Submission of

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in response to the

Consultation Paper of the

Australian Law Reform Commission

Inquiry into Religious Education Institutions and Anti-Discrimination Laws

Contents

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Introduction

I am grateful for the opportunity to contribute to this Inquiry.

The Terms of Reference require consideration of "what reforms...should be made in order to ensure, to the extent practicable, Federal anti-discrimination laws reflect the Government's commitments...in a manner that is consistent with the rights and freedoms recognised in the international agreements to which Australia is a party including the International Covenant on Civil and Political Rights" (ICCPR).

I shall focus mainly on this aspect of the Consultation Paper.

Executive summary

The ALRC presents the case for four key reform propositions which would remove all real substance from the exemption in s. 38 of the Sex Discrimination Act 1984 (Cth) (SDA).

The Consultation Paper ascribes particular meanings to key terms, which do not correspond with their natural usage. "Community of faith," "staff preferencing" and "respect for religious ethos" are purposive concepts, which are almost entirely deprived of meaning by the detail within the individual propositions. The broad effect of the proposals would be to render religious schools indistinguishable from secular schools except for certain superficial religious trappings.

The ALRC does not hide its opposition to the religious dimension of religious schools, and seems closed to the benefits which religious schools may offer. It does not seem to appreciate the degree of support under international law for religious schools, or the fact that they are founded and function primarily to serve, support and protect all staff and students. Wherever this involves discrimination the matter certainly deserves close examination, though with much greater detail and accuracy, and objectivity, than is visible in the Consultation Paper.

The ALRC's proposals are not based on an international law analysis of human rights in which all relevant restrictions are justified convincingly and with particularity, according to required criteria, to produce best available rights-promoting, least restrictive outcomes.

The Consultation Paper draws on a large body of international law texts. Inasmuch as the ALRC maintains that international law drives its four key reform propositions, with such restrictive consequences, I firmly disagree.

International law provides greater protective support for religious schools to operate in accordance with their characterising ethos than is currently available within s.38, taking account both of the rights of religious freedom and to be free from discrimination.

The Consultation Paper conveys such a negative impression of religious schools as to suggest that immediate corrective steps are needed to align certain factual assertions made in the Paper with the actual operations of religious schools. A fresh reappraisal may then be made of fundamental human rights issues with objectivity and impartiality.

The inadequacy of s.38 to meet the requirements of international law

I ground my criticism of s.38 on its ineptitude to provide proper human rights protection based on the idea of avoiding "injury to the religious susceptibilities of religious adherents". It has a sanctimonious ring, particularly in the context of this Inquiry, and it misses the purpose such an exemption should serve, if it is to support the human rights at stake.

Religious schools depend on the rights of individuals within article 18 of the ICCPR, through institutional means, to found and operate a school with a religious ethos, in combination with the right of parents to ensure the religious and moral education of their children in conformity with their own convictions and, as the capacity of affected children evolves, the right of children to make their own religious and other choices. Of course these rights have limits, expressed in article 18(3) (except the parental right in article 18(4) which may be uncertain as to precise scope but stands out in importance for being absolute). Given that any reduction in the scope of s.38 results in the restriction of these article 18 rights, the appropriate justification must come from within article 18(3). According to an international law analysis, the question is whether any restriction to those article 18 rights is necessary, applying article 18(3) principles, and having due regard to the scope of and impact on the freedom from discrimination on any grounds (including those applicable here) in articles 2 and 26. S.38 in not capable of answering that. As an exception within a statutory scheme which has developed since 1984 to address discrimination on particular grounds, s.38 is an inadequate way of providing any form of article 18 protection while addressing the range of sexuality and gender identity-related issues which are now affecting children in ways and on a scale not previously seen.

European Convention case law provides some guidance, though there are differences between the European and UN systems which need to be accounted for in any comparison; and care is needed when drawing conclusions for Australian domestic legislation, especially when relying on European Court decisions. Nevertheless, a number of European Court (and former European Commission) decisions demonstrate strong support for institutional ethos vis-à-vis employees, even where this impinges on matters within the protection available for an employee's private and family life, and other rights. I attach an extract from a book chapter I contributed on this subject, which summarises the position.[2] The most important standards for present purposes are those in the ICCPR, as it is binding on Australia.

SDA is need of re-evaluation

The Consultation Paper helps draw public attention to the need for a (perhaps overdue) re-evaluation of s.38, and other aspects of the SDA.

The main reason why religious schools come into conflict with the prohibited grounds in the SDA, and require exemption, is that to possess their essential character religious schools need employees who understand, support and (depending on the school) exemplify the institutional ethos. I understand that staff are differentiated on this basis, rather than whether they possess characteristics protected by the SDA. A broader range of staff than the Consultation Paper

[2] Paul M Taylor, *Controversial Doctrine: The Relevance of Religious Content in the Supervisory Role of International Human Rights Bodies*, in Rex Adhar (Ed.) *Research Handbook on Law and Religion* (Edward Elgar, 2018), pp 309-330.

admits may be, and are entitled to be, involved in activities which depend on commitment to faith if they are to be performed authentically.

The SDA may not be responsive as it needs to be to the needs of all schools, not just religious schools. The question here is whether the SDA is appropriately adapted to the issues schools face as the SDA currently stands. The most recent additional protected characteristics in the SDA are gender-related identity and various other gender-related characteristics, prompting unanswered questions concerning the need for schoolgirls to have change room privacy and protection in sports from the risks posed by biological males with greater propensity to cause physical harm. It is unclear whether the definition of "sexual orientation" in the SDA will remain as it is, but if it is extended to include matters such as "intimate or sexual relations with" others, all schools will presumably still be expected to uphold their usual protocols. As I understand it, in general, religious schools do not discriminate on SDA grounds on student intake but, along with all other schools, face these among other unresolved challenges under the SDA.

The current range of SDA issues affecting schools are therefore not confined to religious schools.

Disproportionality of the ALRC proposals

The Consultation Paper does not articulate with any great precision the particular facets or operations of religious schools that give rise to SDA-based discrimination or specific harms, nor does it propose separately tailored responses to each of those, as is required if applying international law principles.

This is a serious shortcoming given the principles of necessity and proportionality and other criteria that, under the ICCPR, should guide any proposed reforms. As a brief summary of familiar principles: each restriction on religious freedom must be shown to be 'necessary' in the sense of being directly related to and proportionate to the specific need for which it is invoked; no restriction may be 'imposed for discriminatory purposes or applied in a discriminatory manner';[3] each restriction must 'be provided for by law and be compatible with the objects and purposes of the [ICCPR]';[4] 'restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected';[5] the burden of proving the legal basis for restrictions rests with the State relying on them;[6] the State must 'demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat'.[7]

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[3] *General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, CCPR/C/21/Rev.1/Add.4 (GC 22) [8].
[4] Principle I.A.5., *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4.
[5] *General Comment No. 34, Article 19, Freedoms of opinion and expression*, 12 September 2011, CCPR/C/GC/34 (GC 34) [34].
[6] GC 34 [27].
[7] GC 34 [35].

This summary is considered to represent the more up to date standards upheld by the Human Rights Committee in 2011, in General Comment No 34 on freedom of expression, than those in the 1984 Siracusa Principles (which the Ruddock *Religious Freedom Review* recommended as the reference point in domestic laws limiting freedom of religion),[8] or the 1993 General Comment No 22[9] (though the sources cited in General Comment No 34 draw heavily on General Comment No 22).

Against these standards it is easy to see that the Consultation Paper has fallen well short in proposing changes that must avoid unjustified restriction.

Especially given the seriousness of these proposals, in bringing to an end the means for fulfilling the raison d'être for religious schools, there should have been a detailed factually verified analysis of each of the particular aspects of the operations of religious schools which give rise to concern.

The Consultation Paper's understanding of day-to-day life in religious schools, and the pejorative portrayal of religious schools (including through the hypothetical examples), indicate that it is uncalibrated with the contemporary routine operations of these schools. In certain respects the Consultation Paper appears to be proceeding on a factually false representation of religious schools, how they function, what they stand for, what they teach and the harms they pose.

For each issue of concern, the Consultation Paper should have identified the harm alleged to be associated with it, particularising the specific nature of the harm, its source, impact, ways of reducing or avoiding it, and then propose the least restrictive means of answering the concern. There should be an opportunity to present and challenge evidence that ALRC ultimately relies on.

If the Consultation Paper proposals were merely intended to "focus everybody's attention on what is needed – that is, if these proposals were put forward, what exemption would you need, and how would it be framed," as Justice Rothman is attributed as saying,[10] then these are important questions to answer.

Although the Consultation Paper tables a number of important issues, which warrant further exploration, it does not at this stage provide the necessary supporting international human rights justification for its reform propositions.

Conclusion

In conclusion, it is quite open to the Government to improve upon existing SDA exemptions in order to better enable religious schools to function in accordance with their ethos, well beyond the limited and somewhat clumsily stated protection that s.38 currently offers.

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[8] Recommendation 2.

[9] *General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, CCPR/C/21/Rev.1/Add.4.

[10] *Religious education fears fall on deaf ears*, The Australian, Monday, February 27, 2023 (https://www.theaustralian.com.au/nation/politics/religious-education-fears-fall-on-deaf-ears/news-story/471222ef74a7dd387ae0454dbaba2834).

Instead of reducing s.38 to almost nothing, it should be amended to better reflect the true intentions of religious schools, to appoint and maintain staff in support of religious ethos. Any restrictions imposed by the limited scope of this exemption should have close regard to the criteria to be applied under article 18(3), as summarised above.

At present, the only protection that exists to enable religious schools to function hangs by a thread. If the proposals proceed, the result would be to worsen an already unsustainable inadequacy of Australian law to protect freedom of religion, and to prevent discrimination on grounds of religion.

measures taken by the university on religious dress in *Hudoyberganova* were treated as an unlawful interference with freedom of religion. The contrast with the European Court's headscarf decisions could not be greater.

In summary, aspects of individual and collective religious practice may compromise the human rights of members and leaders (among others) but this is not, in general, objectionable provided the freedoms concerned are voluntarily forgone by those affected. In several cases examined in this section there has been some ambiguity as to whether the European Court was concerned only for the adverse external effects of religious teachings and not their nature or content. It would appear that these enquiries did not extend to the creedal basis of such practices. The notable exceptions are *Refah Partisi* and *Hizb ut-Tahrir*, where the enquiry was necessary in order to protect society from the nation-wide imposition of religious precepts of a decidedly coercive and anti-democratic kind.

5. EMPLOYEE OBLIGATIONS INCIDENTAL TO ORGANISATIONAL ETHOS

Religious and secular entities alike depend on their employees (and others) to support or represent their ethos and objectives. Contractual limitations on convention rights are permissible where they are freely accepted, within certain limits. Specific provision is made within international instruments, including the ILO Discrimination (Employment and Occupation) Convention, and the European Council Directive 2000/78/EC for occupational requirements. They share the aims of promoting equal treatment in the workplace, but the European Directive contains more specific exemptions to allow for different treatment based on the characteristics of religion or belief, disability, age or sexual orientation.[63] A narrow interpretation is said to be required of the inherent requirements provision of the Discrimination Convention,[64] but the UN Special Rapporteur on religion or belief considers that the characteristics of many religious groups fall within those parameters.[65] (The scope of the European Directive is perhaps indicated by a recent European Court of Justice ruling to the effect that an internal company rule which prohibits the visible wearing of any political, philosophical or religious sign does not constitute direct discrimination).[66]

A number of matters considered by the European Court concerned the faith-based requirements of an employer. In *Obst v Germany* it found that the dismissal of a public

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[63] *European Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation*. Art 4(2) concerns occupational activities within churches and other public or private organisations with an ethos based on religion or belief.

[64] ILO Convention 111, Discrimination (Employment and Occupation) Convention, 1958, Art 1(2).

[65] Interim Report to the General Assembly of the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt, A/69/261, 5 August 2014, [39]–[41].

[66] Cases C-157/15 *Achbita, Centrum voor Gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions*, and C-188/15 *Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole Univers* (March 2017).

relations director of the Mormon Church for an adulterous affair did not violate his right to respect for his private and family life. Important factors which the domestic court took into account were that his employment contract reinforced the Church's 'high moral principles'[67] and the employer's ethos was a religious one.[68] However, in *Schüth v Germany*, the Court found that the Roman Catholic Church's dismissal of an organist and choirmaster, similarly for engaging in an adulterous relationship, was a violation of the same right because the domestic court which supported the dismissal had made serious errors. These included a failure to consider adequately the proximity of the employee's job as an organist and choirmaster to the mission of the Catholic Church (which is not the same as that of a priest, who is expected to observe, in his private life, the full canonical code of the Church). Inadequate attention had also been paid to the fact that it would be difficult for him to find work outside the Church as an organist and choirmaster.[69]

Siebenhaar v Germany illustrates how the balancing of interests at stake should be conducted. There, the European Court found that the dismissal of a teacher from a kindergarten operated by a Protestant congregation did not violate her freedom of religion when it was based on her membership of the Universal Church (a religious body with objectives inconsistent with the mission of the Protestant Church). This was so even though her membership did not implicate her conduct while on duty. The bonds of loyalty were supportable as they were intended to preserve the credibility of the Protestant Church in the eyes of both the public and the parents of the children enrolled at the kindergarten.[70]

Fernández Martínez v Spain provides another good illustration. The Court held that the termination of a contract to teach at a secondary school did not violate the right to respect for private and family life of a former Roman Catholic priest who had married and fathered a family. Although this had been known by the employer for many years, it became an issue as a result of public exposure in a newspaper – the latter having also disclosed that the teacher (and former priest) was a member of a movement that challenged certain precepts of the Catholic Church. The Court found that he had voluntarily assumed a heightened duty of loyalty, and given the Church's interest in upholding the coherence of its precepts, teaching the Catholic faith to adolescents could be considered a crucial function requiring special allegiance. This was despite the fact that the applicant did not teach anything incompatible with the Catholic doctrine. In order to remain credible, religion was required to be taught by someone whose very way of life (and public statements) were not flagrantly at odds with the religion in question – especially where the religion was (as indeed many religions are) to govern the private life of its followers.[71]

The rules of celibacy for clerics highlighted in *Fernández Martínez* raised issues of inconsistency with Arts 8 (right to respect for private and family life) and 12 (right to

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[67] *Obst v Germany*, App no 425/03 (ECHR, 23 September 2010), [50], citing *Ahtinen v Finland*, App no 48907/99 (ECHR, 23 December 2008), [41].

[68] *Obst*, [51], citing *Lombardi v Italy* [2011] ECHR 1636, [41].

[69] *Schüth v Germany*, App no 1620/03 (ECHR, 23 September 2010), [69]–[75].

[70] *Siebenhaar v Germany*, App no 18136/02 (ECHR, 3 February 2011), [44]–[48].

[71] *Fernández Martínez v Spain* [2014] ECHR 615, [135]–[138].

marry) of the European Convention. The Court outlined the scope of the duty of domestic courts to scrutinise the appropriateness of an autonomy-serving interference with a Convention right.[72] They must conduct an in-depth examination of the circumstances of the case and undertake a thorough balancing exercise between the competing interests at stake.[73] A mere allegation by a religious community that there is an actual or potential threat to its autonomy is not sufficient. It must also show that, in the circumstances, the risk alleged is probable and substantial, that the impugned interference with the right of the employee does not go beyond what is necessary to eliminate that risk, and that the restriction does not serve any purpose unrelated to the exercise of the community's autonomy.[74] Furthermore, any restriction ought not to affect the substance of the right concerned.[75] In this respect earlier European case law is instructive.

Take *Rommelfanger v Germany*, where the Commission commented that where there was a reasonable relationship between the measure affecting the relevant freedom and the nature of the employment – as well as the importance of the issue for the employer – the measure in question ought to avoid striking at the very substance of the freedom.[76] The Court in *Fernández Martínez* concluded that by signing successive employment contracts the applicant knowingly and voluntarily accepted a heightened duty of loyalty to the Catholic Church. Given the Church's interest in upholding the coherence of its precepts, teaching the Catholic faith to adolescents could be seen as a task requiring special allegiance to Catholic doctrine. A less restrictive measure would not have had the same effectiveness in preserving the credibility of the Church.[77]

The European Court has consistently emphasised that the state has an important role as the neutral and impartial organiser of the practice of religion, faith and belief, and that this role is conducive to public order, religious harmony and tolerance in a democratic society, particularly between opposing groups.[78] This duty of neutrality rules out distinctions based on the precepts of the religion concerned.

In *Sindicatul 'Păstorul cel Bun' v Romania* the Court found there was no violation of the freedom of association when authorities refused to register a trade union formed by Orthodox priests and lay employees of the Romanian Orthodox Church to defend the professional interests of its members. This registration was prohibited by the Statute of the Romanian Orthodox Church. The state was simply declining to become embroiled in affairs of the Romanian Orthodox Church and was thereby observing its duty of neutrality under Art 9.[79] An important factor was that the consultative and deliberative

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[72] Note that in his dissenting opinion in *Fernández*, Judge Sajó conceded that the duty of the state to respect autonomy is a matter of degree. 'It is certainly greater in matters concerning the internal organisation of the life of a religious group and absolute when it comes to defining a religion's doctrines'.

[73] *Sindicatul*, [159].

[74] *Fernández Martínez*, [132].

[75] This requirement is not found in *Schüth* or *Siebenhaar*.

[76] *Rommelfanger v Germany* (1989) 62 D&R 151. For an example of compulsion, see *Young, James and Webster* [1981] ECHR 4, [55].

[77] *Fernández*, [135] and [146].

[78] See, eg, *Sindicatul*, [165]; *Leyla Şahin*, [107].

[79] *Sindicatul*, [166].

bodies provided for by the Church's Statute would be obliged to work together with the union, a body not bound by the traditions of the Church. Nothing would prevent anyone forming an association with aims compatible with the Church's Statute, or objects that did not call into question the Church's traditional hierarchical structure and decision-making procedures.

To sum up, loyalty to organisational ethos may be secured from employees (and contractors) within these limits, even in cases where the beliefs supported are potentially incompatible with Convention standards.

6. THE DYNAMICS OF SUPPORTING AND OPPOSING DOCTRINE AND BELIEF

In general, the expressive freedoms allow doctrine and belief to be proclaimed and challenged in the public space regardless of content. The state's duty is to ensure this may occur without particular viewpoints being excluded – including those held by opponents. There are certain limits in this free exchange, notably those in the hate speech provisions of the Covenant, and under the European Convention where criticism of beliefs reaches a level of severity such as to impinge upon the freedom of believers to adhere to their faith. In this sphere, the European Court has indicated that the state's duty of neutrality and impartiality requires it to ensure mutual tolerance between opposing groups.[80] The role of the authorities is not to remove the cause of tension by eliminating pluralism, but to ensure that competing groups tolerate each other.[81] The question of the compatibility of underlying belief systems with human rights standards in this context should rarely be material.

In *Öllinger (Karl) v Austria*, the European Court found a violation in the prohibition of an MP's protest against war crimes, coinciding on All Saints Day with a meeting of the Comradeship IV Association commemorating the SS soldiers killed in the Second World War. It was undisputed that the aim of protecting the gathering of Comradeship IV did not provide sufficient justification for prohibiting the MP's assembly.[82] The Court reiterated that the state is compelled to abstain from interfering with freedom of assembly, which extends to a demonstration that may annoy or give offence to those opposed to the ideas or claims that it is seeking to promote.[83] It noted that if every probability of tension and heated exchange between opposing groups during a demonstration was to warrant its prohibition, society would be faced with being deprived of the opportunity of hearing differing views on any question which offends the sensitivity of the majority opinion.[84]

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[80] *Leyla Şahin*, [107].

[81] See, eg, *Serif v Greece* (2001) 31 EHRR 20, [53].

[82] *Öllinger (Karl) v Austria* [2006] ECHR 2006, [47]–[50].

[83] Ibid, [36], citing *Stankov and the United Macedonian Organisation Ilinden*, App nos 29225/95 & 29221/95 (ECHR, 29 June 1998), [86]; *Plattform 'Ärzte für das Leben' v Austria*, App no 10126/82 (ECHR, 21 June 1988), [32]. For Committee consideration of neo-Nazi gatherings, see, eg, CCPR A/47/40 (1992) 80 (Austria).

[84] *Stankov*, [107].