



NSWCCL SUBMISSION

**THE AUSTRALIAN LAW
REFORM COMMISSION**

**INQUIRY INTO RELIGIOUS
EDUCATIONAL
INSTITUTIONS AND ANTI-
DISCRIMINATION LAWS**

3 March 2022

NSWCCL

Acknowledgement of Country

In the spirit of reconciliation, the NSW Council for Civil Liberties acknowledges the Traditional Custodians of Country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all First Nations peoples across Australia. We recognise that sovereignty was never ceded.

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

Contact NSW Council for Civil Liberties

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The NSW Council for Civil Liberties [“**NSWCCL**”] welcomes the opportunity to make a submission to The Australian Law Reform Commission [“**ALRC**”] to their Inquiry into Religious Educational Institutions and Anti-Discrimination Laws.

1. Introduction

This consultation paper, produced by the ALRC is in response to a referral from the Attorney-General Mark Dreyfus, in November 2022, for the ALRC to review the exception provisions in the *Sex Discrimination Act 1984* (Cth) and the *Fair Work Act 2009* (Cth) that apply to religious educational institutions.

These provisions have been of concern to NSWCCL and many other community, civil liberties, human rights and legal groups for a long time. Calls for their review are correspondingly longstanding. The ALRC previously commenced a review of the provisions which was regrettably suspended by a previous Government. NSWCCL commends the current Attorney-General for moving quickly to establish this review. It is a very significant law reform initiative of great importance particularly to children and young people, in particular, who are connected with in religious educational institutions.

NSWCCL has engaged extensively with the development of commonwealth and state based legislative frameworks to govern anti-discrimination and religious freedom. This has included numbers of submissions to Government bodies (state and commonwealth) urging reform to legislation relating to the existing exceptions from anti-discrimination laws - and opposing provisions in recent Government Bills (state and commonwealth) which, if implemented, would have significantly increased permissible discrimination particularly against LGBTQI+ persons in religious educational institutions.

To the extent that our previous work has remained relevant, we adopt it in this submission. Our previous engagement includes:

- a. Making a [Submission](#) to the Religious Freedom Review, commonly known as the Ruddock Review 14 February 2018.
- b. Making a [Submission](#) in response to the release of the first exposure draft on 2 October 2019.
- c. Making a [Submission](#) in response to the release of the second exposure draft on 31 January 2020.
- d. Making a [Submission](#) the Inquiry into Religious Discrimination Bill 2021 and related bills.

The ALRC consultation paper provides a thorough and detailed response to the AG's terms of reference and an excellent framework for community response to their reform proposals. NSWCCCL agrees with the large majority of its recommendations for reform. Those few that we disagree with are, however, of considerable significance.

2. Referral brief to ALRC

The ALRC's brief from the Attorney-General is to report on reforms to federal anti-discrimination and fair work laws to ensure that a religious educational institution:

- i) *must not discriminate against a student on the basis of sexual orientation, gender identity, marital or relationship status or pregnancy.*
- ii) *must not discriminate against a member of staff on the basis of sex, sexual orientation, gender identity, marital or relationship status or pregnancy.*
- iii) *can continue to build a community of faith by giving preference, in good faith, to persons of the same religion as the educational institution in the selection of staff.*¹

These three policy objectives which set the parameters for this review of the current legislation, are not open to query by the ALRC.² However, as they have shaped - and constrained - the ALRC's advice, they should be subject to appraisal. NSWCCCL has done so and has a significant concern with one of the objectives.

The first two policy objectives are clear and appropriate in their prohibition of discrimination against staff and students on the specified grounds and are supported by NSWCCCL.

However, we have a concern with the third policy objective which "*ensures that a religious educational institution can continue to build a community of faith by giving preference, in good faith, to persons of the same religion as the educational institution in the selection of staff.*" NSWCCCL considers this to be a problematic proposal, notwithstanding the '*in good faith*' caveat.

There is no clarity as to what '*in good faith*' could mean in this context. In our view, it provides a weak protection against discrimination on religious - and possibly other - grounds in the selection process. It effectively permits absolute employment preference to candidates of the same religion as the employing educational institution. This policy objective is neither appropriate nor necessary.

¹ Note full TOR at <https://www.alrc.gov.au/inquiry/anti-discrimination-laws/terms-of-reference/> ALRC: Consultation Paper: Religious Education Institutions and Anti-Discrimination Laws. Jan 2023

² *It is not the ALRC's role in this Inquiry to question the policy framework the Government has set in the terms of reference*: ALRC: Consultation Paper: Religious Education Institutions and Anti-Discrimination Laws. Jan 2023. Par 9, p7

Persons not of the 'same religion' are capable of fitting well into and contributing to build and sustain 'a community of faith' in a religious educational institution. Diversity of views can be a positive and constructive aspect of community culture.

Nor does NSWCCCL consider that a preferential policy is necessary. It is highly likely that most applicants for employment by a religious educational institution will be of the same religion - or sympathetic with it - especially if they are applying for a position which requires direct engagement with the religious beliefs and practices of the educational institution.

A major concern is that the policy objective does not explicitly specify protection against discrimination of the basis of *sex, sexual orientation, gender identity, marital or relationship status or pregnancy* in the staff selection process – as distinct from these protections applying for the treatment of staff already employed. This seems illogical and could lead to covert discrimination against applicants with these characteristics.

Recommendation 1

- a) **NSWCCL agrees with the Attorney-General's policy objectives 1 and 2**
- b) **NSWCCL does not agree with the Attorney-General's policy objective 3 and recommends that it not be incorporated into future legislation.**

Or If b) is not acceptable to the Attorney-General:

NSWCCL proposes a modification of the objective which restricts religious preference to those applicants whose role within the educational institution is directly concerned with the religious beliefs and practices of the institution; and that it includes a further caveat, consistent with that proposed in technical Proposal 8. i.e. "The treatment does not constitute discrimination on any other ground prohibited by ss 153(1) or 195(1)".

3. Reform propositions and technical proposals

Four substantive reform propositions relating to students and staff are put forward for consideration. Each of these is linked to technical proposals for amendments to the *Sex Discrimination Act 1984* (Cth) and the *Fair Work Act 2009* (Cth) to achieve the proposed reforms. NSWCCCL will comment on both the broad propositions and the proposed legislative changes given the obvious linkage.

As many of these proposals have been previously advocated in recent years and are successfully operating in some states, NSWCCCL will only comment on proposals with which we disagree.

Proposition A:

Discrimination against students on the grounds of sexual orientation, gender identity, marital status, or pregnancy.

There are three sub-propositions relating to discrimination against students.

1. *Religious educational institutions should not be allowed to discriminate against students (current or prospective) on the grounds of their sexual orientation, gender identity, marital or relationship status, or pregnancy, or on the grounds that a family member or carer has one of those attributes.*

NSWCCL agrees with this proposition.

2. *Religious educational institutions should be permitted to train religious ministers and members of religious orders, and regulate participation in religious observances or practices, unfettered by sex discrimination laws. Where applicable, religious educational institutions should also continue to benefit from the exception available to charities in relation to the provision of accommodation.*

NSWCCL is uncomfortable with this proposition. While we respect the rights of religious educational institutions to teach their religious beliefs, we do not consider this to be absolute.

Religious institutions should not be allowed to conduct training of ministers and members of religious orders without providing an understanding of anti-discrimination laws - which could be the case if they were officially sanctioned to function '*unfettered by sex discrimination laws*'. Ministers and members of religious orders preach to their congregations and educate children in their schools. It is imperative that they have an understanding of, and respect for the rights of children and others to be protected from unlawful discrimination.

At the very least the proposition should be modified by the deletion of "unfettered by sex discrimination laws" which implies total disregard.

NSWCCL recommends the deletion of 'unfettered by sex discrimination laws' from this proposition.

3. *Religious educational institutions should be permitted to teach religious doctrines or beliefs on sex or sexual orientation in a way that accords with their duty of care to students and requirements of the curriculum.*

NSWCCL does not consider the caveat re *duty of care to students* is strong enough to protect against the teaching of doctrines and beliefs which may be inherently hateful and harmful to young people given that the religious education curriculum is not developed, accredited or overseen by public education authorities. The proposition should be strengthened to make it explicit that the duty of care applies equally to students regardless of their sex, sexual orientation, gender identity, marital or relationship status, or pregnancy.

NSWCCL does not agree this proposition is strong enough to protect students from discriminatory and harmful teachings on sex, sexual orientation, gender identity, marital or

relationship status, or pregnancy. It should be amended to include a specific duty of care in relation to these students.

Technical proposals for Proposition A

There are 5 technical proposals to achieve proposition A.

Proposal 1

Subsection 38(3) of the Sex Discrimination Act 1984 (Cth) should be repealed.

NSWCCL agrees.

Proposal 3

The Sex Discrimination Act 1984 (Cth) should be amended to specify that the exception for religious bodies in s 37(1)(d) does not apply to educational institutions.

NSWCCL agrees.

Proposal 4

The Sex Discrimination Act 1984 (Cth) should be amended to specify that the exception for religious bodies in s 23(3)(b) does not apply to accommodation provided by an educational institution.

NSWCCL agrees.

Proposal 6:

The Sex Discrimination Act 1984 (Cth) should be amended to extend anti-discrimination protections to prohibit discrimination against students and prospective students on the grounds that a family member or carer of the student has a protected attribute.

NSWCCL agrees subject to an amendment to add 'or associates' after carer.

Proposal 7:

Amend the Sex Discrimination Act 1984 (Cth) to clarify that the content of the curriculum is not subject to the Act.

NSWCCL does not agree that curriculum content should not be covered by the SDA.

We acknowledge that a proposal that the content of the curriculum relating to religious beliefs and doctrines in religious educational institutions should be subject to anti-discrimination legislation to ensure the protection of LGBTQI+ children from harmful and hateful teachings is going to be sensitive and controversial. While we fully respect that freedom of religious belief is an equal and important right, it cannot be ignored that some religious curriculum **content** is capable of being deeply hurtful and harmful to students and adults. Enlightened curriculum development and sensitive teaching can

alleviate this impact - but it cannot always protect against the full extent of the harms that may be caused.

NSWCCL accepts that many religious schools and other educational institutions are likely to take appropriate care to present their curriculum in a way that is safe and non-discriminatory for their students. But others may not.

On balance, NSWCCL considers that relevant anti-discrimination laws should apply to the content of religious curriculum in most educational contexts.

We note the Albanese Government has indicated that it will be proceeding with a religious freedom bill in this term of office. This issue will certainly arise in that context. At this stage, we recommend that Proposal 7 be deleted from this ALRC proposals.

NSWCCL disagrees with Proposal 7 and recommends it be deleted.

Proposition B:

Discrimination against staff on the grounds of sexual orientation, gender identity, marital status, or pregnancy

There are three sub-propositions relating to discrimination against staff.

1. *Religious educational institutions should not be allowed to discriminate against any staff (current or prospective) on the grounds of sex, sexual orientation, gender identity, marital or relationships status, or pregnancy.*

NSWCCL agrees with this proposition.

2. *Religious educational institutions should be able to select staff involved in the training of religious ministers and members of religious orders, and regulate participation in religious observances or practices, unfettered by sex discrimination laws. Where applicable, religious educational institutions should also continue to benefit from the exception available to charities in relation to the provision of accommodation.*

NSWCCL does not agree with this proposition in relation to selection of staff.

While we respect the rights of religious educational institutions to select their staff on relevant grounds, including their religious beliefs, we do not agree that in so doing they should be '*unfettered by sex discrimination laws*'. In this case, the element missing is the caveat that while preference for religious belief may be appropriate, there should be no discrimination on the other prohibited grounds.

More broadly religious institutions should not conduct training of ministers and members of religious orders without providing an understanding of anti-discrimination laws - which could be likely if they were

officially sanctioned to function '*unfettered by sex discrimination laws*'. Ministers and members of religious orders preach to their congregations and educate children in their schools. It is imperative that they have an understanding of, and respect for the rights of children and others to be protected from unlawful discrimination.

The proposition should be modified by the deletion of "unfettered by sex discrimination laws".

NSWCCL recommends the deletion of 'unfettered by sex discrimination laws' from this proposition.

3. Religious educational institutions should be able to require staff involved in the teaching of religious doctrine or belief to teach religious doctrine or beliefs on sex or sexuality as set out by that institution and in accordance with their duty of care to students and staff, and requirements of the curriculum.

This proposition is unduly broad and should stipulate that any requirements placed on staff comply with anti-discrimination law for the reasons that we have expressed above.

NSWCCL disagrees with this proposition.

Technical proposals for Proposition B

There are 5 technical proposals to achieve these propositions.

Proposal 2

Subsections 38(1) and (2) of the Sex Discrimination Act 1984 (Cth) should be repealed.

NSWCCL agrees.

Proposal 3

The Sex Discrimination Act 1984 (Cth) should be amended to specify that the exception for religious bodies in s 37(1)(d) does not apply to educational institutions.

NSWCCL agrees.

Proposal 4

Sex Discrimination Act 1984 (Cth) should be amended to specify that the exception for religious bodies in s 23(3)(b) does not apply to accommodation provided by an educational institution.

NSWCCL agrees.

Proposal 5

The Fair Work Act 2009 (Cth) should be amended to specify that the exceptions for religious bodies in ss 153(2)(b), 195(2)(b), 351(2)(c) and 772(1)(f) do not apply to educational institutions except as otherwise provided in the Sex Discrimination Act 1984 (Cth) and Age Discrimination Act 2004 (Cth)
NSWCCL agrees.

Proposal 7

Amend the Sex Discrimination Act 1984 (Cth) to clarify that the content of the curriculum is not subject to the Act.

NSWCCL disagrees with this proposal. It is an inappropriate weakening of the proposed removal of the exceptions in the SDA. Curriculum content should be subject to the Act. Clearly a proposal for the content of curriculum relating to religious beliefs and doctrines in religious educational institutions to be subject to anti-discrimination legislation to protect LGBTQI+ children from harmful and hateful teachings is sensitive and controversial.

Freedom of religious belief is an equal and important right in Australia. However, it cannot be ignored that some religious curriculum content is hurtful and harmful to others. Enlightened curriculum development and sensitive teaching can sometimes alleviate this impact - but it cannot always protect against taught and learned discriminatory content. NSWCCL accepts that many religious schools and other educational institutions are likely to take appropriate care to present their curriculum in a way that is safe and non-discriminatory for their students. But others may not.

On balance, considering the conflicting rights at play, NSWCCL believes that anti-discrimination laws should encompass the curriculum in all contexts.

It is unlikely that a proposal along these lines will be acceptable to the Australian Government at this time. We note the Albanese Government has indicated that it will be proceeding with a religious freedom bill in this term of office. This issue will certainly arise again in that context. At this stage we recommend that Proposal 7 be deleted from these ALRC proposals.

NSWCCL disagrees with Proposal 7 and recommends it be deleted.

Proposition C:

Preferencing staff involved in the teaching, observance, or practice of religion on religious grounds.

There are two sub-propositions relating to discrimination against staff.

- 1. In relation to selection, appointment, and promotion, religious educational institutions should be able to preference staff based on the staff member's religious belief or activity, where this is justified because:*

- *participation of the person in the teaching, observance, or practice of the religion is a genuine requirement of the role;*
- *the differential treatment is proportionate to the objective of upholding the religious ethos of the institution; and*
- *the criteria for preferencing in relation to religion or belief would not amount to discrimination on another prohibited ground (such as sex, sexual orientation, gender identity, marital or relationship status, or pregnancy), if applied to a person with the relevant attribute.*

2. *The nature and religious ethos of the educational institution should be taken into account in determining whether participation of the person in the teaching, observance, or practice of the religion is a genuine requirement of the role*³

This proposition gives effect to the AG's third term of reference⁴. NSWCCCL disagreed with that stem of the reference,⁵ and continues to disagree as a matter of principle with this particular sub-proposition. In particular, we consider the reference to "religious ethos of the educational institution" as being overly broad and indeterminate in nature.⁶ In our view, it's difficult to see how this would operate in practice, and more precise language would be desirable.

Moreover the use of "ethos" in connection with particular religious educational institutions would put any laws that arise out of step with similar tests which are otherwise known to anti-discrimination law. For example, the SDA considers a religious educational institution to be one which is 'conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed.'⁷ Insufficient justification has been mounted as to why any contemplated law should depart from formulations which have more precise meanings and are already known to Australian anti-discrimination law.

NSWCCCL disagrees with this proposition and recommends that it be deleted.

Technical Proposals for Proposition C

There are two technical consultation proposals to achieve these propositions:

Proposal 8

The *Fair Work Act 2009* (Cth) should be amended such that a term of a modern award or enterprise agreement (as applicable) does not discriminate merely because it gives more favourable treatment on

³ Consultation Paper, p22

⁴ Consultation Paper, p2

⁵ P4 of this report

⁶ In this regard, we have read the Australian Discrimination Law Experts Group submission to this inquiry and agree with these statements on this matter that are contained within their submission from page 8.

⁷ SDA s 38.

the ground of religion to an employee of an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed where:

- the treatment relates to the selection of employees;
- participation of the employee in the teaching, observance or practice of religion is a genuine occupational requirement, having regard to the nature and ethos of the institution;
- the treatment does not constitute discrimination on any other ground prohibited by ss 153(1) or 195(1), respectively; and
- the treatment is proportionate in all the circumstances.

We are particularly troubled by the inclusion of the phrase 'having regard to the nature and ethos of the institution' in this proposed provision for reasons that we have previously expressed.

NSWCCL has no detailed expertise in industrial law, however has reviewed the ADLEG submission and finds their analysis about the way that the section would operate in practice both lucid and compelling. We join them in calling for the removal of this proposal, and support their alternative proposal being included in its place.

NSWCCL disagrees with this proposal and recommends that it be removed and replaced with the wording recommended by the Australian Discrimination Law Expert Group (ADLEG) at recommendation 6 of their submission to this inquiry.

Proposal 10

The Australian Government should ensure that any future legislation to prohibit discrimination on the basis of religious belief or activity contains exceptions in relation to employment and engagement of contract workers that allow an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed to:

- give more favourable treatment to an employee or prospective employee (and contract worker or prospective contract worker) on the ground of religion in relation to selection; and
- take action that is reasonably necessary to prevent an employee or contract worker from actively undermining the ethos of the institution;
- consistent with the limitations on such exceptions contained in Proposals 8 and 9.

We again have difficulty with this proposal given the reference to an "ethos" of a religious institution.

Moreover, we consider the arguments advanced by the ADLEG in favour of using concepts and phrases which are already known to discrimination law to be eminently sensible in this context.

NSWCCL disagrees with this proposal and recommends that it be removed and replaced with the wording recommended by the ADLEG at recommendation 7 of their submission to this inquiry.

Proposition D:

Ongoing requirements on all staff to respect the religious of the educational institution

There are three sub propositions relating to discrimination against staff.

- 1. Religious educational institutions should be able to expect all staff to respect their institutional ethos. A religious educational institution should be able to take action to prevent any staff member from actively undermining the institutional ethos of their employer.*
- 2. Religious educational institutions should be able to impose reasonable and proportionate codes of staff conduct and behaviour relating to respect for the institution's ethos, subject to ordinary principles of employment law and prohibitions of discrimination on other grounds.*
- 3. Respect for an educational institution's ethos and codes of conduct or behaviour should not require employees to hide their own sex, sexual orientation, gender identity, marital or relationship status, or pregnancy in connection with work or in private life, or to refrain from supporting another person with these attributes.⁸*

As outlined earlier in this submission, we are uncomfortable with the educational institution's "ethos" phrasing which ultimately leads us to disagree with these propositions, because it is hard to detect how they would operate in any proposed law.

It is, however, comforting to see that sub-proposition 2 preserves employment and anti-discrimination protections. We also strongly support recognition that employees should not be required to hide aspects of their identity or expression.

NSWCCL disagrees with these sub-propositions.

Technical proposals for Proposition D

There are two technical consultation proposals to achieve these propositions.

Proposal 9

The Fair Work Act 2009 (Cth) should be amended such that a term of a modern award or enterprise agreement (as applicable) does not discriminate merely because it allows an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed to terminate an employee's employment where:

⁸ Consultation paper, p25

- *the termination is necessary to prevent an employee from actively undermining the ethos of the institution;*
- *the treatment does not constitute discrimination on any other ground prohibited by ss 153(1) or 195(1), respectively; and*
- *the termination is proportionate to the conduct of the employee — including by reference to:*
 - *the damage caused to the ethos of the educational institution;*
 - *the genuine occupational requirements of the role, having regard to the nature and ethos of the educational institution;*
 - *alternative action the employer could instead reasonably take in the circumstances;*
 - *the consequences of termination for the employee; and*
 - *the employee's right to privacy.*

The Fair Work Act 2009 (Cth) should be further amended such that religion is a permissible ground of termination, despite s 772(1)(f), in the circumstances set out above.⁹

We are particularly troubled by the inclusion of the phrase 'having regard to the nature and ethos of the institution' in this proposed provision for reasons that we have previously expressed.

NSWCCL has no detailed expertise in industrial law, however has reviewed the ADLEG submission and finds their analysis about the way that the section would operate in practice both lucid and compelling. We join them in calling for the removal of this proposal, and support their alternative proposal being included in its place.

NSWCCL disagrees with this proposal and recommends that it be deleted and replaced with the wording recommended by the ADLEG at recommendation 6 of their submission to this inquiry.

Proposal 10

The Australian Government should ensure that any future legislation to prohibit discrimination on the basis of religious belief or activity contains exceptions in relation to employment and engagement of contract workers that allow an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed to:

- *give more favourable treatment to an employee or prospective employee (and contract worker or prospective contract worker) on the ground of religion in relation to selection; and*
- *take action that is reasonably necessary to prevent an employee or contract worker from actively undermining the ethos of the institution;*
- *consistent with the limitations on such exceptions contained in Proposals 8 and 9.¹⁰*

⁹ Consultation paper, p35.

¹⁰ *ibid*

We again have difficulty with this proposal given the reference to an “ethos” of a religious institution.

Moreover, we consider the arguments advanced by the ADLEG in favour of using concepts and phrases which are already known to discrimination law to be eminently sensible in this context.

NSWCCL disagrees with this proposal and recommends that it be deleted and replaced with the wording recommended by the ADLEG at recommendation 7 of their submission to this inquiry.

Consequential Reforms

There are four consequential proposals:

Proposal 11(quote p35) NSWCCL agrees

Proposal 12(quote p35) NSWCCL agrees

Proposal 13 (quote p35) NSWCCL agrees

Proposal 14 (quote p35) NSWCCL agrees

NSWCCL has not commented on the proposed consequential reforms.


Finally, NSWCCL urges the ALRC and the government to consider taking urgent steps for the drafting of a comprehensive Human Rights Act which can appropriately balance competing rights and interests (such as religious freedom and minority rights). In our view, it is desirable for methodical work to be done on a comprehensive suite of human rights protections immediately instead of expending further time and energy on the piecemeal protection of individual human rights in separate pieces of legislation. Until Australia has a comprehensive Human Rights Act, it will continue to fall short of full implementation of its international human rights obligations.

This submission was prepared by Dr Lesley Lynch, Josh Pallas and Melissa Dib on behalf of the New South Wales Council for Civil Liberties.

Yours sincerely,



Sarah Baker
Secretary
NSW Council for Civil Liberties

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