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24 February 2023

The Australian Law Reform Commission

www.alrc.gov.au/inquiry/anti-discrimination-laws/submission/

RELIGIOUS EDUCATIONAL INSTITUTIONS AND ANTI-DISCRIMINATION LAWS

Liberty Victoria is grateful for the opportunity to make this submission on the Australian Law Reform Commission (ALRC) Consultation Paper, Religious Educational Institutions and Anti-Discrimination Laws.

Liberty Victoria is one of Australia's leading human rights and civil liberties organisations, tracing our history to Australia's first council for civil liberties, founded in Melbourne in 1936. We seek to promote Australia's compliance with the human rights recognised by international law and in the treaties that Australia has ratified and has thereby accepted the legal obligation to implement. We are a frequent contributor to federal and state committees of inquiry, and we campaign extensively for better protection of human rights in the community. Further information may be found at www.libertyvictoria.org.au.

This is a public submission, not confidential.

1. Liberty welcomes the Terms of Reference, in particular the emphasis on compliance with Australia's international human rights obligations, and the importance of respect, equality and dignity.
2. Liberty also notes, however, that the third element of the Terms, namely the Government's commitment to enabling religious educational institutions to "continue to build a community of faith" by their choice of staff "of the same religion" has the potential for interested parties to attempt a departure from human rights principles, a departure which Liberty strongly opposes.
3. We endorse the ALRC's Five Principles, but note places where they seem not to be adequately applied.
4. We welcome the long overdue propositions—A and B— that mean discrimination by religious educational bodies against school students and against staff on the basis of the SDA attributes will be made unlawful.
5. These propositions are vital both for students or staff with the relevant attributes, and for those whose family members have the relevant attribute. This new protection should go much wider however: discrimination against a student or staff member because of any personal association with someone bearing a relevant attribute must be unlawful too.
6. The Government's commitment to allowing the preferencing of staff according to religious belief leads to the ALRC's Proposition C.1, which suggests a "genuine occupational requirements" or "inherent requirements" test. This is inadequate, because a human rights approach requires more: a principled proportionality analysis, looking at the human rights of the parties, and the relative detriments or benefits in all the circumstances, and not just to the "religious ethos" of the employer.
7. The term "ethos" or "religious ethos" appears many times in the Consultation Paper, but it appears to float, untethered, to assert the primacy of religious bodies. This cannot be allowed.

1. *Ethos* (OED 2nd edition): *The characteristic spirit, prevalent tone or sentiment of a people or community; the 'genius' of an institution or system.*
8. Use of 'ethos' is contentious. A body's ethos may be unworthy of respect, or differently understood by various members or groups in the body, or verging on the criminal. If a body's ethos involves conduct or rules that are incompatible with the human rights of those they may affect then that ethos is not worthy of respect, and its relevant rules or conduct must be denounced and replaced.
9. From the Royal Commission into Institutional Responses to Child Sexual Abuse it was clear that many bodies, mostly religious, had an unspoken or wilfully blind ethos of looking the other way when child sexual abuse was taking place, and one of fear of and deference to superiors in the body. This ethos was manifest too in the harsh treatment of whistleblowers. This is but one example of the unsuitability of a vague and undefined appeal to "ethos".
10. If the ethos of a school or workplace has elements that are repugnant to a human rights culture, then that ethos cannot be respected. It is an empty term unless it is made clear that it encompasses a full human rights analysis of the place or body.
11. The conditions for preferencing staff by reference to religion, therefore, must instead be assessed by a true proportionality test, with reference to the human rights of the actual or prospective staff members to freedom of thought, conscience and religion and their other relevant human rights.
12. In particular, the technique of requiring parents to sign a "contract" promising matters of belief, sexual orientation or gender, such as the notorious Citipointe school in Queensland did, must not be allowed to create a false contractual excuse to pretend the SDA attributes are religious.
13. The above propositions lead primarily to amendments to the *Sex Discrimination Act* 1984; they must wherever relevant be supported by cognate amendments to the *Fair Work Act* 2009, some being already identified by the ALRC paper.
14. Three problematic Technical Proposals

15. Proposal 7 takes up some unrealistic concerns some bodies have raised about the ability of religious schools to teach their religious beliefs when discrimination against queer students on SDA attributes is proscribed as recommended. It proposes to declare that the content of the curriculum is not subject to the SDA. Liberty considers this an entirely unnecessary move, as indeed paragraph 91 of the Consultation Paper seems to suggest. It could also have harmful consequences for other duties of the curriculum authorities. It should be deleted.
16. Proposals 9 and 10 seek to create a new way of using "ethos" to enable an employee to be sacked for "actively undermining the ethos" of the institution. As noted above, the unclear, undefined, and vague nature of a religious ethos is an unacceptable device to avoid a proper proportionality test and so convert an impermissible SDA-violating sacking into a permissible sacking on religious grounds, avoiding the proper considerations that should attend management of an employee. These two proposals should be deleted.
17. Thank you for the opportunity to make this submission. If you have any questions regarding this submission, please do not hesitate to contact Liberty Victoria Vice-President Jamie Gardiner or the Liberty office on 9670 6422 or info@libertyvictoria.org.au.

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