious institutions are important for both religious institutions as well as wider society. Religious institutions frequently engage in important services by operating schools and hospitals, as well as a multitude of welfare services to poorer Australians. If religious communities who form organisations to undertake these important activities are compelled to adhere to secular standards, the law would risk making it onerous or impossible for their formation.¹

This submission is an analysis of the 14 ALRC's proposals contained in the Consultation Paper. The analysis finds:

1. The ALRC's proposals would curtail the right of parents to give their children an education consistent with their values.
2. The ALRC's proposals would facilitate division and sectarianism by pushing religious disagreements into the courts.
3. The ALRC's proposals would give government bodies such as the Australian Human Rights Commission powers to control what faith-based schools do and say.

¹ Morgan Begg and Daniel Wild, *Religious Liberty and its Challenges in Australia Today* (Institute of Public Affairs Research Report, 2019) 14.

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Finding 1: The ALRC’s proposals would curtail the right of parents to give their children an education consistent with their values

Central to religious liberty are the many freedoms that are necessary to give effect to the desire to live out a religious life. Among these freedoms is freedom of association: or the right to form communities of faith through which the values of the religion can be reinforced and passed on to the next generation. Religious educational institutions are essential to this desire as many parents want to ensure the education their children receive is grounded in their own shared faith or reflects their values.

The effect of the ALRC proposals 1 through 7 would be to impose new obligations on religious educational institutions prohibiting them from selecting staff or admitting students in accordance with the values of the school.

The restriction on hiring decisions (proposals 2, 3, 5) is a pernicious attack on the religious character of the school. The staff of a school, regardless of what they teach, form the culture of the whole school. The values of the staff therefore form the values of the school. As the IPA noted in a research report in 2019:

The use of anti-discrimination laws to force a faith-based school to employ a teacher who rejects its religious values is a fundamental challenge to the ongoing survival of these bodies. If faith-based organisations are compelled by law to reject their faith-based mission, then its reason for existing is undercut.²

Proposal 7 is similarly restrictive in how schools are allowed to convey religious doctrine. For instance, the Consultation Paper provides that schools can teach religious doctrine but must do so in a way that ‘respects its duty of care to students.’³ This qualification alone appears to assume that the mere conveyance of religious doctrine to students could potentially cause mental or physical harm that would violate a school’s duty of care. Proposal 7 is explored further in Finding 3.

Finding 2: The ALRC’s proposals would facilitate division and sectarianism by pushing religious disagreements into the courts

The proposals would radically curtail the ability of schools to operate in accordance with their religious values. The effect of this would be to dramatically expand the potential for those who have a disagreement with a school to take their dispute to the courts.

Inviting courts to make determinations relating to ‘reasonable’ or ‘proportionate’ religious beliefs represents a challenge to the separation of church and state. As the IPA noted in 2019, this would confer on the court ‘the inappropriate role of defining religion and determining which religious practices or beliefs are legitimate. This is an inevitable consequence of the secular law intruding into the religious sphere.’⁴

The ambiguous and subjective terms in the Consultation Paper would, if reflected in the law, invite significantly more litigation. The narrowing of faith exemptions and the inclusion of

² Morgan Begg and Daniel Wild (2019) 9.

³ Australian Law Reform Commission, *Religious Educational Institutions and Anti-Discrimination Law: Consultation Paper* (2023) 17, 18, 20, 32.

⁴ Morgan Begg and Daniel Wild (2019)

words relating to proportionality or appropriateness of certain actions would expose schools to lower barriers to legal challenge. The subjective language would make it difficult to predict how courts will interpret the duties of the school. The likely outcome is that the proposals would have a chilling effect on schools, diminishing the religious character expected by families (see finding 1).

Finding 3: The ALRC’s proposals would give government bodies such as the Australian Human Rights Commission powers to control what faith-based schools do and say

In addition to the courts, government agencies will be expected to assist in the enforcement of compliance with the new restrictive standards contained in the ALRC’s proposals.

The ALRC is proposing to amend the *Australian Human Rights Commission Act 1986* so that schools are subject to the AHRC’s coercive information gathering powers (Proposal 11). Similarly the AHRC would be expected to issue new guidelines for ‘Temporary exemptions under the *Sex Discrimination Act 1984* (Cth)’, and ‘develop detailed guidance to assist educational institution administrators to understand and comply with the *Sex Discrimination Act 1984* (Cth).’ (Proposals 12 and 13).

The potential consequence of such changes is that the government would pre-emptively ‘guide’ how schools impart religious values and doctrine to students. For instance, the Consultation Paper provides its own guidance for how this might be achieved:

a school could require a LGBTQ+ staff member involved in the teaching of religious doctrine or beliefs to teach the school’s position on those religious doctrines or beliefs, as long as they were able to provide objective information about alternative viewpoints if they wished;⁵ [emphasis added]

And

it would be reasonable and proportionate for a school to preference an applicant for the position of religious education teacher who was willing to teach the school’s particular beliefs around sexuality, as long as the teacher was permitted to objectively discuss the existence of alternative views about other lifestyles, relationships, or sexuality in a manner appropriate to the context.⁶ [emphasis added]

And in clarifying that the content of a faith-based school’s curriculum is not subject to the discrimination laws, the ALRC says the proposal ‘adopts a model from the *Equality Act 2010* (UK), which explicitly excludes the content of the curriculum from the scope of the Act, but includes the way it is taught.’⁷ [emphasis added]

Kind regards

Morgan Begg
Director of Research

⁵ Consultation Paper (2023) 21.

⁶ Consultation Paper (2023) 24.

⁷ Consultation Paper (2023) 32.