

Submission: Religious Educational Institutions and Anti-Discrimination Laws Consultation Paper 2023

1. Thank you for the opportunity to make submissions in relation to the proposed changes to Federal anti-discrimination laws as they affect religious institutions. These submissions have a particular focus on the proposals as they affect religious educational institutions. I make these submissions as a Christian in regular attendance at an Anglican church, as former board member of a Christian school and as someone whose children have all attended a Christian school.

The Importance of a Religious Ethos / Community

2. My wife and I decided to send our children to a Christian school because we wanted them to grow up surrounded by students and teachers who shared a core set of beliefs about the truth of Jesus Christ. It was and is important to us that our children have diverse role models and influences in their lives that are outside of the family but who also share our core beliefs about what is entailed in living an authentic Christian life and developing Godly character traits.
3. The Christian ethos (to adopt the language of the Consultation Paper) of a school is founded primarily on small personal interactions and not by policies, procedures, claims in brochures or even by simply by communal activities. A school may ensure that a student is participating in daily bible teaching, that there is regular prayer and that lessons are related to the Bible where appropriate, but if the personal connections that a student has with other students, teachers and other school staff, lack any Christian flavour then the experience of that student will not be an experience of Christian community. It is impossible in advance to know whether a particular student will form a natural and personal connection with the bus driver, the cleaner, the person serving them in the canteen or the personal assistant in the administration office, but each of these interactions are in themselves valuable and ought not be discounted in understanding what it means to build authentic community.
4. In selecting the school to send our children to it was important to us that the school's commitment to building a Christian community ethos went beyond merely outward manifestations, but was concerned with a deeper, more authentic, community at the level of personal interactions. The school at which our children attend has sought to achieve that by way of a policy of employing staff who were Christian and an admissions policy that sought to ensure a preponderance of children from Christian families. Although the staff and families at the school attend many different churches in the region, it does mean that as a family we know many of the families of the staff and students outside of the school environment and that prior to starting school our children have known many of the staff and students at the school their whole lives.
5. We understand that there is a view within certain parts of the non-Christian community that religious education is an oxymoron and that the perception may be that it involves a sort of indoctrination which does not permit authentic questioning. Our experience has been very

different from this because that is not what we sought for our children. Our experience has been that our children have within the school environment a place where they can grapple (age appropriately) with serious philosophical questions about the nature of existence, the nature of our relationship with God, the existence of evil, the nature and truth of the Christian scriptures such that they can have application to modern life. As a family we appreciate that our children can have these conversations (formal and informal) within a school community that is an extension of their family and church life. In that context we will often disagree with the answers that staff and other students may give, but that disagreement is often at the level of application rather than fundamental belief. We value the disagreement and diversity because it teaches our children to value differences of opinion, to understand alternative views and to be prepared to refine their own thinking as they mature. We recognise that our children need to also engage (age appropriately) with people who have a different fundamental worldviews, but recognising that beyond their family, church and school life, the majority of their interactions will be non-Christian we think that it is important that we are able to equip them with a mature and nuanced understanding of the Christian faith before they go to university or into the workforce and that they should have the opportunity to do this within a school community that has a genuine Christian ethos.

Legal Protection of Religious Communities - Articles 18 & 22 ICCPR

6. The ALRC analysis of the rights that will be restricted by the Propositions and Proposals in the Consultation Paper fails to properly analyse the rights and freedoms of religious people to manifest their beliefs in community and their freedom of association. Accordingly, the conclusions that are expressed have failed to give proper weight to the impact that will be felt by religious communities were the ALRC recommendations adopted.
7. The approach within the Consultation Paper is to focus primarily on the right of religious communities to appoint religious leaders and teachers in order to give protection to the religious freedoms within Article 18. This is one aspect of forming a community. Another aspect to forming a community involves the ability to define who is able to join that community, namely people who share common characteristics which the community is to be about. The Consultation Paper gives almost no weight to this aspect of Article 18 (freedom to manifest religious belief) or Article 22 (freedom of association).¹
8. Commenting on the nature of the Article 18 protected right in the Office for the Commissioner of Human Rights at [General Comments No. 22](#) [4] states.

The freedom to manifest religion or belief may be exercised "either individually or in community with others and in public or private". The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of

¹ I note a passing reference to a Proposition B having a 'potential to interfere' with various freedoms including a freedom of association – see A.39 on page 47 of the Consultation Paper; also in A.36 in relation to Proposition A there is a reference to a "potentially greater impact on freedom of association and the way religious doctrine is taught." At page 46 of the Consultation Paper. Nowhere is there any analysis of Article 22.

symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or headcoverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group. In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.

[emphasis added]

9. This comment makes it plain that Article 18 involves much more than simply preserving the right to appoint religious leaders and teachers. Even if religious institutions are allowed to preference religious people in respect of particular leadership roles, this quote makes it clear that without an ability to preference in relation to the religious community as a whole, there will be a serious impact on the character of the religious community. The Propositions and Proposals supported by the ALRC will have far reaching and negative impacts on the rights that protected by Article 18 which have not been inadequately considered.

10. The right to form religious communities also enjoys protection under Article 22, which provides:

Article 22

- *Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.*
- *No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.*
- *Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.*

11. The rights under Article 22 include the right to form religious communities. The formation of communities necessarily involves the defining of who is admitted into the community. The Propositions and Proposals in the Consultations Paper seek to limit the rights of religious communities to define who may be admitted into the religious community. The European Commission of Human Rights in its [Guide to Article 9 – Freedom of Thought, Conscience and Religion](#), recognised that the ability of a religious organisation to regulate its own membership was a core aspect of its existence and an indispensable aspect of a pluralistic society:

...the believers' right Guide on Article 9 of the Convention – Freedom of thought, conscience and religion European Court of Human Rights 76/107 Last update: 31.08.2022 to freedom of religion encompasses the expectation that the community will be allowed to function peacefully, free from arbitrary State intervention. The autonomous existence of religious communities is indispensable for pluralism in a democratic society and is therefore an issue at the very heart of the protection which Article 9 affords. It directly concerns not only the organisation of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members. Were the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable (Hassan and Tchaouch v. Bulgaria [GC], 2000, §§ 62 and 91; Fernández Martínez v. Spain [GC], 2014, § 127). The internal structure of a religious organisation and the regulations governing its membership must be seen as a means by which such organisations are able to express their beliefs and maintain their religious traditions (Svyato-Mykhaylivska Parafiya v. Ukraine, 2007, § 150).²

[emphasis added]

12. The Consultation Paper gives no consideration to the impacts that the Propositions and Proposals will have in terms of restricting Article 22 rights as they relate to right under Article 18. It follows that the Propositions and Proposals have not properly considered. Where there has not been a detailed consideration of the impacts of the Propositions and Proposals upon the rights of religious communities (schools, teacher, students and parents), the Propositions and Proposals ought be rejected.

Submissions on Propositions and Proposals

13. It is an unfortunate accident of the way in which laws have developed in in recent decades that when anti-discrimination laws were introduced, the way in which religious freedoms were protected was through the granting of blanket exemptions. Freedoms of religion is a fundamental right within a pluralistic society and yet its protection through these exemptions has come to be viewed as a 'licence to discriminate', this is neither appropriate nor helpful. Characterising religious freedom in this way has tended to lead to a perception that religious communities were getting a 'free pass', and that religious beliefs are *a priori* discriminatory (which is incorrect). It is not surprising that cast in such a light religious exemptions are seen as something that is outdated and which can only be tolerated for so long.
14. I therefore agree that it is desirable to remove the current blanket exemptions of religious institutions from the Federal anti-discrimination laws, but only where there are well thought through, balanced and clearly expressed measures in place to appropriately protect the freedoms of religious communities. In my view the blanket exemptions are negatively framed³ and insufficiently nuanced to take account of differences that genuinely and obviously exist between different religious schools (and other institutions). Blanket

² Page 75-76

³ Which is unhelpful for the reasons that I have outlined.

exemptions are not the most sensitive or proportionate way to achieve a balance between competing rights and they can give the impression that religious communities want to discriminate against people for reasons such as marital status, and sexual preferences, when the truth is that they want to be allowed to be in a religious community with people who share their religious beliefs and live according to those beliefs. The freedom to manifest one's religion comes not from a desire to discriminate but from a desire to live in accordance with one's own deepest convictions about the nature of truth and reality. As much as I am supportive of the stated objective, it would be inappropriate to remove the exemptions to the anti-discrimination laws (as proposed by Proposition A and Proposition B) without putting in place new provisions that will protect religious freedoms and the freedom of association.

15. With regard to Christian schooling there are differences amongst schools in relation to how they build a religious community⁴, for example:
 - a. Employment of staff – some schools have a mixture of Christian and non-Christian staff whereas others have employed only Christian teachers or have required all staff and/or contractors to be Christian.
 - b. Religious practices – some schools have prayers and devotional times overseen by selected designated staff, others expect or make opportunity for all teachers or all staff to contribute.
 - c. Curriculum – the degree to which the curriculum content includes explicitly religious teaching that teachers are required to teach varies significantly from school to school.
 - d. Purposes and Vision – some of these practical differences will stem from the foundational commitments of the school community and will be reflected in the school's constitution. For example requirements relating to association membership and board membership, vision statements, explicit motivations for particular policies such as fee help etc.
16. Shaping exemptions so that they permit schools to authentically pursue the legitimate aims of developing a religious school community is a difficult task. I am broadly supportive of the approach but am concerned that the current Proposals and Propositions will leave many Christian schools uncertain about whether they will be able to justify their practices, even in circumstances where the schools is genuinely trying to build a holistic Christian community. It is necessarily the case that the removal of blanket exemptions will cause anxiety amongst those who care about Christian schooling, because the provisions that replace it will be less certain and will leave significant room for doubt about whether a school's policies and practices are compliant.
17. One thing that could be said in favour of the current exemptions (from the perspective of those wanting to protect religious freedom), is that they provided certainty. Whatever flaws they might have (which I do not deny), they allowed religious communities to act in

⁴ In this regard I agree with the approach set out at paragraph 58 of the Consultation Paper.

accordance with their religious convictions in various areas of life. If the ALRC is to recommend the removal of those exemptions it must put something in their place which provides certainty to religious communities. If laws are certain and clear, this will go a considerable way to allaying fears within religious communities about the removal of the blanket exemptions.

18. This anxiety amongst Christians⁵ needs to be considered in the context of the current political environment in which Christians have a strong sense that progressive ideology is often opposed to the Christian worldview. The anxiety that Christians (and possibly other religious groups) have regarding these proposals is not a reason to refuse to improve the current laws, but it is a powerful and important reason to ensure that the Propositions and Proposals provide as much certainty as is reasonably possible to allay concerns that the changes are to some degree open ended and that the case law that flows from any changes will result in a more extensive repeal of the exemptions than is foreshadowed in the Consultation Paper.

Proposition A (proposals 1, 3, 4, 6, and 7)

19. The removal of the exemptions in relation to discrimination against students (Proposition A) is appropriate, but only where a more tailored protection is put in place to allow schools to protect the character of the religious communities that they are seeking to build.
20. My understanding is that Proposition A would remove the blanket exemption so that schools would not be able to refuse a student admission or exclude a student from the school on the basis of a protected characteristic. This is not in itself a problem but I note that there is no positive right to preference families / students who are from a particular faith background. This leaves religious communities open to being in breach of the anti-discrimination laws in circumstances where a family / student is not admitted to a school (in accordance with a stated policy) on the grounds that their family did not share the school's religious beliefs. My understanding is that absent the blanket exemption, this may be indirect discrimination (per [46] of the Consultation Paper). Under the ALRC recommendations there would be no legislated right for schools to adopt an admissions policy that took account of the religious beliefs of a family whose child was seeking admission to the school.
21. It is notable that whereas the impact of Proposition B is ameliorated by Propositions C and D, no such attempt to ameliorate the impacts of Proposition A is proposed. The Commonwealth has a positive obligation to protect religious freedoms and it ought to consider whether:
 - a. Religious communities should be protected by an explicit right to preference religious families in relation to school admission policies; and
 - b. Religious communities should have a right to expect members of the community to not undermine the fundamental beliefs of the community.
22. The ethos of a school community is determined by the particular combination of the staff, the students and the families of the students. The community consists in the totality of

⁵ I cannot comment on whether there is a similar anxiety in relation to other religious groups.

those interactions and each of those elements is important. Schools ought be able to require all or a certain proportion of families who send their children to a religious school be families who profess the same religious views. If schools are not able to do this there will be a profound impact on the nature of the communities that are created. Once in a religious community there is a reasonable expectation that people behave in such a way as to support the furtherance of the aims of that community and so the law ought to enshrine that as a positive right of religious communities. Such measures would go a significant way to ensuring that the removal of religious exemptions in relation to students are in fact proportionate.

23. The legal analysis of Proposition A⁶ seeks to balance the competing rights and it frames the question in the following way:⁷

A.30 Proposition A may require a religious educational institution to accept and support students whose views or conduct on sexual orientation or gender identity do not align with, and may directly challenge certain religious beliefs promoted by a particular institution. Such a requirement potentially interferes with institutional autonomy connected to the right to manifest religious belief in community with others, parents' liberties in relation to their children's religious and moral education, freedom of expression, and freedom of association.

A.31 On the other hand, allowing discrimination against students or their families on Sex Discrimination Act grounds has the potential to impact students' rights to equality and non-discrimination in education, health, privacy, freedom of conscience, belief and religion, freedom of expression and....the rights of the child. States' duties to promote non-discrimination and equality through education are also relevant to consideration of the proposed reform.

24. I accept that Proposition A is pursuing a legitimate aim.⁸ The difficulty is that the ALRC's approach is not necessary and proportionate.

25. As I have noted above⁹ Proposition A will seriously impact the nature of the school community and the way in which the religious beliefs of the community are manifested in practice. The assessment of the impacts of Proposition A upon the rights of school communities¹⁰ is superficial and inadequate. This in turn undermines the assessment of whether Proposition A was necessary to achieve the legitimate aim. The practical impacts upon the rights of schools and parents are described in this way:

On the other hand, there is a strong argument that retention of the existing broad exception is not necessary to allow those involved with religious educational institutions to manifest religion within their institutions . While prohibiting discrimination may require inclusion and support of individuals with different beliefs or conduct that is not in compliance with religious beliefs, it does not significantly

⁶ A.29-A.38 - pages 45-47 of the Consultation Paper.

⁷ A.30-A.31

⁸ A.32-A.34

⁹ [17]

¹⁰ As outlined in A.30

burden the ability to teach doctrine or to manifest religious beliefs through worship and practice in community.

This statement has many significant problems and merely asserts that there is a 'strong argument' (without making that argument) and then further asserts (without evidence or argument) that the changes would not "significantly burden" the rights of schools and parents. It was noted in A.30 that the rights of parents include the right to manifest religious beliefs in community and community must necessarily mean a school community that is made up of staff, students and parents/carers. The impacts upon the community are simply not considered.

26. As I have noted in the previous section, the Consultation Paper does not contain an adequate analysis of the impacts that the Propositions and Proposals will have on the right to manifest religious belief in community (Article 18) or the right to freedom of association (Article 22). The manifestation of religious beliefs in community involves more than simply the ability to teach doctrine, conduct worship and have times of prayer. The manifestation of these beliefs in community necessarily entails community amongst students and amongst parents. If the majority of students in a class are from families that do not share the school's religious beliefs, that will have a profound effect on the nature of the classroom and will inevitably make it significantly harder for children from religious families to be supported in manifesting and developing their beliefs. Similarly, where the majority of parents come from a non-religious background the priorities of those parents may not align with the priorities of the parents who share a common religious belief system. It is easy to foresee a situation where the voice and influence that parents who hold religious beliefs within a community are significantly diminished and perhaps entirely overridden even within the context of an ostensibly religious school. The point is not that there is no place for alternative voices within these communities, but that the changes proposed by Proposition A create the real risk of significantly undermining the religious ethos and character of the religious communities that exist around many religious schools.
27. The consideration of alternative means of achieving the aims of the Terms of Reference are superficial and make little effort to seriously consider less restrictive ways of achieving the aims. It seems to me that ALRC has not had regard to options that involve a genuine attempt to avoid discrimination and protect the rights of schools and parents to build authentic religious communities in which children can be educated. There are many ways that this could be achieved. By way of example, a school policy that would strike what I consider to be a suitable balance might:
- a. The School developing and publishing a policy that provides that one of the ways that it seeks to build an authentic religious community is through aiming to have at least 80% of students in each home room class are from a family that shares the religious beliefs of the school.
 - b. To try and achieve that policy the school aims to maintain the an 80/20 ratio of Christian/Non-Christian families within the school community.
 - c. Families who were unknown to the school (enrolling a child for the first time) undertaking an admission process that involves them providing information about their religious beliefs.

- d. Where a non-Christian family has already enrolled children at the school, further enrolments will always be accepted regardless of the above policy.
- e. Families with students enrolled may change their religious beliefs and this will have no impact on the ongoing education of their children or their ability to enrol further children.
- f. Where a new non-Christian family seeks to enrol a child for the first time and the school is unable to accommodate them within their policy settings, then an enrolment may be refused and the family put on a waiting list which will be monitored so that they will be informed should the situation change.

I believe that the above description very closely reflects the policy of the school which my children presently attend. I appreciate that there is some scope for indirect discrimination to occur in that there is a possibility that a student with protected characteristics whose family does not share the religious beliefs of the school may find that the policy operates to exclude them from admission in some instances. It seems to me that the prospect of this occurring is capable of being controlled by ensuring the schools policies are not used to recreate the blanket exemption.

I suspect that there are many other alternative ways that a suitable balance could be struck which have not been considered in the ALRC but will, I hope, be proposed in other submissions.

28. In my view the ALRC's consideration of alternative less restrictive options is inadequate and appears to have had no regard to approaches that are not just theoretical, but which have been operating successfully in religious schools for many years. At A.10 of the Consultation Paper the ALRC describe the very careful approach that should be taken when considering imposing restrictions on the right to manifest religious beliefs, noting that 'legislators or representatives of the judiciary should always analyse the respective cases with empirical and normative precision'.¹¹ In view of this requirement I urge the ALRC to rethink its approach to Proposition A, giving greater weight to the impact that the changes will have on the manifestation of religious belief in school communities and the options that exist to strike a more proportionate balance.
29. Whilst I fully support the aim of removing of the blanket exemption from the anti-discrimination laws, I cannot support Proposition A as it is presently drafted. It may be that the concerns that I have raised could be addressed by broadening Propositions C and D to allow preferencing in relation to admissions policies as well as in relation to staff appointments and to require all members of the religious community to adhere to not actively oppose the stated aims of the community. Whether that would be an effective means of balancing the interests would in the end depend on the way in which the positive rights were framed.

Proposition B (proposals 2, 3, 4, 5, and 7)

¹¹ I note that there is a significant body of case law that underscores this point which is highly relevant to the consideration of Proposition A and Proposition B, none of which is cited in the Consultation Paper. This is notable in circumstances where the Consultation Paper in numerous places cites official commentary and case law that tends to favour the conclusions that the ALRC are recommending.

30. I agree with Propositions B but only subject to my comments on Propositions C and D.
31. The analysis of the justification for Proposition B as a stand-alone provision (i.e. without regard to Propositions C and D) as it is set out at A.39 to A.47 offers a conclusion that the removal of the right is necessary and proportionate without making any compelling case for that position and without fairly setting out the case for a continuing protection of the rights arising under Articles 18 and 22.
32. The analysis of necessity and proportionality suggests in dismissive tones that the only arguments against Proposition B are:
- a. that "...staff may simply seek employment at a different kind of institution...";
 - b. that "...educational institutions already deal with these issues in a pastoral way that incorporates considerations of the facts of a particular case.";
 - c. the considerations under A.36 – which would be the "interference with institutional autonomy can be intensely uncomfortable and disorientating for those within an educational institution, and can expose the student population to different ideas about personal conduct and/or religious belief..."
33. This analysis fails to take account of the negative impacts that Proposition B will have on the rights and freedoms protected by Articles 18 and 22. Some of the key considerations that have not been factored into this analysis are:
- a. That parents will not be able to assume that their children are being taught by teachers who share their fundamental religious worldview. Whilst exposure to other worldviews is appropriate for children, parents ought not to have to have disagreements with teachers at the level of fundamental beliefs with the people charged with teaching their children. This is relevant throughout a child's schooling but is particularly relevant whilst the children are younger and less able to think critically.
 - b. Children will be exposed to worldviews that are fundamentally different to those of their family and for younger children in particular this will create a situation where they are asked to trust their teacher, whilst also being told that their teacher is mistaken in their religious beliefs.
 - c. Expecting students to be able to manifest their religious beliefs in a setting where their teacher holds (potentially quite strongly) opposing beliefs is unrealistic and creates a clear risk that students will not feel that they are free to express, develop and test their religious beliefs in the classroom setting.
 - d. The school community includes all staff, students and parents. Even outside the teaching environment the students and parents will interact with other staff at the school. Where a school is no longer able to select people who share their religious beliefs this will impact the religious character of a school community. The proposed removal of the exemption will likely lead to some division amongst staff along the lines of religious belief, this will make it harder for religious teachers and for students to manifest their religious beliefs within the wider community. Whilst opposing views are to be welcomed, the introduction of views that are fundamentally hostile to religious worldview into that community has undeniable

negative impacts that do not seem to have been considered in the Consultation Paper.

34. The mere removal of the exemption in relation to the appointment of staff, without the creation of positive rights to protect religious freedoms would be disproportionate. Whilst the ALRC do recommend the creation of positive rights, it is important to note that absent those positive rights the removal of the blanket exemption would have a discriminatory effect on religious communities. This is important because it frames the nature of the obligation that the Commonwealth has to actively protect religious freedoms and requires the Commonwealth to justify that the protections that are being put in place have been carefully considered, properly consulted upon and tested to ensure that they will satisfy the treaty obligations of the Commonwealth. It is in that context that Propositions C and D are then considered.

Proposition C (proposals 8 and 10)

35. The approach proposed by Proposition C is a good one and is one that has been adopted in other jurisdictions. To allow religious communities (including schools) a positive right to *preference* staff according to certain specific criteria seems to be a good way to craft positive rights to protect religious freedoms, and to distinguish between circumstances that may move beyond a legitimate manifestation of religious belief, and veer into the unlawful territory of discrimination. Laws framed in this way have the significant benefit that to the public at large there is a clear distinction between a legitimate and free expression of religious belief within community (which is positive and is not a thing to be tolerated but celebrated if we are genuine about being pluralists), and the illegitimate manifestation of prejudice in the form of discrimination (which is always negative and ought not be tolerated).
36. However, a right to preference is a mere framework and it is the detail of the right that will determine whether it is effective in delineating between permitted positive expressions of religious belief and prohibited discriminatory manifestations of prejudice. That means that it is the detail that must be examined.
37. The criteria for allowing preferencing as it is framed in Proposal 8 is unreasonably and unnecessarily narrow and uncertain to provide proper protection to the rights of those who seek to participate in religious communities. The test may be broken down to the following elements:
- a. The role one where participation in the teaching, observance or practice of religion is a genuine occupational requirement,
 - b. Whether the role satisfies the requirement of 'a' above must be satisfied having regard to the nature and ethos of the institution; and
 - c. The treatment proportionate in all the circumstances.
38. The shortcomings of Proposition B (as implemented through Proposal 8) are as follows:
- a. It fails to create a clear and applicable positive right for religious communities to manifest their religious beliefs in community. The right to preference as explained

by the ALRC remains vague and open to a broad range of interpretations that will necessarily leave religious communities vulnerable to legal challenges. In order to successfully rely upon the right a religious institution must satisfy three complex and uncertain legal requirements.

- b. The vulnerability to legal challenges will reduce the confidence of religious communities to legitimately manifest their religious beliefs for fear that that the Courts might take a more restrictive view of the right to preference. It is crucial that if the blanket exemption is removed (as it should be) that it is replaced by a positive right that clear and can be relied upon by religious organisations with a high degree of confidence and which is not vulnerable to erosion by judicial interpretation.
- c. It will almost inevitably result of the Proposition that only a small proportion of staff within an institution would be able to be preferred for their shared faith belief. For many religious institutions the introduction of people into the staff of the institution who do not share the core religious beliefs will inevitably have a negative effect on the religious character of the community.¹²
- d. There will be no option to preference contractors who share the religious beliefs of the community.

39. Whilst a right to preference will never be as certain and reliable as the blanket exemption, there is considerable scope to craft the right such that it will give significantly more confidence and certainty to religious institutions. Nothing in the ALRC Consultation Paper suggests that significant thought has been given to how this might be achieved. Some preliminary thoughts on what from this might take are:

- a. A general right to preference in respect of roles where the teaching, observance or practice of religion is a genuine occupational requirement.
- b. A right to preference in respect of other roles and contractors where it is demonstrated that it is a reasonable requirement having regard to the nature and religious ethos of the institution.

40. There are no doubt many other ways that this could be drafted but it is something to which further consideration should be given. The point is to demonstrate that a positive right to preference can be drafted in such a way that there is greater certainty for religious communities.

41. Propositions B and C represent a significant infringement upon the freedom of a religious community to build and shape the religious ethos of the community. In my view what is proposed significantly under-values the contribution of personal interactions, that are not an explicit requirement of any role, in building the genuine religious community. The approach of the Consultation Paper appears to assume that the community consists in the conduct of the outward expressions of religious observance rather than primarily in the informal individual interactions that occur on a daily basis. This 'top down' thinking is misconceived and risks doing serious harm to the ability of schools to build authentic Christian communities.

¹² The negative effects of undermining the religious character of the community are set out elsewhere in this submission.

42. I note the comments that the existing laws in many states already have a similar requirements in place and that these do not appear to have caused dramatic problems. In my view this is a naïve and short-sighted approach. Communities have some in-built resilience and the impacts of these changes will not be felt through dramatic immediate changes but through subtle erosion over many decades. If the laws are passed in their current form the school community for my children will most likely be unaffected in any material way but the school community for their children will most likely bear little resemblance to the authentic Christian community that my children have enjoyed. It is incumbent upon the ALRC and the Commonwealth to have regard to the long term implications of the changes that are recommended because once the changes are made and the freedoms of religious communities are impacted, it will be virtually impossible to reverse the effects.

Proposition D (proposals 9 and 10)

43. I am supportive of what I understand to be the intent behind Proposition D insofar as it relates to staff within a religious community. As I have said elsewhere, I consider that there is scope to extend proposition D so that it applies to all people within a religious community, which in a school context would mean staff, contractors, children and parents.

44. Although the Consultation Paper makes no mention of this, it is notable that the discussion of Proposition D does not even consider the possibility of bringing contractors within its remit. This is notable when the discussion of Proposition B does explicitly deal with how the removal of the blanket exemption will impact the way in which a religious community interacts with contractors.

45. Any laws arising from Proposition D should be framed as a positive right to protect religious freedom by enforcing reasonable and proportionate behavioural standards that support the maintenance and growth of a religious community. It follows (as discussed elsewhere) that the religious communities do not need and are not assisted by a licence to discriminate on Sex Discrimination Act grounds.

46. The extent to which Proposition D is effective in protecting religious freedoms will depend very heavily on how the right to preference is framed. The narrower the right to preference is framed the less utility there is in a right to develop and enforce a behavioural code.

Concluding Comments

47. Some themes that emerge in examining the ALRC's Consultation Paper are:

- a. The need to re-frame the way in which the Commonwealth fulfills its obligations to protect religious freedoms in Australia. The present use of blanket exemptions casts religious communities in a negative light and gives the impression that any exercise of religious freedom is the same as discrimination. Addressing this in a genuine and constructive way would be a step toward developing mutual trust and understanding within Australian culture.

- b. The task of drawing distinctions to identify what is a legitimate expression of religious belief within a community setting and what is discrimination is not easy. It is however essential that this task is tackled thoughtfully, analytically and thoroughly before any protections (even though they are blanket exemptions) are removed. If these are not in place when the exemptions are removed and if genuine efforts have not been made to ensure that religious communities understand and are comfortable with the changes and the intent behind them, then such steps will be divisive and may itself be discriminatory.
- c. A much broader, more organic and in fact more realistic view of what it takes to form a community needs to be adopted if adequate protection is to be given to religious communities. The approach proposed by the ALRC may be consistent with certain strands of thought in established case law in other jurisdictions but that does not absolve the ALRC or the Commonwealth of their obligation to bring their own thinking and judgement to bear on how religious freedoms might best be protected in a positive manner in Australia, and to do so with a view not to just the next election cycle, but looking at the implications of what is proposed in a generational context.

48. The ALRC's recommendations are disappointing in that the overall attempt to protect religious freedoms feels tokenistic. Whilst I understand and support the desire to remove exemptions that ostensibly licence discrimination, I do not get the sense from reading the Consultation Paper that there is an equal enthusiasm to ensure that the rights and freedoms of religious people are protected. This is disappointing and worrying in a professedly pluralistic and tolerant society, but it is an example of why Christian groups are nervous (and often defensive) about changes that are proposed.

49. None of the Christians that I know would want to be associated with discrimination but they do desire to be able to live their lives in community with people who share their beliefs. I hope that the ALRC and the Commonwealth will take note of the submissions made against the current proposals and will take the opportunity to revisit the recommendations and develop new proposals that will achieve the legitimate aims of actively stamping out discrimination and (with equal vigour) taking positive steps to enhance religious freedoms in Australia.