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Australian Law Reform Commission
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Sent via email - antidiscriminationlaw@alrc.gov.au

RE: NATIONAL CATHOLIC EDUCATION COMMISSION SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION'S INQUIRY INTO RELIGIOUS EDUCATIONAL INSTITUTIONS AND ANTI-DISCRIMINATION LAWS

The National Catholic Education Commission (NCEC) offers this submission to the Australian Law Reform Commission's (ALRC) Inquiry into religious educational institutions and anti-discrimination law. In doing so, the NCEC notes the deep disappointment of Catholic stakeholders to the baseline position outlined in the ALRC's consultation paper.

This submission represents the interests of 1,759 Catholic schools and education authorities, educating one in five or nearly 794,000 students, and employing over 104,000 teaching and non-teaching staff in Australia.

Summary of key points

The key points outlined in this submission are that:

- the Terms of Reference of the ALRC Inquiry have not been adequately addressed in the consultation paper, particularly the third point that educational institutions can continue to build a community of faith in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed
- the issues of enrolment and employment are treated similarly in the ALRC's propositions without a full and proper understanding of religious freedom or the mission and operation of religious schools
- the ALRC's paper displays an impoverished understanding of religion and freedom of religion, creates a hierarchy of rights, and places religious rights below other rights in the proposed anti-discrimination reforms
- there is a lack of evidence, and domestic and international case law, underpinning the ALRC's propositions
- the ALRC's proposed reforms do not meet the ALRC's own legal framework for this inquiry to ensure that any limitation on human rights has a 'compelling justification', 'pressing social need', are 'proportionate', and 'least restrictive'
- the serious deficiencies in the ALRC's proposals need to be addressed to ensure religious rights are protected
- the NCEC recommends that the ALRC goes back to the drawing board to ensure an appropriate balancing of protected rights.

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Catholic education in Australia

The NCEC was established in 1974 by the Australian Catholic Bishops Conference (ACBC) through the Bishops Commission for Catholic Education (BCCE) and is the peak body for Catholic schools in Australia.

Catholic education is unique in its provision and scope in the world offering a parallel, alternative system of faith-based schools alongside government. We are the largest single provider of non-government schooling and the major provider of faith-based schooling in Australia.

In Australia, there are 1,759 Catholic schools educating one in five or nearly 794,000 students, and employing over 104,000 teaching and non-teaching staff. Catholic schools are located in nearly every major town and city across Australia with almost 40 per cent in regional, rural and remote communities, and serve some of the most disadvantaged communities across the country.

Over 200 years, Catholic schools have educated millions of Australian children who are now parents, grandparents and great grandparents of children in our schools today. Catholic school alumni have gone on to make substantial contributions in civic life, in business, in the Church, in community leadership, in social outreach, and among other arenas of public and private life.

One of the most unique and valuable features of Australia's education system is the wide-ranging availability of genuine, affordable school choice which has been positively supported by Australian families and by both major political parties over successive parliaments.

Catholic school families, many of whom have a long and multi-generational involvement in our communities, continue to choose a Catholic education because it aligns with their beliefs and values.

In making this choice, Catholic school families take on nearly 26% of the annual recurrent cost of their child's education and almost 90% of the funding required to support school buildings and capital works. In 2021, Catholic school families contributed approximately \$5.88 billion towards their children's education and school building projects, representing an enormous saving to Australian taxpayers¹. It is worth noting that non-government schools operate on a non-profit basis with government funding strictly used for educational purposes as governed under the Education Act 2013.

The growth in Catholic schools is a considerable achievement given that, for over a century, they were entirely funded by parents and local parish communities. It was the Catholic parents and families who built, and taught, in our earliest schools because of their desire for a faith-based education for their children. Our sustained growth shows the great importance and the sacrifice Catholic school families continue to make to choose a school that meets the educational needs of their children and one that reflects their values and beliefs.

The confidence in Australian faith-based schools is also evidenced by the recent release of the latest data from the Australian Bureau of Statistics (ABS) which shows enrolments in Catholic schools growing from 766,088 students in 2017 to 793,729 in 2022. The ABS data

¹ National Catholic Education Commission 2023, NCEC website, accessed 2 March 2023, <https://www.ncec.catholic.edu.au/>

also shows strong growth across all faith-based non-government schools with enrolments increasing around 8 per cent from 2017-2022. Overall enrolments in faith-based schools increased from around 1.2 million in 2017 to 1.3 million in 2022,² with much of this growth in New South Wales independent schools being attributed to the demand in Anglican, Islamic and Christian schools in Sydney's newer suburbs.

Approximately 30 per cent of all Australian students are educated in faith-based schools with Catholic schools educating about 60 per cent of students in the non-government sector.

Our schools welcome students from a range of backgrounds including an increase in Aboriginal and Torres Strait Islander students (up 195 per cent since 2000). Students with disability represent 20.6 per cent of the student population and 41.9 per cent of students attending Catholic schools experience socio-educational disadvantage.³

There is a broad and sustained range of schools in which a Catholic education is offered including comprehensive co-educational and single-sex schooling, boarding, early childhood education and care, and specialist schooling for students with disability, young people at risk, agriculture, performing arts, etc. This is parental choice and expectation clearly in action and represents the mission of Catholic schools in catering for the diversity and gifts of all students, and the preferences and values of Catholic school parents and their children.

Catholic schools make a significant contribution to the educational, moral and social fabric of this nation. Our schools are open to anyone who seeks an education in Catholic beliefs, practice, values and teachings. Catholic schools are committed to educational excellence and are underpinned by charisms of prayer, witness, catechesis, social justice and pastoral care.

Attendance and employment at Catholic schools is **voluntary**. As stated in *Dignitas Humanae*, the Second Vatican Council's Declaration on Religious Freedom (1965), religious beliefs and teachings are not to be imposed on anyone: no one is forced to embrace the Christian faith against his own will.⁴

Parents and staff make an informed choice to enrol their children or to work at our schools. Catholic schools explicitly express their ethos and mission, with expectations on all members of the community to participate in the faith and liturgical life of the school.

There is also strong support for faith-based schools to operate according to their religious ethos. A survey on school perceptions showed 63 per cent of the general population, 82 per cent of Catholics and 79 per cent of Catholic school parents believe religious schools should be 'entitled to require employees to act in their roles that uphold the ethos and values of that faith' and the school should be free to favour hiring employees who share these values (Utting, 2021).

Context of the submission

This submission should be read jointly with the submission made by the Australian Catholic Bishops Conference (ACBC) which applies to Catholic schools. The NCEC supports and endorses the ACBC submission.

2. National Catholic Education Commission 2023, Media Release. Available at, <https://ncec.catholic.edu.au/media-centre/record-number-of-students-in-catholic-schools-shows-support-for-faith-based-education/>

3. National Catholic Education Commission 2023, NCEC website, accessed 2 March 2023, <https://www.ncec.catholic.edu.au/>

4. Pope Paul VI 1965, Declaration on Religious Freedom *Dignitatis Humanae*, (1965) §10.

In presenting this submission, the NCEC notes this is our sixth (6) submission addressing religious freedom in recent years. Additionally, the ACBC has made ten (10) submissions, attended four (4) hearings and participated in the Expert Panel on Religious Freedom and the Religious Freedom Roundtable since 2015.

The protracted debate and delay in introducing proactive legislation to protect religious freedom in Australia is discouraging for communities of faith and creates uncertainty for faith-based schools in their management and operation.

This situation has not been improved by the ALRC's proposals to remove the existing exemptions in the *Sex Discrimination Act* protecting the right to religious freedom for religious schools, before a broader framework for protecting religious freedom has been put in place. Removing these existing protections in the absence of a broader religious freedom framework, apart from being a discordant and fractured approach to a deeply important principle, makes religious schools vulnerable to having their freedom to teach and operate in accordance with their beliefs severely limited, as the legislative changes proposed in the consultation paper demonstrate. It also makes it impossible to view the legislative response to issues holistically.

Underlying this submission are a number of fundamental principles which Catholic education supports:

- The inherent dignity of the human person irrespective of personal attributes, values or beliefs and their inalienable right to freedom, while supporting the common good
- The introduction of proactive Commonwealth legislation – as mandated by international law – to ensure religious rights are protected in the same way as other rights in Australia and, at the same time, ensuring a fair and reasonable balance with other protected rights
- The codification of the universal right of freedom of religion to address this gap in Australian legislation and the harmonisation of religious freedom legislation across Australia
- Australian governments to respect and protect the right of parents who choose to send their children to a faith-based school where they will be taught in accordance with their religious beliefs and values
- The right of faith-based schools to operate and teach according to their religious beliefs, values and teachings while maintaining a commitment to equity and excellence in our schools through the delivery of the curriculum in accordance with state and federal education standards and requirements
- In seeking the freedom to operate in accordance with their religious beliefs, Catholic schools do not discriminate or seek to discriminate based on an individual's personal attributes

The terms of reference, which the consultation paper addresses clearly, require the ALRC to balance appropriate protections from discrimination for students and staff at religious schools, with the right of those schools 'to continue to build a community of faith by giving preference, in good faith, to persons of the same religion' in the selection of staff.

Unfortunately, the consultation paper's propositions do not seem to be informed by a proper understanding of what it means for a religious school to be a community of faith, or more generally of why religion is important to those who have faith. This submission commences therefore with a discussion of the religious nature of Catholic schools and what this entails for staffing and teaching.

The failure to appreciate, in greater depth, what it means for a religious school to be a community of faith points to a larger incomprehension in the paper about the nature of religion, and consequently, about the nature of religious freedom. This is further reflected in one of the governing assumptions of the paper which seems to approach religious schools as inherently discriminatory, and religious beliefs and teachings, especially about sexuality and gender, as harmful. This false assumption leads to the wrong conclusions about the legislative context and changes required.

The submission then discusses a number of shortcomings and inconsistencies in the Inquiry Approach adopted by the ALRC. These include the failure to refer to the earlier inquiries and reviews it mentions, most importantly the Ruddock Expert Panel Religious Freedom Review and significant literature on religious freedom and anti-discrimination law; uncertainty over how broad or narrow the inquiry is meant to be; and how the paper interprets what international human rights law requires in these areas. The need for a broader framework to protect religious freedom before changes are made to existing protections in anti-discrimination law is also proposed.

The ALRC's four propositions are then discussed in turn.

The analysis of **Proposition A** sets out how Catholic schools, in seeking the freedom to operate in accordance with their religious beliefs, do not discriminate or seek to discriminate on the basis of an individual's personal attributes. It rejects the implication that the teaching of Catholic doctrines and beliefs on sex and sexual orientation is harmful to students. It highlights shortcomings in the paper's treatment of the rights of parents to choose a religious education for their children, and the omission of adequate international jurisprudence from the consideration of human rights issues.

Proposition B fails to strike an appropriate balance between the inquiry's second and third terms of reference (concerning how schools are not to discriminate in the selection of staff, and how schools can continue to build a community of faith by preferencing staff who share its religion). The claims made to support the legislative changes proposed are not sufficient reasons to demonstrate that they are necessary. The reforms are claimed to be consistent with international human rights norms but this is not supported. The variations in the meaning of terms like 'gender identity' and 'sexual orientation' in overseas jurisdictions are also noted. While the NCEC welcomes the proposal, linked to Proposition B, to clarify that the content of curriculum for the teaching of religious beliefs, would not be subject to the *Sex Discrimination Act*, it raises other significant problems.

Proposition C proposes a narrow interpretation of what constitutes a 'genuine requirement of the role' in a Catholic school. While it is proposed that this question be the matter of an 'objective' inquiry into the requirements of the role and the actual practices of a school, the factors that will determine how broad or narrow such an inquiry is likely to be, are not explained. Developments in recent years suggest that 'objective' inquiries into the roles and requirements of religious schools are typically drawn very narrowly. Notwithstanding the problems with Proposition C's specific proposals, the inclusion of a school's ethos as a factor to be considered in determining the genuine requirements of roles at religious schools is welcome, and is supported by international human rights law. Other aspects of Proposition C's reforms, however, are not consistent with Australia's international human rights obligations under the International Covenant on Civil and Political Rights.

Proposition D significantly interferes with the institutional autonomy of religious educational institutions and prevents these institutions from manifesting their religion. Faith-based schools cannot build a community of faith if they are legally prevented from disciplining or

removing staff members, beyond those who it can be established have actively undermined the religious ethos of the school. Religious freedom requires faith-based schools to engage staff who will support the religious ethos of the school, and as such, must be able to set policy and practices which protect the school's mission and do not leave them exposed to extended 'lawfare'. The paper's propositions in relation to these fundamental requirements for establishing and maintaining a religious school are so narrow and so heavily conditional as to offer little value.

The Catholic school as a community of faith

The consultation paper displays an impoverished understanding of religion. Its appreciation of what religion means for believers on a day-to-day basis, and specifically in relation to schools, does not rise above the vague observation that 'Religion is of great importance in many people's lives, and can be central to a person's identity, sense of self, and purpose.'⁵

This is also reflected in the lack of clearly defined terms used in the paper or the *Sex Discrimination Act 1984* including 'religion', 'religious ethos', 'creed', 'community of faith', 'religious susceptibilities' and so on. The lack of clarity of what these terms mean in the context of the proposed reforms, and how they might be applied, create uncertainty and can leave schools exposed to unnecessary litigation.

The paper acknowledges that religious schools are intended to teach their students the beliefs, doctrines and religious practices of their respective faith traditions, and the third term of reference directs the review to protect the right of religious schools to continue to be able to build 'a community of faith'. However, the paper shows no proper understanding of how religious teaching and a community of faith are connected or why they are important.

The paper dismisses that faith-based schools wish to maintain a critical mass of co-religionists, where staff are seen as authentic role models for living a religious life. It also ignores that school choice is an established and well-respected component of Australia's education system.⁶

The principle of ensuring a critical mass of adherents is not an unusual practice in Australian schools or organisations. For example, ensuring a critical mass of each gender of students is desirable in co-educational schools and in ensuring a gender balance of male to female staff members where possible. A critical mass of faith adherents, which has been supported by anti-discrimination exceptions to allow for the preferencing of students and staff, has supported faith-based schools to build an authentic community of faith.

It is an established principle in domestic and international law to recognise the corporate autonomy of religious institutions where individual rights and freedoms are not adversely affected because the individuals enjoy the right to leave.⁷

The Catholic Church has been involved in education for millennia, not least of all in the education of the excluded and the abandoned, the most marginalised in society –

5. Australian Law Reform Commission, Consultation Paper: Religious Educational Institutions and Anti-Discrimination Laws, January 2023 (ALRC paper), p. 7 at [10].

6. [57]

7. *Iliafi v The Church of Jesus Christ of Latter-Day Saints Australia* [2014] FCAFC 26. Available at <http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2014/26.html>

irrespective of whether they are Catholic or even Christian. It also has a long tradition of reflecting on the purpose of education, both in its human and religious dimensions.

Drawing on this record of practice and reflection, the Second Vatican Council's Declaration on Christian Education, *Gravissimum Educationis*, set out what it means for a Catholic school to be a community of faith:

No less than other schools does the Catholic school pursue cultural goals and the human formation of youth. But its proper function is to create for the school community a special atmosphere animated by the Gospel spirit of freedom and charity, to help youth grow according to the new creatures they were made through baptism as they develop their own personalities, and finally to order the whole of human culture to the news of salvation so that the knowledge the students gradually acquire of the world, life and man is illumined by faith. So indeed the Catholic school, while it is open, as it must be, to the situation of the contemporary world, leads its students to promote efficaciously the good of the earthly city and also prepares them for service in the spread of the Kingdom of God, so that by leading an exemplary apostolic life they become, as it were, a saving leaven in the human community.⁸

In short, the Catholic school as a community of faith is a school where Catholic beliefs on faith, morality, religious practice and social justice are lived and taught, where Catholic faith and practice are opened up and imparted to students, and where students are prepared, through the deepening of their faith and an immersion in their tradition, to contribute to building up a just and good society in the world around them.

As this description makes clear, Catholic schools are not merely providing a service to the general public. They are an essential part of the ministry of the Catholic Church. This is not just a matter of ownership or administration. It is not just a matter of having some religion classes and attendance at worship safely quarantined from the 'real' teaching. It is ultimately a matter of the mission and purpose of Catholic schools. As the Congregation for Catholic Education at the Vatican has observed,

The complexity of the modern world makes it all the more necessary to increase awareness of the ecclesial identity of the Catholic school. It is from its Catholic identity that the school derives its original characteristics and its 'structure' as a genuine instrument of the Church, a place of real and specific pastoral ministry. The Catholic school participates in the evangelising mission of the Church...⁹

Further, another document from the Congregation for Catholic Education emphasises that 'Catholic schools, being Catholic, are not limited to a vague Christian inspiration or one based on human values. They have the responsibility for offering Catholic students, over and above a sound knowledge of religion, the possibility to grow in personal closeness to Christ in the Church.'¹⁰ For these reasons, it is a 'genuine requirement of the role' of all staff at a Catholic school to support the religious mission and ethos of the school.

The deepening of students' religious knowledge and personal faith requires more than an academic presentation of Catholic beliefs and teachings in a comparative religion subject, or

8. Second Vatican Council, Declaration on Christian Education *Gravissimum Educationis*, (1965) §8.

9. Congregation for Catholic Education, *The Catholic School on the Threshold of the New Millennium* (1997), §11.

10. Congregation for Catholic Education, *Educating to Intercultural Dialogue in Catholic Schools* (2013), §56.

in an isolated religion subject apart from the curriculum. This much can be found in many public schools. The activity of Catholic schools is centred around the integration of faith, learning, life and service. This is taught not just in the classroom, but through the example offered by teaching and non-teaching staff, and through the experience of the student being part of a community and culture which models this integration in a life-giving way.

This requires many teachers and staff at the school to be prayerful, practising Catholics, committed to their faith and able to speak about it, when called to do so, in an engaging and respectful manner. It also requires a commitment on the part of non-Catholic teachers and staff, who make an enormous and highly valued contribution to Catholic schools, to support and co-operate with the mission of the school and its day-to-day realisation.

Catholic schools must be able also to teach and operate in accordance with their beliefs, including their beliefs about respect for life, the nature of marriage, sexuality and gender. The consultation paper suggests that it may be indirect discrimination if a teacher is selected on the basis that they were 'willing to teach the school's particular beliefs around sexuality', without also being 'permitted to objectively discuss the existence of alternative views about other lifestyles, relationships, or sexuality...'¹¹

This seems to suggest that Catholic beliefs on sexuality could only be taught under the ALRC's propositions if other beliefs repudiating them are also taught. It is at this point that the lack of understanding of religion in the paper also reveals the paper's incomprehension of religious freedom. Catholic schools exist to propose to their students the religious and moral beliefs underlying a life-giving vision about what it means to be human, about what enables individuals to flourish and live a good life, and what makes for justice and a good society.

Catholic schools cannot step back from proposing these beliefs. They have a responsibility, to the broader Catholic community of which they are a part; to the parents who have sought a Catholic schooling for their children – precisely so that they will be taught Catholic beliefs and practice; and above all to the truth. Catholic schools cannot be silent about their beliefs and convictions, even when they may be at odds with the beliefs of others and secular authorities. Nor can they facilitate the promotion of beliefs and convictions which oppose or undermine their own. This is one of the starting points for considering what religious freedom means for schools: schools should not be forced to teach or act against their own convictions, or forced to be silent about them.

The beliefs and convictions of religious communities are often not well understood by people who are not religious, and on some issues they are regarded with suspicion and hostility. A complex pluralist society can accommodate people whose faith does not accord with what are thought to be mainstreams beliefs, without discounting or marginalising their religious convictions.

For example, Christian anthropology regards every person as being made in the image and likeness of God, and loved by him. God created humans as male and female, and our embodiment is a unique and inseparable part of the irreplaceable individuals that each of us are. This anthropology determines Catholic beliefs about sexuality and sexual morality, and marriage as the union of one man and one woman for life, as well as Catholic beliefs about gender and identity.

11. ALRC paper, p. 24 & fn 89.

That these beliefs are at odds with contemporary beliefs about sexuality, marriage and gender does not need to be said. What does need to be highlighted is the long tradition that Catholic and other religious schools have of caring for students from all beliefs and religions, and supporting them to succeed in their education in the midst of whatever challenges they may face. This tradition of pastoral care in a strong faith tradition is reflected in *Created and Loved: A Guide for Catholic Schools on Identity and Gender*, a document published by the Australian Catholic Bishops Conference to provide guidance for schools caring for students with gender dysphoria. It details a compassionate response to these students and refers to the biopsychosocial model, which is less invasive and more closely aligned with a Catholic worldview, as it is a family centred, more holistic approach.¹²

This document, about which the NCEC has provided opportunities for professional learning for school leaders and staff, has been well received by staff, parents and students.

Inquiry Approach

The section of the ALRC paper entitled 'Inquiry Approach' reveals many of the problems which underlie the ALRC's Propositions and proposals in the rest of the paper. Below are a few examples:

1. 'This Inquiry follows several years of activity regarding potential law reform across Australia on related issues, and in the context of numerous inquiries and reviews considering these and similar exceptions, including by the ALRC, over nearly 40 years.'¹³

It is striking that the ALRC paper contains little reference to any of these inquiries, or their recommendations and findings, including those of its own previous inquiries. The paper appears to mostly ignore significant work done in the area of anti-discrimination law and freedom of religion in Australia, not least in the Religious Freedom Review conducted by the Ruddock Expert Panel and much of the academic literature on these issues.

2. The ALRC paper also refers to 'targeted consultations with a broad cross-section of stakeholders, meeting more than 80 individuals in approximately 35 meetings and roundtables. Among them have been past students, school principals, teachers, parents, education administrators, religious leaders, members of human rights commissions, lawyers, unions, and academics. Consultees have included members of the LGBTIQ+ community, including LGBTIQ+ people of religious faith, Aboriginal and Torres Strait Islander people, and people from cultural and linguistically diverse backgrounds.'¹⁴

Despite the fact that the ALRC consulted with the heads of some religious education bodies (including representatives from the NCEC), only one Anglican bishop was consulted, and no Catholic bishops were consulted. This is striking, given that Anglican and Catholic schools together provide education for nearly one million students across Australia. Given the sweeping nature of the reforms canvassed in its paper, most of which will directly affect Catholic educational institutions, it is disappointing that the ALRC did not consult more extensively with individual bishops as well as the Australian Catholic Bishops Conference.

12. Australian Catholic Bishops Conference, *Created and Loved: A guide for Catholic schools on identity and gender*, (2022).

13. ALRC paper, p. 5.

14. ALRC paper, p. 6.

3. The ALRC paper states that '[t]he issues at the heart of this Inquiry are deeply personal, and relate to individuals' and groups' sense of identity and self. Debates concerning these issues can therefore give rise to heightened emotions and anxieties. The task of this Inquiry is relatively narrow and technical in scope, and the ALRC is not tasked with assessing the relative importance of religion and equality, nor of related human rights such as the rights to privacy and the rights to freedom of association. Rather, the ALRC has been asked to formulate a legislative approach to implement the government's policy position in relation to quite specific circumstances concerning religious educational institutions, their students, and their staff.'¹⁵

Any kind of legislative reform affecting the rights and obligations of religious educational institutions necessarily involves an assessment (according to particular criteria) of the relative importance of religion and equality, rights to privacy, and rights to freedom of association. The consultation list provided by the ALRC points in a different direction to that of a 'narrow' inquiry in this sense, as many of those consulted represent organisations which advocate certain views about the relative importance of religion and equality, as well as rights to privacy etc. in the public sphere.

The paper shows how difficult it can be to separate a 'narrow' concern of formulating an approach to a reform of anti-discrimination law in relation to religious educational institutions from a 'broader' concern about the relationship between religious freedom and certain conceptions of equality. These broader issues must underlie proposals of any kind of legislative reform in this area, given that any such reform, in order to be meaningful, must pursue a certain political purpose. The pursuit of that purpose will necessarily require the adoption of a position on these broader issues. It is therefore implausible to suggest that sweeping reform of Australia's anti-discrimination law is merely 'technical'. What the paper proposes is radical, far-reaching and potentially irreversible.

The ALRC paper notes 'the personal nature' of issues related to freedom of religion and freedom from discrimination for many people.¹⁶ It then draws a causal connection between the personal nature of these freedoms and the risk of personal harm when rights to these freedoms are limited. The paper notes also that freedom of religion and freedom from discrimination are at once 'deeply personal and relate to individuals' and groups' sense of identity and self.'¹⁷ While it is true that issues of religious freedom and freedom from discrimination concern groups as well as individuals, it also follows from this that the legitimacy of law reform in these areas should not be based on assumptions of the perceived harm posed by religious schools, without detailed scrutiny of these claims, and without hearing fully from those most familiar with the workings of those schools.

4. Finally, the ALRC paper states that it 'adopts frameworks provided by international human rights law to seek a legislative solution that would maximise the enjoyment of all relevant rights by all persons, while being sensitive to the impact on the rights of others.'¹⁸

It should be kept in mind that, while it is not the ALRC's role to question the government's policy framework in relation to the issue of religious educational institutions and discrimination law, it is consistent with the Terms of Reference for the ALRC to propose more limited reforms which provide clarity and reassurance of fair treatment for students and

15. ALRC paper, p. 7.

16. Ibid.

17. Ibid, at [9].

18. Ibid.

staff at religious schools, while preserving broad freedoms for religious schools to build and maintain a community of faith. The ALRC has chosen instead to advocate radical reforms, but, as outlined below, it does not make a convincing case that these reforms are necessary, 'proportionate', 'least restrictive', have a 'compelling justification' or 'pressing social need', etc.

Broader issues regarding religious freedom

The paper's limited understanding of the nature of religion leads to an over-simplified approach to freedom of religion.

The ALRC paper acknowledges that freedom of religion is 'fundamentally important'; that human rights are 'universal, inalienable, indivisible, interdependent and interrelated';¹⁹ that it is important to adopt a framework towards legislative proposals 'that would maximise the enjoyment of all relevant rights by all persons'²⁰; and ensure that rights are 'interpreted generously'.²¹ The unbalanced propositions, which the ALRC has in fact produced however, maximise protection against discrimination and reduce religious freedom for religious schools to an extremely limited, tightly constrained, and highly qualified 'right to discriminate', applicable to a small number of circumstances.

This lack of balance is apparent in the ALRC's interpretation of the human rights principles which frame its inquiry.

Principle 1 refers to the importance of human dignity and that '[a]lthough people may hold differing views about how difficult issues should be resolved, the methods used to resolve them should promote respect.'²² Respect for human dignity is essential to the expression and protection of all human rights. However, within a pluralistic society, both institutions and individuals have different and potentially incompatible views about what constitutes human dignity and how it should be respected.

For example, although it is at odds with some contemporary views in certain particulars, the Catholic tradition is strongly supportive of the fundamental rights of human beings, based on respect for human dignity. There is scope for law reform, in accordance with fundamental human rights protection, which allows for different traditions and understandings, but the ALRC paper does not appear to have explored this.

In Principle 3, the ALRC paper states that '[i]n situations where human rights appear to be in tension, 'pragmatic elasticity' is required to produce 'practical concordance' of all human rights involved, to the maximum degree possible. Application of a competing or hierarchical lens, or engaging in a balancing act that produces 'trade-offs' should be avoided'.²³

There is, however, a clear hierarchy of rights evident in the approach taken by the paper, contrary to this principle.²⁴ Early in the paper, an excerpt from the 2020 *Report of the Special Rapporteur on freedom of religion and belief* is cited, emphasising that 'the right to freedom of religion or belief must not be used for ends inconsistent' with other rights, and that 'no human right may be invoked to destroy another human right'.²⁵

19. ALRC paper, p. 9 (Principle 2).

20. ALRC paper, p. 7, at [12].

21. ALRC paper, p.11, at [25].

22. ALRC paper, p. 9.

23. Ibid (footnote omitted).

24. ALRC paper, p. 9 (Principle 3).

25. ALRC paper, p. 12, at [28].

The points being made by the Special Rapporteur are unexceptionable. When read in light of what follows in the consultation paper, however, they suggest that one of its governing assumptions is that freedom of religion is a problematic, even dangerous right; one which is often used as a pretext against other rights, and even to destroy other rights. Unfortunately, it is possible to use other rights in the same way, including against freedom of religion.

Given the necessity of considering broader issues of religious freedom in relation to any inquiry regarding anti-discrimination law reform and religious educational institutions, it is important to note the following issues which have been overlooked in the ALRC paper.

1. The need for a broader legislative framework for religious freedom before changes are made to the *Sex Discrimination Act 1984* (Cth) and other anti-discrimination laws

Following the 2018 Religious Freedom Review (the Ruddock Review) the major parties committed themselves to providing a broader framework to protect religious freedom. As submissions to the Ruddock Review highlighted, various problems with the current framework include 'the absence of a positive right to freedom of religion in Australian law', heavy reliance on exceptions in anti-discrimination legislation (which a number of states and territories have since restricted), and 'inconsistent approaches across different jurisdictions'.²⁶ Attempts by the previous government to legislate a Religious Discrimination Act were unsuccessful, and the current government remains committed to legislating a broader framework of religious freedom protections.

In their 2021 National Platform, the Australian Labor Party committed, if elected, to work towards an equal and inclusive nation. This commitment extends to Australia's diverse religious communities. The platform makes clear that 'Labor recognises that the freedom to have or adopt a religion or belief, to change a religion or belief, or not to have or adopt a religion or belief is absolute'.

Moreover, Labor believes in and supports the right of all Australians to have and to manifest their religion or beliefs, and the right of religious organisations to act in accordance with the doctrines, tenets, beliefs or teachings of their faith. Such rights should be protected by law and, in accordance with Article 18 of the International Covenant on Civil and Political Rights, subject only to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

Labor believes that people of faith deserve the same human rights, equality, respect and safety as every other Australian. No Australian should ever be vilified, discriminated against or subjected to violence or threats of violence because of that person's religion or religious belief. Labor will therefore ensure that Australia's anti-vilification laws are fit for purpose.²⁷

Religious freedom needs greater prominence than the limited ALRC proposals 8 and 9 to amend the Fair Work Act 2009 to allow provisions regarding what does **not** constitute discrimination, and delaying considerations of the interaction of religious freedom and anti-discrimination in a broader context as proposed in proposal 14.²⁸

26. Religious Freedom Review: Report of the Expert Panel, May 2018, p. 39.

27. ALP National Platform (2021), p. 66, nn46 & 47. Available at <https://alp.org.au/media/2594/2021-alp-national-platform-final-endorsed-platform.pdf>

28. ALRC paper p. 33-34, 36.

The NCEC would consider reasonable amendments to the existing protections for schools provided by the *Sex Discrimination Act*, as we have outlined in previous submissions on these issues. However, these provisions should not be amended or repealed until after clear, legislated protections for religious schools and other religious bodies, have been put in place, as part of a broader Commonwealth legal framework for the protection of religious freedom, and protection from religious vilification and discrimination. Among other things, this broader framework should protect the freedom of religious educational institutions to build and maintain communities of faith, with the autonomy to teach and operate in accordance with their beliefs and values as protected by international law.

As it stands, the ALRC paper recommends the repeal of the protections for religious educational institutions in ss 37(1)(d) and 38 of the *Sex Discrimination Act* without proposing the introduction of significant alternative protections. Contrary to the ALRC's claim, such a repeal would not be 'consistent with Australia's international human rights obligations',²⁹ rather, the result would be a situation in which legitimate religious freedom protections which *are* consistent with Australia's international human rights obligations would simply be no longer afforded to religious educational institutions under Australian law.

The ALRC's Propositions C and D (in particular) do not constitute a sufficiently robust engagement with the question of what constitutes reasonable protection for the religious freedom of religious educational institutions in Australia.

2. Religious freedom cannot be adequately addressed through the framework of anti-discrimination law

A strong implication of (1) above is that Australia's anti-discrimination law regime is not an adequate framework within which to protect religious freedom. While it falls outside the ALRC's terms of reference for this inquiry, the broader question of how religious freedom is best to be protected in Australia must be addressed with any consideration of the ALRC's review. The tightly restricted scope for religious educational institutions to exercise religious freedom under the ALRC's Propositions underscores the importance of putting clear protections for religious freedom in place in a broad framework, before existing protections are removed.

The ALRC's Four Propositions

The approach outlined in the four main propositions of the ALRC paper is unnecessary; inconsistent with Australia's international human rights obligations; and relies on an impoverished conception of what it means for a religious educational institution to 'manifest' its faith. These four propositions are now considered in turn.

Proposition A

The three subparts of Proposition A are as follows:

- (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.

29. ALRC paper, p. 19.

- (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.
- (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.

Subpart (1)

The operating assumption behind the prohibition in subpart (1) seems to be that the human rights to equality and non-discrimination are so fundamental as to not admit any scope for differential treatment of any kind, even where it pursues a legitimate aim and is justified to allow for religious freedom that is enjoyed through religious educational institutions operating according to their ethos and identity. This is not consistent with basic principles of discrimination under international law, including those cited in the paper. The applicable approach to the present Inquiry is whether the restriction on freedom of religion is properly justified by international law standards.

A stumbling block for the paper seems to be in understanding how schools which are dedicated to a particular religious purpose for a particular religious community can at the same time accept students from different faith traditions or with no faith at all. The assumption seems to be that if certain Catholic beliefs on sexuality and gender are upheld and taught in Catholic schools, the necessary result must be exclusion and discrimination towards students who have different beliefs and experiences.

It may be that this assumption underlies Consultation Proposal 11, which is to make religious schools 'subject to the [Australian Human Rights] Commission's inquiry powers', including 'the power to inquire into systemic unlawful discrimination'.³⁰ Because of the false assumption informing this proposal that religious schools or Christian teaching are inherently discriminatory, this proposal should be abandoned altogether.

The day-to-day reality of life in a Catholic school demonstrates that it does not involve any inherently discriminatory practices. On the contrary, it is part of the religious mission of a Catholic school to teach and nurture all students who are part of it, whatever their story. 'A distinctive feature of its ecclesial nature is that it is a *school for all*'.³¹ A Catholic school cares for all of its students no matter what the circumstances or challenges confronting them, and especially those who are vulnerable or struggling. For this reason, in seeking the freedom to operate in accordance with their religious beliefs, Catholic schools do not discriminate or seek to discriminate based on an individual's personal attributes.

Quite properly, anti-discrimination law focuses on the rights of individuals who may be vulnerable to discrimination or unequal treatment. The 'rights of others' at Catholic schools who are enrolled there because their families want a Catholic education for them, and the collective rights of the individual enjoyed in a broader school community, must therefore also be taken into account. The rights of these students and their families are not properly considered in the consultation paper. As it stands, the objections – or the potential objections – of some are treated as the basis for severely constraining the rights of religious schools to foster a community of faith, and to teach and uphold their beliefs to those who are enrolled in them for that very purpose.

30. ALRC paper, p. 35.

31. Congregation for Catholic Education, *The Identity of a Catholic School for Cultural Dialogue* (2022), §22.

The NCEC is willing to consider reasonable amendments to the *Sex Discrimination Act* to reassure students that they will be treated appropriately, as we believe they are at present, while also ensuring that Catholic schools can continue to teach their faith in its fullness and beauty, and operate in accordance with Catholic beliefs.

The amendments outlined in 2018 and 2021 supported by both parties, or the approach by former ALRC president Justice Sarah Derrington in 2019, are a better starting point than the proposed amendments outlined in the ALRC paper.

Catholic education will continue to make strong recommendations to the government and opposition to ensure religious rights are protected alongside any changes to anti-discrimination law that seeks to narrow or remove current exceptions.

Subpart (2)

Subpart (2) reflects the constitutive role played by 'manifestation of belief' in the maintenance of the integrity of any religious institution, educational or not. There is a direct nexus between 'having' and 'manifesting' a religious belief, because religion is a way of life, not merely a set of propositions to which a person may give their mental assent.

This is consistent with a definition of religious belief given by the High Court of Australia: religion comprises a belief in a supernatural being or principle as well as canons of conduct to give effect to that belief. This definition clearly recognises that religious belief necessarily involves doing something concretely as well as assenting to something intellectually.³²

When religious educational institutions train religious ministers and members of religious orders, they do so in accordance with the canons of conduct, beliefs, traditions and practices of their religion. Part of this training usually entails the cultivation of virtue and the pursuit of excellence. Part of its purpose is to help those undertaking these particular courses of study and formation to realise the fullness of their humanity as their relationship with God grows.

Religious schools are of course different institutions with a different body of students and different courses of study. The contrast with institutions for the training of ministers highlights the connection between believing and manifesting, between conviction and conduct, which is also present in religious schools. In very different ways, both work from an integrated vision of faith, life and culture which is taught in classes and lived in the community of faith the institution forms.

Subpart (3)

The permission granted to religious educational institutions in subpart (3) to teach their beliefs on sex and sexual orientation is linked to accordance with the institutions' duty of care to students and requirements of the curriculum. The insertion of this qualification clearly implies that there is a real risk such teaching could breach institutions' duty of care or curriculum requirements, but the ALRC provides no evidence to support this implication.

32. See *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120 at [17].

The NCEC categorically rejects the implication that the teaching of Catholic doctrines and beliefs regarding sex and sexual orientation is harmful to students. At [A.32], the ALRC paper claims that the reforms in Proposition A are necessary to protect ‘the fundamental rights and freedoms of students: in particular the rights to equality and non-discrimination, to health, to education, and to freedom of thought, conscience and religion.’³³ The accompanying footnote claims that some stakeholders argued the reforms were necessary to protect public health as well, ‘because of the impacts that discrimination and stigma in educational institutions can have on the mental and physical health of students and other members of the community, and the costs this involves to the community’.³⁴

The ALRC paper does not identify the basis for this claim, or how stakeholders came to that conclusion. The paper does not provide any evidence to suggest that the discrimination and stigma referred to is religiously based. The paper goes on to cite an Australian study published in 2021 which reported that ‘one in four LGBTQ+ young people have attempted suicide and one in two trans young people.’³⁵ This is an alarming and deeply concerning statistic. The paper, however, does not provide evidence linking it to the teaching of doctrines or beliefs on sex or sexual orientation at religious educational institutions.³⁶

The NCEC supports the freedom of parents to choose the school to which they send their children. Parents who disagree with Catholic teaching on sex and sexual orientation are not required to send their children to Catholic schools and are free to remove their children from Catholic schools should they so wish. In light of this, it is difficult to see why the reforms proposed in Proposition A are necessary while providing no evidence to support these suppositions. At [A.34], the ALRC paper claims that these reforms are necessary for four reasons:

- I. The fact of exclusion is in itself a significant burden on the person’s rights, with the potential for mental health impacts and impacts on the individual’s freedom of religion, particularly where membership of a religious community is part of a person’s family and social identity;
- II. Students do not necessarily exercise choice in where they are to be educated;
- III. Students may only develop awareness of their own identity while already part of the school or college community, and the disruption of a student’s education and social relationships by needing to move to another school can be very significant; and
- IV. Students may not have other suitable or comparable education options nearby.³⁷

In relation to the claim in (I), if the ALRC means to suggest that its reforms are necessary because Catholic schools deliberately exclude LGBTQ+ students on religious grounds, then the necessity of the reforms can only be predicated on clear evidence that Catholic schools engage in this kind of exclusion. The ALRC has provided no such evidence. It is our understanding that such exclusion does not occur.

33. ALRC paper, p. 45.

34. Ibid, fn 147.

35. See *ibid*, fn 148.

36. The paper also cites a study by Penelope Strauss in 2017, claiming that ‘factors associated with schooling were major drivers of mental health problems for transgender students’, but this is too vague a claim to support the proposition that the teaching of doctrines and beliefs on sex and sexual orientation cause mental health harm. In another footnote (fn 148) the paper cites an article by Douglas Ezzy et al in the *Journal of Sociology*, presumably in support of the notion that religiously based discrimination in educational institutions leads to mental and physical health harms to LGBTQ+ students, but the cited pages of that paper do not talk about religious education, discrimination and mental health harm.

37. ALRC paper, p. 46.

In relation to the claim in (II), decisions about school choice are rightly made by parents, not students, though with the interests of their children (the students) in mind.³⁸

In relation to the claim in (III), students move schools for all kinds of reasons, and the law accepts that the possibility of doing so is implicated in the scope of parents' rights to choose the school(s) to which they send their children. Everyone understands that moving school can be disruptive in various ways, but in itself this provides no support for this aspect of the Proposition.

The suggestion in claim (IV) that students may not have other suitable or comparable education options nearby is unconvincing, given the extensive networks of state-based education across Australia. As stated above, Catholic education provides an alternate, parallel system of schools in nearly every major city and town in Australia, alongside public schools. Families have the option to choose a public or non-government school that aligns with their beliefs and meet the needs of their child.

At [A.35] the paper argues that it is not necessary to retain 'the existing broad exception' for schools, because including 'individuals with different beliefs or conduct' 'does not significantly burden the ability to teach doctrine or to manifest religious belief'.³⁹ In fact, it cannot be described as 'a broad exception', and indeed it is the only exception which allows religious schools to function according to their purpose. Again, there is no evidence to support this supposition. One could easily make the counter-argument that an active support and commitment to religious (and non-religious) beliefs makes for a more compelling and authoritative teacher.

Human rights considerations

The paper employs an unreasonably narrow selection of cases, judgments and extracts of opinion in relation to the interpretation of article 18 of the ICCPR, and does not present a convincing case that its proposed reforms are consistent with Australia's human rights obligations.

The paper's discussion of article 18(4) and the right of parents to determine the moral and religious education of their children is inadequate.⁴⁰ In particular, it minimises the scope of article 18(4) as if it has little or no relevance to the issues raised by its Propositions. For example, the ALRC states that 'much of the focus of article 18(4) is on ensuring that state-provided education is delivered to students in a way that is not inconsistent with the convictions of their parents'.⁴¹ The paper further suggests that article 18(4) is confined in scope to the particular issues that have been in contention in the few individual communications examined by the Human Rights Committee (which concerned questions of funding, the need to preserve neutrality in state-operated schools, or where there is compulsory religious instruction in the public school system the need to allow for the possibility of 'opting out' if it goes against a student's or parent's convictions).

However, article 18(4) plays an important role in support of freedom of religion more generally. As General Comment 22 explains, the 'liberty of parents or legal guardians to ensure that their children receive a religious and moral education in conformity with their own convictions, set forth in article 18.4, is related to the guarantees of the freedom to teach a

38. This right is clearly articulated in Art 18(4) of the ICCPR. See also below section on Human rights considerations.

39. ALRC paper, p. 46.

40. ALRC paper, p. 44.

41. Ibid.

religion or belief stated in article 18.1.⁴² The General Comment also plainly states that ‘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 establish ... *religious schools*’.⁴³ This clearly shows that the role of article 18(4) in the ICCPR is far broader than a mere mechanism to ensure state-provided education is not inconsistent with parental choice.

Moreover, the ALRC nowhere mentions that article 18(4) falls in the rare category of rights which cannot be restricted, even though General Comment 22 clearly says that the ‘liberty of parents and guardians to ensure religious and moral education cannot be restricted’.⁴⁴

The ALRC paper fails to acknowledge that the exemptions in s 38 of the *Sex Discrimination Act* do not, as has long been accepted, put Australia in conflict with human rights obligations under the ICCPR and other conventions because of any supposed discriminatory impact. The ALRC has not made a convincing case that law reform is needed in respect of the *Sex Discrimination Act* on the grounds of human rights compliance.

Existing State and Territory laws

The ALRC paper asserts, without reference, that in cases where Commonwealth, state, and territory laws concerning anti-discrimination overlap, a complainant may choose whether to bring a complaint under Commonwealth law, or under the relevant state or territory law and where both apply, duty holders must comply with the most restrictive law. We question whether the interpretation is an appropriate characterisation between the intersections of Commonwealth, state and territory laws.

In the course of its proportionality analysis, the ALRC claims that the reforms in Proposition A ‘reflect the legal position that has existed in Queensland and Tasmania for a number of decades’ and that ‘[t]his indicates that such reforms would not significantly undermine the ability of religious schools to maintain their religious ethos’.⁴⁵ It is unclear why only Queensland and Tasmania are mentioned in the proportionality analysis, given that at [47], the paper claims the Proposition A reforms are ‘generally consistent’ with the law in the Australian Capital Territory (ACT), Northern Territory (NT), Queensland (QLD), South Australia (SA), Tasmania (TAS), and Victoria (VIC).⁴⁶ The main problem with these claims is that there can be significant differences between the way religious bodies are treated in these jurisdictions.

The table presented by the ALRC entitled, ‘Exceptions for Students’, claims that there are ‘no exceptions’ for religious educational institutions in relation to prohibitions on discrimination on the basis of sexual orientation or gender identity for the ACT, NT, QLD, SA, TAS and VIC.⁴⁷ However, this claim may not be accurate, as opinions differ as to whether or not (and to what extent) exceptions to general anti-discrimination clauses apply for religious educational institutions in these jurisdictions. For example, the Ruddock Review noted that exemptions for religious educational institutions on the basis of sexual orientation and gender identity applied at the Commonwealth level, as well as in the ACT, New South Wales (NSW), and Western Australia (WA).⁴⁸

42. General Comment No. 22: *Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, CCPR/C/21/Rev.1/Add.4. [6].

43. *Ibid.*, [8].

44. *Ibid.*

45. ALRC paper, p. 46.

46. *Ibid.*, p. 18.

47. ALRC paper, p. 16.

48. Religious Freedom Review: Report of the Expert Panel, p. 133.

In other words, the Ruddock Review and the ALRC came to different conclusions about whether there exist exemptions with respect to sexual orientation and gender identity in the *Discrimination Act 1991 (ACT)*. Similarly, the Ruddock Review noted that exemptions for religious educational bodies with respect to sex applied at the Commonwealth level, as well as in the ACT, NSW, NT, QLD, VIC, and WA,⁴⁹ but the ALRC paper lists most of these jurisdictions as having no exceptions on the basis of sex. Other uncertainties can be found in the ALRC's treatment of other state and territory anti-discrimination laws.⁵⁰ Clearly, reasonable minds can differ when interpreting legislation, but there may be greater differences between jurisdictions than suggested in the table of the status of exemptions at the state and territory level given by the ALRC.

In discussing state and territory legislation, the paper refers to proposed state reforms supporting the proposed narrowing of exemptions.⁵¹ However it fails to reflect proposed Commonwealth reforms, including the provisions in the Religious Discrimination Bill to override the Victorian 'inherent requirements' test, which were supported by both major political parties. Nor does it mention the Australian Human Rights Commission's (AHRC) recommendation in relation to that bill that, pending a comprehensive review, religious education institutions should continue to be permitted to preference staff and students for admission based on their religious belief or activity, provided that this is done in accordance with a publicly available policy and is consistently applied.⁵² It should be noted that the AHRC did not promote the Victorian or other proposed state approaches as a generally consistent benchmark. A comprehensive review has not yet been conducted and the ALRC paper does not provide a sound assessment of these matters.

Overseas jurisdictions

Despite its claims about the consistency of its proposed reforms with international human rights or anti-discrimination jurisprudence, the ALRC paper presents an extremely selective and unrepresentative picture of that jurisprudence. For example, no US law whatsoever is cited, and Canadian jurisprudence in relation to religious freedom and educational institutions appears to be ignored.

These omissions are in contrast with the statements in the Sex Discrimination Commissioner's 1992 review of the Sex Discrimination Act which stated that '[t]he debate on s 38 in Australia should not be considered in isolation from the extensive debates in the United States on the separation of church and state because those who made submissions at the time of drafting the SDA, and to subsequent inquiries such as this, are clearly aware of and influenced by the religious freedoms issues that the US Supreme Court has considered for many years.'⁵³ Undoubtedly, there are differences in the structure of the Australian and US legal systems, but it is strange that the ALRC has not considered the rich and extensive commentary on religious freedom by US courts and other legal institutions.

49. Ibid.

50. For example, the paper claims that reforms similar to the ones it suggests in Proposition A have enjoyed success in Queensland and Tasmania for over two decades, but this is not clear, given the recent broadening of the definitions of 'gender identity' and 'sexual orientation'. These broader definitions do not apply in anti-discrimination legislation except in Victoria, and then only recently.

51. ALRC paper, pp. 23-24.

52. Australian Human Rights Commission, Submission to the Inquiry into the Religious Discrimination Bill 2021 and related bills (Parliamentary Joint Committee on Human Rights), 21 December 2021, p. 56, Recommendation 7.

53. Sex Discrimination Commissioner, Report on Review of Permanent Exemptions under the Sex Discrimination Act 1984, (Canberra: Australian Government Publishing Service, 1992), p. 56.

Proposition B

The three subparts of Proposition B are as follows:

- (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 relationship status, or pregnancy.
- (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.
- (3) Religious educational institutions should be able to require staff involved in the teaching of religious doctrine or belief to teach religious doctrine or belief 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.

Proposition B is intended to give effect to the second and third Terms of Reference, namely that religious educational institutions 'must not discriminate against a member of staff on the basis of sex, sexual orientation, gender identity, marital or relationship status, or pregnancy; and 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'.⁵⁴

On any natural reading, the second and third terms of reference should balance each other. Proposition B does not strike an appropriate balance. Faith is fundamental to the nature of the education students receive at religious schools, and this means that it is critical that religious schools be free to give preference to staff who actively practise and give witness to their faith in accordance with the beliefs and teachings of the school's religion.

Teaching and learning are relationship-driven, and in both the school as a community of faith and in the teaching of religion, students are most open to learning from teachers who believe what they teach and witness to it in their conduct. Even maths teachers who do not teach religion provides witness to what it means to live a Christian life through the way in which they integrate their faith with their work as teachers. Building up a community of faith in this way would be placed in doubt under the propositions put forward in the consultation paper.

One of the accompanying proposals to implement Proposition B in anti-discrimination law suggests amending the *Sex Discrimination Act* 'to clarify that the content of curriculum is not subject to the Act'.⁵⁵ While the NCEC welcomes this proposal as a reasonable attempt to clarify that it is not discrimination for a school to teach its religious beliefs and doctrines, it offers only limited certainty due to the difficulties in drawing lines between 'content' and 'the way [content] is delivered'.⁵⁶ Where such inquiries might start and stop is not easy to say. For practical purposes, the contrast between the content of a curriculum, particularly a curriculum concerning a religion's beliefs on sexuality and gender identity, and how it is delivered may prove to be a distinction without a difference. They can be quite difficult to separate if someone makes an objection. It can be difficult also to distinguish between a claim that the manner of delivery of content is discriminatory, and the desire not to hear beliefs with which a person disagrees.

54. ALRC paper, pp. 19-20.

55. ALRC paper, p. 32 (Proposal 7).

56. *Ibid.*

More broadly, doctrinal beliefs and teachings in the Catholic tradition often interlock in ways that those of other faiths (or no faith) find surprising. Thus, simple Catholic doctrine concerning Christian marriage as the union of one man and one woman for life can often have profound theological implications for discussions on the nature of God -- for example, in Scripture passages (Ephesians 5: 31-32) that harness a spousal metaphor to liken the relationship between Christ and the Church to the relationship between bridegroom and bride. It is unclear that these interconnections and nuances in the material would not be caught up in inquiries about delivery or content.

Subpart 3 of Proposition B proposes that religious schools can teach 'religious doctrine or belief on sex or sexuality... in accordance with their duty of care to students and staff...'⁵⁷ Linking the teaching of religious beliefs and doctrines to duty of care will add to the uncertainty. Delineating the standard and content of a duty of care in the teaching of religious beliefs and teachings would likely be influenced by external guidances and requirements for schools, such as those mentioned in relation to the *UK Equality Act (2010)*.⁵⁸ This may or may not be a problem, depending on what these guidance or requirements entails. Certainly the existing state and territory regulatory authorities would be the appropriate bodies for determining matters related to curriculum, not Commonwealth human rights bodies. However a much more fundamental objection arises from the way that linking the teaching of religious beliefs and doctrine to the school's duty of care would institutionalise an assumption that religious beliefs are inherently discriminatory and harmful. This is not acceptable and fails to do justice to the individuals and communities who adhere to religious convictions.

Human rights considerations

The right to freedom of association, in order to be meaningful, necessarily implies a real plurality of institutions in a given society. This includes faith-based educational institutions. Proposition B, to the extent that it hinders the capacity of religious educational institutions to cultivate communities of faith with integrity, undermines this fundamental right.

In a free Australia, society can support a range of values and beliefs and the rights of individuals to gather and associate based on those commonly-held values and beliefs.

The right to freedom of association has been an enshrined part of Australian industrial relations and fair work policy and practice over many decades. It protects the rights of all people to voluntarily associate on common values and goals. It is these protections that underpin trade unionism. We also see this freedom reflected in political parties, corporations and community associations which seek to recruit members or employ staff whose values align with those of the organisation.

We often see reports in the media where individuals or organisations have parted company because of a misalignment of values and beliefs.

The ALRC paper claims that Proposition B is necessary to protect the 'rights to equality and non-discrimination, employment, health, privacy and freedom of thought, conscience and religion',⁵⁹ and is proportionate as a means of protecting them. The reasons proffered by the paper, however, are not sufficient to the claim. The ALRC gives three reasons why the reforms in Proposition B are necessary:

57. ALRC paper, p. 20.

58. Ibid.

59. ALRC paper, p. 47.

- I. Because exclusion from any area of public life on *Sex Discrimination Act* grounds is a serious interference with a person's dignity, particularly where it relates to exclusion from something as personal and fundamental as a faith community;
- II. In relation to marital status, because the potential economic and social cost of separation or divorce may act as a barrier to a staff member leaving an abusive relationship; and
- III. Because students are acutely sensitive to the treatment of staff, and exclusion or poor treatment of LGBTQ+ staff may deprive students of important support mechanisms and entrench feelings of exclusion and associated mental health impacts. A number of stakeholders have suggested that, even without revealing personal details, LGBTQ+ staff can play an important role in supporting LGBTQ+ students and ameliorating some of the mental health risks they disproportionately face.⁶⁰

In relation to claim (I), 'dignity' is a contested term in modern Western societies. The fact that it is a contested term strengthens, not weakens, the argument that religious educational institutions should be afforded the right to ensure that their understanding of dignity is taught and practised by their staff, particularly since it derives from belief in divine love for all humanity, and special regard for each human being, as a creature made in the image and likeness of God. No one is required to seek work at Catholic schools, and prospective staff are free to seek employment elsewhere. Choosing not to apply for work at a particular school because of its faith-based membership criteria is not equivalent to being excluded from that school.

It is unclear what the ALRC means to suggest in proposing (II) as a reason why the reforms in Proposition B are necessary. Potential economic and social costs of separation may act as a barrier to a person leaving an abusive relationship whether or not they are a staff member at a religious educational institution. It is important to clarify that Catholic teaching on marriage does not ask anyone to stay in an abusive relationship, and indeed, school communities already respond pastorally to issues such as these to support their staff. Church agencies often assist those leaving these relationships.

Claim (III), that the reforms in Proposition B are necessary because staff are or may be excluded or poorly treated by religious educational institutions, points to a situation that no one wants to occur, but there is no evidence to support this claim, and it is not clear that this concern by itself makes the proposed change proportionate.

The ALRC paper claims that the reforms in Proposition B are consistent with international human rights norms, for example, the European Union's Directive 2000/78/EC concerning the application of the European Convention on Human Rights (ECHR) in employment situations.⁶¹ This consistency is not supported, because the purpose and coverage of the Directive and the human rights protections in the ECHR are different.⁶² The Directive does

60. Ibid, p. 48.

61. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16 art 4(2).

62. See Aroney & Taylor (2020), 'The Politics of Freedom of Religion in Australia: Can International Human Rights Standards Point the Way Forward?' *University of Western Australia Law Review*, Vol. 47, p. 58: 'it is important to distinguish the purpose and coverage of the Directive (as an aspect of EU labour law) from the human rights protection provided by the ECHR across a broader spectrum. The Directive draws its inspiration at a general level from the protection against discrimination as a universal right expressed in various UN instruments. The ECHR is mentioned in that context (with obvious relevance given its signatories). However, much closer to the Directive's own purpose, and mentioned separately, is the 1958 ILO Convention concerning Discrimination in Respect of Employment and Occupation. The titles of the Directive and the ILO convention signify their commonality. Article 1.2 of the ILO convention takes a 'requirements-based' approach (as does the Directive) in providing that '[a]ny distinction, exclusion or preference in respect of a particular

not subtract from, nor does it have competence to alter, the human rights protection of the European Convention, including protection in support of religious ethos.

The Directive allows far more than mere ‘preferencing’ as envisaged by Proposition B. Preferencing is insufficient to provide practical support to schools in a *Sex Discrimination Act* exception. It is not comparable to the ‘difference of treatment,’ ‘based on a characteristic related to any of the grounds’ of ‘religion or belief, disability, age or sexual orientation’ which, according to article 4 of the Directive ‘shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate’.

‘Gender identity’ is not a prohibited ground in the Directive at all, and ‘sexual orientation’ under the Directive is far removed from the definitions recently introduced in Australia. Article 4 of the Directive could extend to all staff within a religious school, depending on the ethos of a religious school, and the extent to which staff are genuinely recruited to mission-based employment (‘the nature of the particular occupational activities concerned’ of those staff members, ‘or of the context in which they are carried out’). In the case *Siebenhaar v Germany*,⁶³ a teacher was dismissed from a kindergarten run by a Protestant church because of her membership and enthusiastic support of another Christian denomination. The European Court recognised the terms of the Directive in *Siebenhaar*, noting the employer had an ethos based on religion or belief, and found a lower court decision in favour of the Protestant school was not unreasonable, and that the bonds of loyalty to the school’s religion expected of staff were acceptable.

Overseas jurisdictions

The ALRC paper claims that the reforms in Proposition B are consistent with ‘the law in a number of overseas jurisdictions considered by the ALRC’,⁶⁴ but the ALRC does not provide any evidence to suggest the meanings of terms like ‘gender identity’ and ‘sexual orientation’ are common across those jurisdictions, nor does it provide any evidence to suggest that the meanings of these terms overseas are the same or similar to those emerging in Australia. In fact, a preliminary comparative analysis indicated a contrary trend.⁶⁵

job based on the inherent requirements thereof shall not be deemed to be discrimination. The inherent requirements test exists to meet the generic needs of all organisations, whatever their nature or purpose.’

63. No. 12136/02, ECtHR (Fifth Section), 3 February 2011.

64. ALRC paper, pp. 21, 49.

65. European network of legal experts in gender equality and non-discrimination, ‘A comparative analysis of non-discrimination law in Europe’, European Commission, 2021, p. 31: ‘The introduction of legal protection against discrimination for the first time on the ground of sexual orientation proved to be controversial and was challenging for many of the states. Very few countries have defined sexual orientation within anti-discrimination legislation. In Bulgaria, sexual orientation is defined under the Protection Against Discrimination Act as ‘heterosexual, homosexual or bisexual orientation’, (Section 1.10 Additional Provisions). A similar approach is adopted in Finland, Ireland and Sweden. British legislation refers to ‘a sexual orientation towards (a) persons of the same sex, (b) persons of the opposite sex, or (c) persons of either sex’. The 2006 German General Equal Treatment Act adopts the term ‘sexual identity’ while the Federal German Constitutional Court refers to both sexual identity and sexual orientation as being part of each individual’s autonomous personality. This is understood to go beyond sexual orientation and also encompasses protection against discrimination for transsexual people. Similarly, in Austria ‘sexual orientation’ is generally considered to cover heterosexuality, homosexuality and bisexuality. Although Belgian anti-discrimination legislation does not contain a definition of sexual orientation, it is worth mentioning that the 2013 Inter-federal plan to fight homophobic and transphobic violence, defined sexual orientation as ‘heterosexuality, homosexuality and bisexuality’. It further specified that ‘[s]exual orientation is not a choice. Sexual orientation is defined on the basis of the gender of individuals for whom an individual has both physical and emotional attraction and affection’. Although explicitly mentioned in the Hungarian Equal Treatment Act of 2003, the provision prohibiting discrimination in the Fundamental Law of Hungary does not list sexual orientation among the grounds explicitly protected from discrimination. However, it can be considered that all the grounds covered by the directives fall within the open-ended list of grounds protected by the Constitution. Regarding candidate countries, anti-discrimination provisions in Turkey do not explicitly mention sexual orientation as a protected ground, while anti-discrimination laws in Albania, Montenegro, North Macedonia and Serbia do. In Turkey, in 2017, the

Proposition C

The two subparts of Proposition C are as follows:

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:
 - a. participation of the person in the teaching, observance, or practice of the religion is a genuine requirement of the role;
 - b. the differential treatment is proportionate to the objective of upholding the religious ethos of the institution;
 - c. 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

Proposition C is based on a narrow interpretation of what constitutes a 'genuine requirement of the role' in a Catholic school. At [58], the ALRC paper notes that '[t]he use of the word 'genuine' requires an objective inquiry into the actual nature of the role in light of the practices of the institution.'⁶⁶ It is unclear what words like 'objective' and 'actual' mean here. While they are obviously intended to suggest the impartial and evidence-based nature of such an inquiry, it leaves unclear the factors that may be taken into account to determine how broad or narrow it would be. If the approach taken in different state and territory jurisdictions in recent years is an indication, such 'objective' inquiries into the nature of roles and practices in religious schools are likely to be narrowly limited.

In relation to condition (1)(c), the ALRC does not give proper consideration to the fact that differential treatment in respect of certain attributes does not always constitute discrimination, particularly when the differential treatment arises in order to achieve a purpose which is legitimate under international covenants or in order to avoid injury to the religious susceptibilities of adherents to a particular religion or creed. This view is supported in international human rights documents and the *Fair Work Act 2009* (Cth).⁶⁷

Subpart (2) is welcome to the extent that it takes into account the nature and religious ethos of an educational institution. By itself, however, this is insufficient to protect that institution against the accusation that its preferencing of staff breaches the requirement in subpart (1)(c). This means that to the extent that Proposition C would allow religious educational institutions to preference staff on the basis of the staff member's religious belief or activity, the accompanying conditions make it a very limited right.

The way in which subpart (2) informs the ALRC's view on the role that a school's religious ethos plays in the preferencing of staff is shown in the last of the ALRC's 'examples' on p. 24

Constitutional Court ruled explicitly, by referring to the case law of the European Court of Human Rights, that sexual orientation is a prohibited ground of discrimination. As far as EEA countries are concerned, national legislation in Liechtenstein gives no definition of sexual orientation. Norway provides a definition similar to that used in many countries, as sexual orientation covers 'lesbian, gay, bisexual and heterosexual orientation'. In Iceland, sexual orientation is defined simply as 'the ability of an individual to be attracted to or fall in love with another person.' (Footnotes omitted).

66. ALRC paper, p. 23.

67. See Human Rights Committee, General Comment 18 (Non-Discrimination), [13]; *Fair Work Act 2009* (Cth), s 153(2)(b).

of the paper. In this example, the ALRC envisages that ‘it would be reasonable and proportionate for a school to preference an applicant for the position of religious education teacher who was willing to teach the school’s particular beliefs around sexuality, as long as the teacher was permitted to objectively discuss the existence of alternative views about other lifestyles, relationships, or sexuality in a manner appropriate to the context’.⁶⁸

Once again, the language of ‘objectivity’ is used but its meaning is not clarified. What role is the word ‘objectively’ meant to play in the example? Does it play the same role as ‘objective’ does in [58] of the paper? According to the Catholic faith, the position of the Catholic Church regarding alternative views about other lifestyles, relationships, or sexuality is ‘objective’. Does the ALRC mean to suggest that religious teaching in relation to sex and sexuality cannot be objective? Without a clear sense of what ‘objective’ means, the ALRC’s example does not sufficiently clarify what it intended.

The ALRC paper gives no basis or evidence to support the extraordinary encroachment into the autonomy of faith-based schools to teach according to their religious beliefs and values. We are only aware of one case where a teacher at a Christian College believed she could continue to teach the school’s religious beliefs while holding an opposing view, so long as she could present ‘objective’ alternatives.

The proposition that teachers should be free to present ‘objective’ alternate views in the context of teaching the religious beliefs of the faith-based school is untenable and makes a nonsense of authentic faith-based teaching.

Human rights considerations

While there are the problems with Proposition C’s particular proposals for considering the religious ethos of a school, identified above, the acknowledgement of the religious ethos of a school is an important consideration in balancing anti-discrimination law with the right to religious freedom is welcome. It is a concept which is supported in international human rights law.

Pertinent passages in *Siebenhaar v Germany*⁶⁹ show that the European Court accepted that staff loyalty to religious ethos was needed for reasons comparable to those in Catholic schools, namely the ‘mission of proclaiming the Gospel in word and deed [such that employees] place their professional skills in the service of this goal and form a community of service independent of their position or their professional functions’. This provides support for engaging more than just those who teach religion, or have specific religious functions, in the school’s mission. It is up to the individual school to make such decisions and it is legitimate for them to do so.

The European Court found that the dismissal of the kindergarten teacher was not a violation of her rights, in circumstances where her membership of, and enthusiastic involvement in, the ‘Universal Church’ conflicted with the Protestant Church’s interest to remain credible in the eyes of the public and parents of children attending the kindergarten, and to avoid any risk of influence on children by an educator who was a member of a denomination at odds with the precepts of the Protestant Church, which was the manager of the kindergarten.⁷⁰

⁶⁸ ALRC paper, p. 24.

⁶⁹ *Siebenhaar v. Germany*, No. 18136/02, ECtHR (Fifth Section), 3 February 2011.

⁷⁰ *Ibid*, [44]

The European Court's reasoning, which is pivotal to the question of institutional autonomy for religious schools and the balance to be achieved in this instance with her personal right to freedom of religion against the termination, was as follows:

the Court noted that religious communities traditionally and universally exist in the form of organised structures and that when the organisation of these communities is concerned, Article 9 [freedom of religion] must be interpreted in light of Article 11 of the Convention which safeguards associative life against unjustified interference by the state. Indeed, the autonomy of such communities is indispensable for pluralism in a democratic society, and is at the heart of the protection afforded by Article 9. The Court further recalls that, except in very exceptional cases, the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the state [to evaluate] the legitimacy of religious beliefs or the means of expression of these (*Hassan and Chaush v. Bulgaria* [GC], No. 30985/96, § § 62 and 78, ECHR 2000-XI).⁷¹

International human rights law does not, however, support other aspects of the ALRC paper's reforms. The paper quotes a UN Guide as authority for the proposition that 'there is no legitimacy in maintaining rules, policies or practices enacted with reference to religious or affiliated cultural doctrines or sensitivities that discriminate on the basis of sex, sexual orientation, gender identity or other characteristics'.⁷² However, the paper does not quote paragraph [8] of the UN Human Rights Committee's 'General Comment 22', which qualifies the proposition significantly.

States 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 in articles 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. The Committee observes that paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant.⁷³

What this means is that no restriction on manifesting freedom of religion can ever be established by law or applied in a manner (even in support of non-discrimination) if the result would be to vitiate the rights (to religious freedom) guaranteed in article 18 of the ICCPR. This is pertinent, given that the ALRC's Propositions and proposals would appear to remove many important rights of religious schools to operate according to their ethos. Moreover, the quoted passage from the UN Guide relied upon by the ALRC sits within the context of a discussion about '[d]iscrimination in situations in which religion is a pretext' and concerns national laws against conscientious objection, family and personal status law, and practices like female genital mutilation. It is therefore of little relevance to the issues discussed in Proposition C.⁷⁴

71 Ibid, [41]

72. Office of the United Nations High Commissioner for Human Rights, 'Protecting Minority Rights: A Practice Guide to Developing Comprehensive Anti-Discrimination Legislation', (United Nations and Equal Rights Trust, 2022), 149.

73. Human Rights Committee, *General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion*, Article 18, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (1993) at [8].

74. See Office of the United Nations High Commissioner for Human Rights, 'Protecting Minority Rights: A Practice Guide to Developing Comprehensive Anti-Discrimination Legislation', above n 37, 149-153.

The ALRC paper presents an incomplete picture of the extent to which international human rights law supports their reform proposals. The reforms suggested in Proposition C are not consistent with Australia's international human rights obligations under the ICCPR.

Proposition D

The three subparts of Proposition D are as follows:

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.

The ALRC admits that 'Proposition D has the potential to interfere with institutional autonomy connected to the right to manifest religion or belief in community with others and parents' freedoms in relation to their children's religious education, in that it limits the extent to which schools can demand compliance of their staff with particular religious beliefs, observances or practices.'⁷⁵ This interference is apparently ameliorated by the qualification that Proposition D 'does, however, allow an institution to maintain its religious ethos by allowing reasonable and proportionate policies and practices that ensure staff respect that ethos, and by allowing action to be taken to prevent staff from actively undermining the ethos.'⁷⁶

It appears that the ALRC's position is that, in relation to staff, what it means to maintain the religious ethos of a religious educational institution is little more than preventing staff from actively undermining that ethos. This again reflects an inadequate understanding of the life of a religious educational institution as a community of faith.

The ALRC claim that the reforms in Proposition D have the potential to interfere with institutional autonomy is correct. The reforms in Proposition D significantly interfere with the institutional autonomy of religious educational institutions to prevent these institutions from manifesting their religion in fulfilment of the very purpose for which they exist. In this sense, Proposition D is inconsistent with the third Term of Reference. Religious educational institutions cannot build communities of faith if they are legally prevented from disciplining or removing staff members, beyond those who it can be established have actively undermined the religious ethos of those institutions in the sense described above. Religious freedom requires faith-based schools to engage staff who will support the religious ethos of the school.

Catholic schools must be able to determine the selection and promotion of staff in accordance with their commitment to upholding or supporting the religious mission of the school. They must be able to set policy and practices which protect the school's mission without the risk of extended 'lawfare' over whether these policies and practices disadvantage

75. ALRC paper, p. 27.

76. Ibid.

people with protected characteristics, and therefore constitute indirect discrimination.⁷⁷ In rare circumstances, they must be able to separate from staff who refuse to co-operate with the mission of the school or who actively work against it – not only when they ‘denigrate’ it.⁷⁸ The paper’s propositions in relation to these fundamental requirements for establishing and maintaining a religious school are so narrow and so heavily conditional as to offer little value.

Human rights considerations

It is important to appreciate the protections in international human rights law that are accorded to individuals to manifest their religious beliefs ‘in community with others’ (ICCPR article 18(1)), and the autonomy that this gives to the institutions they establish so that belief can be manifested collectively.

The European Court, has made it clear that:

...religious communities traditionally and universally exist in the form of organised structures. Where the organisation of the religious community is at issue, Article 9 [freedom of religion] must be interpreted in the light of Article 11 [freedom of association], which safeguards associations against unjustified state interference. The autonomous existence of religious communities is indispensable for pluralism in a democratic society and is an issue at the very heart of the protection which Article 9 affords. It directly concerns not only the organisation of these communities as such but also the effective enjoyment of the right to freedom of religion by all their active members. Were the organisational life of the community not protected by Article 9, all other aspects of the individual’s freedom of religion would become vulnerable.⁷⁹

The 2014 report of Special Rapporteur Bielefeldt provides guidance on the scope of the right of religious institutions to burden employees. He acknowledged:

...that religious institutions constitute a special category, as their *raison d’être* is, from the outset, a religious one. Freedom of religion or belief also includes the right to establish a religious infrastructure which is needed to organise and maintain important aspects of religious community life. For religious minorities this can even become a matter of their long-term survival. The autonomy of religious institutions thus undoubtedly falls within the remit of freedom of religion or belief. It includes the possibility for religious employers to impose religious rules of conduct on the workplace, depending on the specific purpose of employment. This can lead to conflicts with the freedom of religion or belief of employees, for instance if they wish to manifest a religious conviction that differs from the corporate (i.e., religious) identity of the institution.⁸⁰

In 2013 Special Rapporteur Bielefeldt said this on the position of religious organisations that function in conformity with their religious self-understanding. The ALRC only cites the first

77. ALRC paper, p. 20, at [52].

78. ALRC paper, p. 26. The examples given on this point in relation to Proposition D leave it open to question as to whether a staff member opposed to Catholic teaching on sexuality and describing it as harmful or discriminatory would be ‘denigrating’ the religion.

79. *Sindicatul ‘Pastorul Cel Bun’ v Romania*, App.No. 2330/09, Judgment of 9 July 2013 [136]

80. A/69/261 (2014), para 41.

paragraph but what follows is crucial to the right of self-autonomy of religious institutions which is now being eroded, and it is helpful to quote this at length:

Freedom of religion or belief also covers the right of persons and groups of persons to establish religious institutions that function in conformity with their religious self-understanding. This is not just an external aspect of marginal significance. Religious communities, in particular minority communities, need an appropriate institutional infrastructure, without which their long-term survival options as a community might be in serious peril, a situation which at the same time would amount to a violation of freedom of religion or belief of individual members.

...Moreover, for many (not all) religious or belief communities, institutional questions, such as the appointment of religious leaders or the rules governing monastic life, directly or indirectly derive from the tenets of their faith. Hence, questions of how to institutionalise religious community life can have a significance that goes far beyond mere organisational or managerial aspects. Freedom of religion or belief therefore entails respect for the autonomy of religious institutions.⁸¹

In relation to this point, it is important to mention that the Catholic Church's Code of Canon Law is a key binding source of authority for Catholic institutions on how they are to be organised and administered. This includes Catholic schools and the obligations and responsibilities which they have as part of their ecclesial identity.

For the reasons Special Rapporteur Bielefeldt explains above,

It cannot be the business of the state to shape or reshape religious traditions, nor can the state claim any binding authority in the interpretation of religious sources or in the definition of the tenets of faith. Freedom of religion or belief is a right of human beings, after all, not a right of the state. As mentioned above, questions of how to institutionalise community life may significantly affect the religious self-understanding of a community. From this it follows that the state must generally respect the autonomy of religious institutions, also in policies of promoting equality between men and women...

... freedom of religion or belief includes the right to establish new religious communities and institutions. The issue of equality between men and women has in fact led to splits in quite a number of religious communities, and meanwhile, in virtually all religious traditions, reform branches exist in which women may have better opportunities to achieve positions of religious authority. Again, it cannot be the business of the state directly or indirectly to initiate such internal developments, which must always be left to believers themselves, since they remain the relevant rights holders in this regard. What the state can and should do, however, is to provide an open framework in which religious pluralism, including pluralism in institutions, can unfold freely. An open framework facilitating the free expression of pluralism may also improve the opportunities for new gender-sensitive developments within different religious traditions, initiated by believers themselves.⁸²

81. A/68/290 (2013), para 57.

82. A/68/290 (2013), paras 59-61.

Supporting the pluralism that the Special Rapporteur mentions here included protecting the rights of religious believers to manifest their religion in community together, and the autonomy of the institutions they establish to do so. Proposition D is insufficient to achieve this.

Conclusion

The NCEC recommends that the ALRC start afresh in its inquiry into Religious Educational Institutions and Anti-Discrimination Laws.

The Propositions put forward in the ALRC paper fail to achieve an appropriate balance for the religious freedom rights of religious schools with the right to be free of unjust discrimination. As a result, protections for religious freedom for schools would be significantly reduced. The proposed reforms would radically narrow the rights of religious schools and their autonomy, and the rights of parents to choose the religious and moral education of their children. Recommendations about the existing protections under the Sex Discrimination Act and how they should be amended should not go forward without a deeper and more comprehensive consultation process, drawing on the experience of religious schools and experts on the requirements of religious freedom, not just those who are experts in anti-discrimination law.

Not only religious freedom, but also freedom of association and freedom of speech, mean that in a pluralist society, with a well-established tradition of school choice in education and with an extensive secular public school system in each state and territory, religious schools should be allowed to teach and uphold their religious beliefs in accordance with general curriculum and legal requirements. No family is required to send their children to a Catholic school, or to stay at a Catholic school if they do not like Catholic beliefs and teachings.

Catholic schools are well-respected providers of education to Catholics, families of other faiths, and families with no faith. They have successfully contributed to educating millions of Australians and to strengthening social cohesion for 200 years. They have done this on the explicit basis that families who choose to send their children to them accept the religious faith and ethos of the school. No special treatment is being requested. Catholic schools simply want to continue providing high-quality, affordable, accessible education, based in our faith, for the benefit of children, families and the wider community throughout Australia.

There is another important consideration here as well. Catholics have almost always been a minority in Australia, sometimes a despised minority. One of the major purposes of human rights is to ensure that the rights of minorities, including the various minorities that make up the diverse religious life of our country, are not disregarded or destroyed by the determination of the majority (or a powerful minority) to impose its way of thinking and its frame of values on everyone in society. This seems to have been forgotten in the ALRC's consultation paper.

Over the last decade, studies and reports have been commissioned that reveal that religious discrimination is a problem in Australia, especially for minority faiths. These studies reveal

that up to one in four Australian children have been on the receiving end of discrimination on the basis of their religion.⁸³

The paper fails to engage properly with the reality about religious schools as communities of faith. Its propositions fail to ensure that religious freedom is 'interpreted generously',⁸⁴ so as to 'maximise the enjoyment'⁸⁵ of this right for those Australians who wish to provide their children with an education in accordance with their religious beliefs. Religious freedom is discounted like no other right considered in the paper.

A false premise can lead to a wrong conclusion. The consultation paper seems to be informed by an assumption that religious schools are inherently discriminatory, and that the life-giving and life-affirming teachings of religious faith are harmful and possibly in breach of the duty of care religious schools have to their students.⁸⁶ In this, it fails to understand the explicitly religious and mission-based nature of Catholic schools, their duty to seek the truth and to teach it to their students, and encourage them to discover it for themselves. It also fails to grasp the obligation Catholic schools are under to carry out every part of their activities, including in their care of staff and students, in imitation of Christ, the gentle and loving teacher.

83. M.Z. Sharif et al. (2021), The association between experiences of religious discrimination, social-emotional and sleep outcomes among youth in Australia, *SSM – Population Health*.

84. ALRC paper, p. 11, at [25].

85. ALRC paper, p. 7, at [12].

86. ALRC paper, p. 17 (Proposition A).