



AMBROSE CENTRE FOR RELIGIOUS LIBERTIES

SUBMISSION

TO

THE AUSTRALIA LAW COMMISSION

ENQUIRY INTO

RELIGIOUS EDUCATIONAL INSTITUTIONS

AND ANTI DISCRIMINATION LAWS

PREAMBLE

The Ambrose Centre for Religious Liberty (Ambrose Centre) is an incorporated organisation devoted to promoting, educating and publishing material with respect to the fundamental right of religious liberty.

The Ambrose Centre has an advisory panel that comprises religious leaders from different religious faiths, lay people from a variety of religious beliefs, legal practitioners, academics and past politicians.

The Ambrose Centre has a deep interest in matters of religious beliefs and conscience. In particular, the right to publicly manifest matters of belief and conscience.

The Ambrose Centre is pleased to submit this submission to the Australian Law Reform Commission into the

**ENQUIRY INTO RELIGIOUS EDUCATIONAL INSTITUTIONS AND ANTI
DISCRIMINATION LAWS
THE FAIR WORK ACT**

INTRODUCTION

The Australian Law Reform Commission (ALRC) has been asked by the Attorney-General of Australia, the Hon. Mark Dreyfuss KC MP, to make enquiry into and make recommendations upon relevant sections of the Sex Discrimination Act (Cth) (SDA) and the Fair Work Act (Cth) (FWA). The purpose of the request by the Hon Mark



Dreyfuss KC MP is the regard for the Government's commitment to remove or repeal sections 39, 153, 195, 351, 772, of the FWA and sections 23(3)(b), 37 (1), 38 (1), (2) and (3) of the SDA, with the effect of removing present legislative rights from educational institutions, conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, to discriminate against students, teachers and or staff on the basis of sex, sexual orientation, gender identity, marital or relational status or pregnancy (attributes).

With respect to students with the nominated attributes, the objective of the inquiry is directed towards preventing refusal to enrol, expulsion or different treatment to students without the said attributes (other than sex, of course). With respect to teachers and or staff, preventing refusal to hire, dismissal or different treatment to teachers and or staff without the said attributes (other than sex, of course).

The ALRC identified the following sections of the SDA, 23(3)(b), 37 (1), 38 (1), (2) and (3). The following sections of the FWA were also identified, 38, 153, 195, 351 and 772.

The ALRC report put forward four Substantive Reform Propositions and fourteen Technical Consultation Proposals to achieve the Government's commitment and invited interested parties to make submission on the Reform Propositions and Technical Consultation Proposals.

This submission concentrates on eleven Technical Consultation Proposals (TP). It is noted there are fourteen Technical Consultation Proposals, but nos. 12-14 are consequential rather than direct amendments to allegedly offending sections of the SDA and FWA.

I am happy to have this submission published.

ALRC – INQUIRY APPROACH

The ALRC has provided a learned, albeit short, outline of how it approached the subject matter. In doing so emphasis turned on Australia being a signatory to human rights instruments, sponsored by the United Nations. The ALRC rightly mentioned that Australia has an obligation arising from those instruments following upon becoming a State Party verified by its signature.



ISSUES

Sir Gerard Brennan, former Chief Justice of the High Court of Australia noted how international law influences the common law. In his judgment in the Mabo case¹, his Honour said:

*The common law does not necessarily conform with international law, but international law is a legitimate and influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration.*²

Sir Gerard Brennan, speaking when he was the Chief Justice of Australia, also noted how the community looks to the courts for the protection of minorities and individuals against the over reaching of their legal interests by the political branches of governments. He said:

*In other parts of the common law world, courts have been expected to protect minority and individual rights in situations that were once not thought to be justiciable. In Canada, the Charter of Rights and Freedoms has conferred on the Courts a wide jurisdiction touching issues that were once reserved to the political branches of government. In New Zealand, a Nation with a Unitary Constitution, an appellate judge has suggested that “[s] one common law rights presumably lie so deep that even Parliament could not override them” In India, the long record of activism on the past Supreme Court has entrenched it firmly in the affectionate confidence of the people. In Australia, the High Court’s approach has been more cautious, although its declaration of an implied freedom of political discussion has stimulated judicial and public discussion of the validity of a variety of laws.*³

As the Inquiry deals principally with religious rights, which would be affected, conceded, or eliminated; the focus of the recommendations advanced in the Technical Consultation Proposals (TP) would impact on the obligations of the Government pursuant to the International Covenant on Civil and Political Rights (ICCPR), particularly on Article 18 and also other Articles related to this within the ICCPR. The obligations imposed on the Government are considerably weakened as the Government has not incorporated the ICCPR into our domestic law. Hence, the impugned Articles within the ICCPR do not impose a legal requirement upon the Government to adhere to their requirements.

Article 2.2 – states:

2. *Where not already provided for by existing legislative or other measures, each State Party to the Covenant undertakes to take the necessary steps, in accordance with its Constitutional*

¹ *Mabo v The State of Queensland [No 2]* (1992) 175 CLR 1.

² *Ibid*, at 42.

³ Talk on Judicial Independence, The Judicial Conference, University House, Australian National University, Canberra, 2 November 1996, pp3-4



processes and with the provisions of the of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognised in the present Covenant

The requirements provided for in Article 2.2 have not hitherto been undertaken by successive Governments since the date of signature in December 1979. The Hon. James Spigelman in his McPherson Lectures on Statutory Interpretation and Human Rights is equally unable to state why this is the case.⁴

The government seeks to remove all discrimination which religious run (or faith based) educational institutions may presently exercise against sex, sex orientation, gender identity and intersex persons, be they students, teachers, or staff.

The government seeks the removal of such clauses from ss.23, 37 and 38 of the SDA and similarly from ss. 153, 195 and 351 of the FWA. Some consequential amendments will be required to other sections of the FWA relevant commonwealth human rights instruments. This submission will not address consequential issues or other amendments.

I wish to make clear from the onset that this submission does not support discrimination per se, whether exercised by faith based educational institution or religious houses. Exceptions must be made where religious houses engage in training of new vocationalist where traditions, practices and teachings mandate a particular gender. Similarly, exceptions are acknowledged in accommodation quarters rooms or areas are set aside separating sexes.

Exceptions in the same vein are extended to political parties where a person with a known or publicly acknowledged viewpoint contrary to that of the political party, seeks membership of that party or employment in the office of a politician of that party. An application by that person would generally be rejected. Such discriminatory purpose against political opinion is not only tolerated but accepted. The alternative would be absurd and unworkable.

The ALRC is caught in a similar position in making recommendations on existing rights of Religious run educational institutions. To what extent can or should long standing established beliefs, canons, tenets and faith of the affiliated religion of the educational institution be abrogated, abridged, or disregarded. Particularly when the beliefs are entrenched by centuries of learned scholarship, soundly tested, and reasoned. In examining the ALRC recommendations, a central issue is whether the word 'discrimination' is the correct description of why faith based educational institutions seek to uphold tenet and canon of their doctrine and teaching.

In consideration of making the recommendations within the ALRC's Report, the test should not be the weight of public opinion, or the supporting forces within the government of the day, but application of the law in a balanced and proportionate manner for all parties.

⁴ Queensland University Press, 2008, p29



THE LAW

The initial question is whether a religiously run educational institution or a community within the institution enjoys the same rights. As a rule, only individuals have human rights.

The foundational principle for religious human right is found in Article 18 of the ICCPR:

Article 18

- 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*
- 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.*
- 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.*
- 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.*

Article 21 of ICCPR also is relevant as it establishes the right for religious persons to assemble be it a church or other gathering, as in an educational institution.

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the 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.

Important to note that Article 18 is one of only a small number of Articles within the ICCPR which does not permit any derogation.

Article 4.2

- 2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.*



Article 4.1 makes clear that even ‘*In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed... no derogation from the above stated articles, inclusive of article 18 is permitted.*

However it is noted that the manifestation of a religious belief is not absolute and may be subject to some limitations to protect public safety and public morals⁵. The Human Rights Committee, established by the UN to oversee complaints from eligible person/s against State Parties accused of breaching their rights pursuant to the ICCPR, has published General Comment 22 dealing with Article 18 of the ICCPR.

General Comment 22 commented on Article 18.3, which imposes limitations on the manifestations of religion, relating to public safety. Paragraph 8 of General Comment 22 states:

8 *Article 18.3 permits restrictions on the freedom to manifest religion or beliefs only if limitations are prescribed by law and are necessary to protect public order, health or morals, or the fundamental rights and freedom of others....In interpreting the scope of permissible limitation clauses, States (sic) parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified 2, 3 and 26. Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18.*

Para 8 goes on to say ... ‘*Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.*’

It would appear on face value that what is being asked by the Government of the ALRC is to vitiate the rights guaranteed in article 18 when it comes to faith-based educational institutions.

As a passing comment, arguments in support Reform Propositions B (1) and C are weak and tenuous. If implemented, they would grant an entitlement to a person with the nominated attributes to trump any alternative view offered by a faith based educational institution, even if offered in good faith and which is proportionate and balanced.

Nonetheless, allow me to comment on the Technical Consultation Proposals (referred to above as TP)

TP 1.- at para 74 recommends the repeal of s 38(3) of SDA.

Section 38 (3) states:

(3) Nothing in section 21 renders it unlawful for a person to discriminate against another person on the ground of the other person’s sexual orientation, gender identity, marital or relationship status or pregnancy in connection with the provision of education or training by an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in

⁵ See paragraph 3 of article 18.



good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

TP 2 recommends the repeal of subsections 38 (1) and (2).

The true effect of TP 1 and TP 2 is to repeal section 38 entirely whereby religious educational institution would be powerless to uphold their doctrines, teachings tenets and canons even when acting in good faith.

These two recommendations advocate a scheme where persons of the nominated attributes are at liberty to set their own beliefs and to manifest such beliefs to the detriment of the teachings, doctrines, tenets and canons of the religious affiliations of the educational institution. Furthermore, and alarmingly, the religious educational institution can do nothing to uphold its beliefs, teachings, canons and tenets of the religion with which the institution identifies with.

TP 3 is a flow-on effect to maintain consistency when section 38 is repealed in its entirety. This amendment may not be necessary should the ALRC reconsider its recommendations in TP 1 and TP 2 if this submission's proposal listed under the caption Alternative Option, which follows, is accepted.

TP 4 recommends that religious bodies in s 23 (3)(b) have no authority to regulate accommodation within their houses or dormitories etc. It is presumed that a religious body only has an intention to discriminate rather than act in good faith seeking a common understanding of its position.

It is not immediately clear why this recommendation is required other than to demonstrate a clear prejudice towards religious bodies. However, a religious body may act in good faith with sensitivity and proper ethical standards, yet it is alarming that the ALRC should disregard any such notion. The impression is that religious institutions can only exercise an authority by reverting to discrimination.

Amendments to the FWA recommended in TP 5, 8 and 9 would follow if the SDA is amended as recommended in TP 1, 2, 3 and 4. I see no need to comment on these amendments.

TP 10 and 11 are not contested in this submission but TP 11 should be read in the event of the ALRC accepting either in part or in whole the Proposals to be made under the caption Alternative Option.

Before moving to the Alternative Options, I take the liberty of pressing the importance of having and holding true to a religious belief.

In the case of *Hasan and Chaush v Bulgaria* in the European Court of Human Rights before a Grand Chamber, the Grand Chamber is the highest Judicial body within the European Court of Human Rights. The case turns on the religious rights of the applicants.

The Grand Chamber made the following observations:



60 *The Court recalls that freedom of thought, conscience and religion is one of the foundations of a democratic society within the meaning of the Convention.*

While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to manifest one's religion, alone and in private, or in a community with others, in public and within the circle of those faith one shares...

At para 62, the Court continues:

The court recalls that religious communities traditionally and universally exist in the form of organised structures. They abide by rules which are often seen by followers as being of a divine origin. ...the believers' right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully, free from arbitrary State intervention.

The High Court of Australia has also made strong comments on the importance of religion in the lives of individuals. The joint judgement of *Mason A.C. J and Brennan in the Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)*, is instructive.

"The law seeks to leave man as Free as possible in conscience to respond to the abiding and fundamental problems of human existence. In all societies and in all ages man has pondered upon the explanation of the existence of the phenomenological universe, the meaning of his existence and his destiny."

Then the joint judgment went on to speak of the impact of the meaning of religion.

"What man feels constrained to do or to abstain from doing because of his faith in the supernatural is prima facie within the area of legal immunity, for his freedom to believe would be impaired by restriction upon conduct in which he engages in giving effect to that belief. The canons of conduct which he accepts as valid for himself in order to give effect to his belief in the supernatural are no less a part of his religion that the belief itself. Conversely, unless there be a real connexion between a person's belief in the supernatural and particular conduct in which that person engages, that conduct itself cannot itself be characterized as religion."

Then to put it into perspective the search for meaning and belief, the joint judgement said:

"..... the freedom to act in accordance with one's belief is not as inviolate as the freedom to believe, for general laws to preserve and protect society are not defeated by a plea of religious obligation to breach them."

What should be clear from the above extracts from legal authorities is that religion is not a passing notion which does not move a person to observe fundamental and binding conduct upon those beliefs. Furthermore, that the religious beliefs are not frivolous nor intended or designed to ignore the obligation to comply with honourable intentions.



To characterise religious practices as inimical to personal lifestyle defined as protected attribute is misleading, false and prejudicial. But, it should be obvious to any meaningful analysis that discrimination plays no part in religious practice or conduct.

The ALRC centres on removing the presently lawful discriminatory behaviour or entitlements from faith based educational institutions but fails to balance the fundamental human right of religious beliefs to be protected.

Faith based educational institutions are not empty shells with no moving parts. The educational institutions are filled with people of faith and supported by many parents who also believe, practice and observe doctrines, teachings, canons and tenets of the religion (or belief) with which the institution is aligned. They are the people who wish to maintain the integrity of their faith and belief. they have no desire nor stomach to discriminate. They wish that the institution with which they identify does not submit to conduct which openly rejects or advocates against the doctrines, teachings, canons and tenets of the religion attached to the educational institution. Whether the contrary belief is exercised by a student, teacher (of any subject), staff or an employee with miscellaneous responsibilities, disharmony within the institution, or among parents may result. The institution is a whole not a category of divisible parts.

It is with these thoughts in mind that I offer the following Alternative Options.

ALTERNATIVE OPTIONS

I note the Terms of Refence given to the ALRC by the Hon. Mark Dreyfuss, Attorney General of Australia, contained at p3 of the Consultation Paper, do not mention the preservation of Religious Rights for Religious Educational Institutions, when removing discrimination rights. From this I do not read into that request of the Government not to consider, or ignore, any proposal to preserve Religious Rights for religious educational institutions.

Additionally, it is important to move away from the concept that religious institutions act only on a right to discrimination. Such a concept is mistaken and false. It is the right to openly practice and abide by the religious doctrines and beliefs that motivates the religious institutions.

It is with this in mind that I propose the following options for the ALRC's consideration and possible recommendation.

Sex Discrimination Act 1984 (Cth):

Section 23 (3)(b):

Be amended so that it reads-

(b) a religious body offering accommodation shall not discrimination against another person with attributes mentioned in subs.(1) above, provided the person seeking the accommodation undertakes to respect the religious body's doctrines, tenets, beliefs or teaching of the religion with which the religious



body is affiliated. And does not publicly voice or act contrary to those doctrines, tenets, beliefs or teachings; or

Section 37 (1)(d):

Be amended so that it reads:

(1)(d) any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs, of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion, provided that the act or practice does not discriminate against another person on the basis of that person's sexual orientation, gender identity, marital or relationship status or pregnancy; provided the body established for religious purposes can do an act or practice to protect the integrity of the doctrines, tenets or beliefs of that religion, including the right to take disciplinary action against a person who disregards or brings into disrepute the doctrines, tenets or beliefs of that religion.

Section 38 (1), (2) and (3) and insert (4):

Educational institutions established for religious purposes

Subs. (1) be amended so that it reads:

(1) A person acting on behalf of an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed shall not discriminate against a person on the ground of the other person's sex, sexual orientation, gender identity, marital or relationship status or pregnancy in connection with employment as a member of the staff of the educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed subject to sub-section (4) below.

Subs. (2) be amended so that it reads:

(2) A person or principal acting on behalf of an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed shall not discriminate against a contract worker on the ground of that person's sex, sexual orientation, gender identity, marital or relationship status or pregnancy in connection with a position as a contract worker that involves the doing of work in an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed.

Subs. (3) be amended so that it reads:

(3) A person shall not discriminate against a student or potential student on the ground of that student's sex, sexual orientation, gender identity, marital or relationship status or pregnancy by;

- (i) Refusing to enrol that student or potential student; or
- (ii) Expelling the student on the ground only because of that student's sex, sexual orientation, gender identity, marital or relationship status or pregnancy;



- (iii) Treating that student different to other students without the said attributes;

on behalf of an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed subject to sub-section (4) below.

Insert sub-section (4):

- (4) An educational institutional conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed shall be entitled to maintain the integrity of the educational institution and the doctrines, tenets, beliefs or teachings of the religion or creed with which the institution identifies, in the face of any public dissention or misconduct of a teacher, potential teacher, staff member, contract worker, staff employed in miscellaneous work, student or potential student, including the taking of disciplinary action such dissenter or misconducting person notwithstanding sub-sections (1), (2) and (3) above.

The above proposals would have consequential follow on to the FWA and other relevant human rights instruction on I do not need to make comment as it is best left to the parliamentary drafts person to make the requisite amendments.

Submitted by: R. Mimmo LLB LLM

For the Ambrose Centre for Religious Liberty.

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