SUBMISSION

ALRC CONSULTATION PAPER: RELIGIOUS EDUCATIONAL INSTITUTIONS AND ANTI-DISCRIMINATION LAWS

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I. Background

1. In its Discussion Paper on *Religious Educational Institutions and Anti-Discrimination Laws*,[1] the Australian Law Reform Commission (ALRC) presents four propositions that express its 'preliminary views' about how the Australian Government's policy objectives can be achieved consistently with Australia's international human rights obligations, especially the International Covenant on Civil and Political Rights (ICCPR).[2]

2. In formulating the Discussion Paper, the ALRC explains that it has undertaken a 'preliminary review of the legal position across a number of overseas jurisdictions to gain an insight into comparative practice', focusing on England, Hong Kong, Ireland, New Zealand, Northern Ireland, and the European Union.[3] The Commission claims that the positions set out in Propositions A, B, C and D are 'consistent with' the law in 'a majority', in 'a number', or in at least one, of the overseas jurisdictions considered by the ALRC.[4]

3. One of the most significant issues in comparative research concerns the problem of case selection.[5] To avoid 'cherry-picking' cases or jurisdictions that suit the personal preferences of the individual researcher, rigorous social science inquiry is based on exacting principles of inductive inference designed to maximise the reliability of research findings. One of these principles is that the considerations guiding the selection of cases or jurisdictions are clearly articulated in advance of the research. If only a subset of all relevant jurisdictions can be closely assessed, it is also important that those selected for examination are genuinely representative. The field of comparative law studies is littered with research that lacks inductive validity due to the tendency of scholars to select

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[1] Australian Law Reform Commission, *Consultation Paper: Religious Educational Institutions and Anti-Discrimination Laws* (January 2023).
[2] Ibid para [43].
[3] Ibid para [5]. Although Hong Kong and Northern Ireland are mentioned at para [5], they are not expressly referred to elsewhere in the Consultation Paper.
[4] *Consultation Paper*, paras [48], [53], [60], [66], [72], [A.38], [A.47].
[5] Ran Hirschl, 'The Question of Case Selection in Comparative Constitutional Law' (2005) 53 *American Journal of Comparative Law* 125.

jurisdictions that are most familiar or most amenable to their cultural assumptions and expectations, without regard to the many cases or jurisdictions that contradict their preferred outcomes.[6]

4. Rigorous principles of case selection should also be applied in the field of international human rights law, where ambiguous or vague treaty provisions need to be interpreted in the light of the jurisprudence and practices of the wide diversity of states that are parties to the treaty.[7] The tendency of traditionally trained lawyers to focus on the authoritative decisions of courts within particular legal systems can be 'less helpful, even misleading' for international lawyers seeking to make doctrinal claims involving cross-country generalisation.[8]

5. The ALRC Discussion Paper properly acknowledges that the research upon which it relies is based only on a 'preliminary review' of a small selection of jurisdictions.[9] However, other than a vague and passing reference to these jurisdictions as being 'comparative',[10] the Paper offers no explanation for the choice of these particular jurisdictions and no reflection on whether those jurisdictions are a representative sample of countries that are parties to the ICCPR.

6. The jurisdictions specifically discussed in the ALRC Consultation Paper are England, Ireland, New Zealand and the European Union (EU), as well as several unidentified member states within the EU. While there are obvious cultural relationships between Australia and these countries, the selection is heavily weighted to English-speaking and European countries. A sufficiently representative sample of the 173 countries that have ratified the ICCPR would need to include many more non-English speaking and non-European jurisdictions to provide reliable indicators about how the relevant provisions of the ICCPR have been implemented throughout the world. Even among English-speaking countries, there appears to have been no consideration of relevant jurisprudence from Canada or the United States, for example.

7. This submission outlines several reasons why it cannot reliably be claimed that Propositions A, B, C and D are supported by 'comparative practice', as claimed in the ALRC Consultation Paper. Firstly, the submission examines EU Council Directive 2000/78/EC, to which the ALRC refers in support of its four propositions. It is shown that Propositions A, B, C and D depart in several significant respects from the EU Directive. Secondly, this submission reviews the implementation of the EU Directive by several EU member states. It is shown that Propositions A, B, C and D are not consistent with the implementation of the Council Directive by several member states of the EU. Thirdly, this submission

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[6] Ran Hirschl, 'Comparative Methodologies' in Roger Masterman and Robert Schütze (eds), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge University Press, 2019) 11 (referring to 'result-driven' research that lends credence to the accusation of 'cherry- picking').

[7] Katerina Linos, 'How to Select and Develop International Law Case Studies: Lessons from Comparative Law and Comparative Politics' (2015) 109(3) *American Journal of International Law* 475, 475.

[8] Ibid 476.

[9] *Consultation Paper*, para [5] (emphasis added).

[10] *Consultation Paper*, para [72].

draws attention to other countries, outside the EU, whose laws regulating these matters accord wider protections for the freedom of religious educational institutions than proposed by the ALRC.

8. It follows that the ALRC has *not* demonstrated that Propositions A, B, C and D are supported by 'comparative practice' and that, in fact, many jurisdictions offer suitably *more* protection of the freedoms of educational institutions to maintain their religious ethos than proposed by the ALRC.

II. EU Council Directive 2000/78/EC

9. EU Council Directive 2000/78/EC lays down a general framework for addressing discrimination on the grounds of grounds of religion or belief, disability, age or sexual orientation in employment and occupation. Article 2 of the Directive prohibits both direct and indirect discrimination on the basis of these protected attributes.[11]

10. Article 4(1) of the Directive declares that difference of treatment does *not* constitute discrimination where 'by reason of the nature of the particular occupational activities concerned' or 'the context in which they are carried out' the relevant characteristic necessitating differential treatment 'constitutes a genuine and determining occupational requirement', provided the 'objective is legitimate' and the 'requirement is proportionate'.

11. Article 4(2) of the Directive clarifies that:

> in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief *shall not constitute discrimination* where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos.[12]

12. Article 4(2) also clarifies that:

> the Directive shall … not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.

13. A comparison of the Directive with the ALRC's Propositions A, B, C and D reveals several important differences that are not adequately considered in the Discussion Paper.

14. Firstly, the attributes referred to in the EU Directive and the ALRC Propositions are not the same. The EU Directive addresses discrimination on the grounds 'religion or belief, disability, age or sexual

[11] *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.
[12] Emphasis added.

orientation', whereas Propositions A, B, C and D address 'sex, sexual orientation, gender identity, marital or relationship status, or pregnancy'. The Discussion Paper does not acknowledge these important differences and does not take them into account.

15. Secondly, the EU Directive clarifies that certain forms of differential treatment 'do not constitute discrimination', whereas Propositions C and D, as implemented by Proposals 1-5 and 10, indicate that the practices of religious institutions should continue to be protected only by 'exceptions' which allow 'discrimination' in certain circumstances. The Discussion Paper does not acknowledge this important difference or consider its significance.[13]

16. Thirdly, Propositions B, C and D define the scope of the proposed exceptions more narrowly than the EU Directive and require religious educational institutions to comply with more conditions in order to benefit from them. In particular, Proposition C requires that a religious educational institution will not benefit from the exception if the criteria for preferencing staff would 'amount to discrimination on another ground (such as sex, sexual orientation, gender identity, marital or relationship status, or pregnancy)', while Proposition D stipulates that the freedom of a religious educational institution to impose a code of conduct is 'subject to … prohibitions of discrimination on other grounds'. This is inconsistent with Article 4(2) of the EU Directive, which states categorically and without qualification that any 'difference of treatment' based on religion or belief that meets the conditions set out in the article 'shall *not* constitute discrimination'. These significant differences between Propositions C and D and Article 4(2) of the EU Directive are detailed in the Appendix to this submission.

17. For these reasons, it is incorrect for the Discussion Paper to claim or imply that Propositions B, C and D are consistent with the EU Directive.[14] The Discussion Paper seems to acknowledge some of this inconsistency, but only in the context of its discussion of Proposal 8, concerning a particular exception to the *Fair Work Act 2009* (Cth).[15] It states its preliminary view that 'there may be benefit in providing greater clarity' about the operation of the exception,[16] but does not acknowledge that the proposed 'exception' would be significantly narrower than the freedom guaranteed by Article 4(2) of the EU Directive.

III. Member State Implementation of Council Directive 2000/78/EC

18. As many as twenty-five European states have implemented Article 4(2) of the EU Directive into their national law.[17] The ALRC Discussion Paper selects only two of these for its comparative analysis,

[13] See Aroney and Taylor, 'The Politics of Freedom of Religion in Australia: Can International Human Rights Standards Point the Way Forward?' (2020) 47 *University of Western Australia Law Review* 43, at 53, 57 and 59.
[14] *Consultation Paper*, footnotes 76, 87, 92, 160.
[15] *Consultation Paper*, para [96], footnote 103.
[16] *Consultation Paper*, para [96].
[17] Isabelle Chopin and Catharina Germaine, *A comparative analysis of non-discrimination law in Europe 2021* (Publications Office of the European Union, 2023) 72.

Ireland and the United Kingdom (the latter of which, of course, is no longer a member of the EU). However, many of the twenty-five member states have incorporated protections for the freedom of religious organisations in terms closely aligned with the language of Article 4(2), thus conferring wider protections for religious organisations than proposed by the Discussion Paper.[18]

19. Some EU countries offer considerably wider protection of the freedom of religious organisations than required by the EU Directive. In Croatia, for example, it is not discrimination for an organisation to place a person in a less favourable position 'if this is required by the religious doctrine, beliefs or objectives' of any 'public or private organisation'.[19] In Germany, noting the state repression of religious organisations that occurred during the Nazi era, difference of treatment on grounds of religion or belief by a religious organisation is not discrimination if this is a justified occupational requirement having regard, inter alia, to the 'self-perception of the religious society or association', considered in light of the 'right of self-determination' of the organisation.[20] Furthermore, it is stated that the prohibition on difference of treatment 'shall not affect' the right of religious organisations 'to be able to require their employees to act in good faith and loyalty in accordance with their self-perception'.[21] These provisions exist in the context of the German Basic Law, which guarantees 'freedom of association to form religious societies' and the right of those societies to 'confer [their] offices without the involvement of the State'.[22]

20. Rather than refer to these and similar jurisdictions, the ALRC Discussion Paper cites the example of Ireland, which amended its law in 2015. The Discussion Paper claims that these changes brought Irish law 'into line with European law'.[23] However, a comparison of the two regimes reveals that the Irish law is now more restrictive of the freedom of religious organisation than is required by the EU Directive, because it adds the requirement that the treatment must not constitute discrimination on other grounds.[24]

21. For these reasons, it is simply incorrect for the ALRC Discussion Paper to claim or imply that Propositions A, B, C and D are consistent with the implementation of the EU Directive by the member states of the EU.

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[18] For example, *Protection Against Discrimination Act 2003* (Bulgaria), article 7(3); *Anti-Discrimination Act 2008* (Czech Republic), section 6(4); *Equal Treatment Act 2008* (Estonia), article 10(2), none of which are acknowledged or discussed in the ALRC Discussion Paper.

[19] *Anti-Discrimination Act 2008* (Croatia), article 9(5).

[20] *General Law on Equal Treatment 2006* (Germany), paragraph 9(1).

[21] Ibid paragraph 9(2).

[22] Basic Law for the Federal Republic of Germany (1949), article 140, incorporating article 137 of the Weimar Constitution (1919).

[23] *Consultation Paper*, para [66].

[24] *Employment Equality Act 1998* (Ireland), section 37(1A).

IV. Other Jurisdictions

22. There are countless states that are parties to the ICCPR that are not considered in the ALRC Discussion Paper. As noted above, rigorous principles of case selection need to be applied to the interpretation of ambiguous or vague treaty provisions in the light of international practices. As also noted, there appears to be a bias in the Discussion Paper in favour of English-speaking and European countries. One possible justification, strictly not relevant to assessing Australian law against standards of international human rights law, might be that Australia has special cultural and legal affinities with other English-speaking and European countries. But if that were the justification, then it is highly anomalous that neither Canada nor the United States were considered.

23. United States jurisprudence on these matters is especially relevant because the Australian Constitution was largely modelled on the US Constitution and section 116, in particular, was modelled on the religion clauses of the US First Amendment. Moreover, Australian federal anti-discrimination laws are subject to the requirements of section 116. Although the jurisprudence of the two countries on these matters is different in certain important respects, the High Court of Australia has consistently acknowledged the relevance of decisions of the US Supreme Court in the interpretation of the Constitution.

24. In a unanimous judgment delivered in 2011, the US Supreme Court held that a religious school enjoyed the benefit of an exception to anti-discrimination laws in respect of its employment decisions based on the free exercise and establishment limbs of the First Amendment.[26] In the course of its reasoning, the Court characterised as 'extreme' the position advanced by the Equal Employment Opportunity Commission that the exception only applies to employees whose duties are exclusively religious and that the employee did not fall within the exception because most of her duties were the teaching of secular subjects and her 'religious' duties occupied only 45 minutes of her working day. In a concurring opinion in which Justice Kagan joined, Justice Alito noted that different religious groups have different views as to what qualifies as a 'religious' appointment or position, but that it clearly includes 'those who are entrusted with teaching and conveying the tenets of the faith to the next generation'.

25. This reasoning was affirmed and extended by the US Supreme Court in a case decided in 2019, in which the Court decided by a clear majority (7-2) that the 'ministerial exception' applied to two teachers employed by Catholic schools under employment agreements that set out the schools' mission to develop and promote a Catholic faith community within the school. Justice Alito, writing the Opinion of the Court, observed that 'educating young people in their faith, inculcating its

[26] *Hosanna-Tabor Evangelical Lutheran Church and School v EEOC*, 565 US 171 (2012).

teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school'. Justice Alito further stated:

> The religious education and formation of students is the very reason for the existence of most private religious schools, and therefore the selection and supervision of the teachers upon whom the schools rely to do this work lie at the core of their mission. Judicial review of the way in which religious schools discharge those responsibilities would undermine the independence of religious institutions in a way that the First Amendment does not tolerate.

26. These decisions of the US Supreme Court establish a set of principles that are significantly more protective of the freedom of religious schools to ensure the maintenance of their religious ethos than offered by the EU Directive, let alone the proposals set out in the ALRC Discussion Paper. And yet neither of these two cases is referenced or discussed in the ALRC Discussion Paper.

27. Section 702 of Title VII of the US Civil Rights Act of 1964 offers another comparative example. It provides that the general prohibition on discrimination established by the Act does not apply to 'any religious corporation, association, educational institution or society' that hires employees of a particular religion to perform work connected with the activities of the group.[27] This provision of US statutory law accords significantly more protection of the freedom of religious schools to ensure the maintenance of their religious ethos than offered by the EU Directive, let alone the proposals set out in the ALRC Discussion Paper.

Conclusions

28. The ALRC has been tasked to report on reforms to Commonwealth anti-discrimination laws to ensure, to the extent practicable, that they reflect the Government's policy commitments in a manner that is consistent Australia's international human rights obligations. In the course of its reasoning, the ALRC has drawn extensively, but selectively, on the law of other jurisdictions. In particular, the ALRC Discussion Paper maintains that its proposals are consistent with the law of these jurisdictions. However, as outlined in this submission, the ALRC's proposals depart in several significant respects from EU Council Directive 2000/78/EC and from the law in several European and other jurisdictions not examined in the Discussion Paper. It follows that the ALRC has *not* demonstrated that Propositions A, B, C and D are supported by 'comparative practice' and that, in fact, many jurisdictions offer suitably *more* protection of the freedoms of educational institutions to maintain their religious ethos than proposed by the ALRC.

[27] Civil Rights Act of 1964 § 702(a), 42 U.S.C. § 2000e- 1(a) (2012).

APPENDIX

29. The ALRC Discussion Paper claims or implies that ALRC Propositions B, C and D are consistent with EU Council Directive 2000/78/EC. However, the ALRC Propositions define the scope of the proposed exceptions for religious educational organisations significantly more narrowly than the EU Directive.

30. Proposition B limits the freedom of religious educational institutions to require staff to teach a particular religious doctrine or belief on sex or sexuality so that it applies only to 'staff involved in the teaching of religious doctrine or belief'. This is ambiguous because it is not clear whether it extends to the teaching of such doctrines or beliefs in the context of the teaching of other subjects such as French literature or mathematics, or is restricted only to classes focused specifically on religious doctrine or belief. The Discussion Paper also proposes that a staff member should be free to 'provide objective information about alternative viewpoints if they wished'. The EU Directive does not limit the freedoms protected by Article 4(2) to the teaching of religious doctrine or belief as a distinct subject and it does not suggest or imply that a staff member should be free to express 'alternative viewpoints'. The Discussion Paper does not acknowledge these important differences or consider their significance.

31. Proposition C limits the freedom of religious educational institutions to preference staff to those 'involved in the teaching, observance, or practice of religion'. The Discussion Paper explains in this specific context that for 'some educational institutions, religion is infused through all school life' whereas for others 'it is taught and practiced separately from the other aspects of education'. This implies that the exception could apply to *all* staff in an institution of the first type.

32. However, Proposition C further limits the freedom of such institutions by requiring that the criteria for preferencing staff must 'not amount to discrimination on another prohibited ground'. Article 4(2) of the EU Directive does not impose this additional requirement on religious organisations. It states categorically, and without qualification, that any 'difference of treatment' based on religion or belief that meets the conditions set out in Article 4(2) 'shall not constitute discrimination'; that is, at the least, it shall *not* constitute discrimination on the 'grounds of religion or belief, disability, age or sexual orientation', as referred to in Article 1 of the EU Directive.

33. ALRC Proposition D limits the freedom of religious educational institutions to being able to 'expect' their staff to 'respect' the institution's ethos and only to take action to prevent a staff member from 'actively' undermining that ethos. Proposition D also limits the freedom of religious educational institutions to require codes of conduct such they must not involve 'discrimination on other grounds' (presumably, grounds other than religion or belief) and must not require employees to 'hide their own sex, sexual orientation, gender identity, marital or relationship status, or pregnancy'.

34. Again, Article 4(2) of the EU Directive contains no such limitations. It allows religious organisations to 'require' employees to 'act in good faith and with loyalty to the organisation's ethos' and clarifies that it is to the organisation's own ethos, as determined by the organisation, that regard must be had to determine what is a genuine, legitimate, and justified occupational requirement. It also clarifies, as noted, that any 'difference of treatment' based on religion or belief that meets the conditions set out in Article 4(2) 'shall not constitute discrimination'.

35. In these ways, Propositions B, C and D place greater restrictions on the freedoms of religious educational organisations than contemplated by the EU Directive.