



**Submission to the  
Australian Law Reform Commission (ALRC)**

# **Religious Educational Institutions and Anti-Discrimination Laws**

**March 2023**

**Prepared by the Muslim Legal Network (NSW)**

The Muslim Legal Network NSW is an Australian-based legal practitioner and law student association. It is a gateway for Australian Muslim law students and legal practitioners to both network with one another and engage with the wider legal community. We provide community legal education and participate in law reform and legal advocacy, as well as offering a Muslim perspective on civil liberties issues.

**Contact:**



## INTRODUCTION

1. The Federal Attorney-General, the Honourable Mark Dreyfus KC MP has asked the Australian Law Reform Commission (“ALRC”) to consider what reforms should be made, compatible with Australia’s international human rights obligations in light of current Federal anti-discrimination laws.
2. In the terms of reference. The ALRC was asked to consider possible amendments to the *Sex Discrimination Act 1984* (Cth), other Federal anti-discrimination laws, and the *Fair Work Act 2009* (Cth), to ensure that an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed;
  - do not discriminate against a student on the basis of sexual orientation, gender identity, marital or relationship status or pregnancy;
  - do 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.
3. The ALRC’s Consultation Paper (“Consultation Paper”), which was released on 27 January 2023, outlines a number of proposals and technical recommendations for reform.
4. The Muslim Legal Network (NSW) (“MLN”) welcomes the opportunity to provide submissions to the ALRC to their inquiry on Religious Educational Educational institutions and Anti-Discrimination Laws.

## CURRENT FRAMEWORK

5. As outlined in the terms of reference, any change to current anti-discrimination regime is intended to ensure it is compatible with Australia’s obligations under international human rights law.
6. When incorporating these obligations into domestic law, the aim of the legislature is to strike the right balance between competing rights, whether that be the freedom of religion, freedom of choice or the obligation to not discriminate. For example, provisions have existed in various State and Commonwealth legislation that allow the “positive discrimination” to occur in circumstances where there might, for example exist a requirement for the persons employed in a particular role demonstrate either particular knowledge, a value set or other attribute essential to delivering it. In the existing format, some of those exemptions extend to faith-based educational institutions.
7. As recently as 2013, the Federal Parliament passed the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) where it maintained the current exemptions to sections 37 and 38 of the *Sex*

*Discrimination Act 1984* (Cth) (the SDA). In the Explanatory Memorandum to the amending Bill, the then and now current Attorney-General, the Honourable Mark Dreyfus KC, said:

The importance of the right to freedom of religion is recognised in sections 37 and 38 of the SDA. These sections provide exemptions for religious bodies and education institutions from the operation of the prohibition of discrimination provisions of the SDA in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

The Bill will extend the exemption at section 38 of the SDA, so that otherwise discriminatory conduct on the basis of sexual orientation and gender identity will not be prohibited for educational institutions established for religious purpose. Consequently, the Bill will not alter the right to freedom of thought, conscience, and religion or belief in respect of the new grounds of sexual orientation and gender identity.

8. There was bi-partisan support for the Bill as the then Shadow Attorney-General, the Honourable Senator George Brandis KC, said in the course of the Second Reading Speech:

The right of people to fair treatment, a precious value, must take its place alongside other precious values, and one of those precious values is freedom of religion...in balancing those competing and sometimes inconsistent values...**the right of freedom of religious practice and the right of freedom of religious worship must always be respected.** And if we are to respect the right of religions which conduct social institutions, whether they be schools or churches or aged-care facilities or hospitals, to conduct those institutions in accordance with the tenets of their faith should always be respected. That is a very fundamental value.

**You cannot have freedom of religion if you also have legislation which requires, which imposes by statutory obligation, an obligation upon a church or religious institution to conduct its affairs at variance with the tenets of its teachings.** (Emphasis added)

9. The balancing act between different rights was recognised by both sides of politics in which certain amendments were made to protect “protected attributes” but both sides accepted that religious institutions should be able to conduct faith-based educational institutions in accordance with the doctrines and tenets of their faith.

## INTERNATIONAL HUMAN RIGHTS OBLIGATIONS AND PARENTAL CHOICE

10. Article 18 of the International Covenant on Civil and Political Rights (the ICCPR), of which Australia is a signatory, provides parents with, amongst other things, the right to choose a school based on their religious beliefs.
11. Article 26(3) of the Universal Declaration of Human Rights (the UDHR) affords parents the prior right to choose the kind of education that want to give their children.
12. Whilst there exists no explicit right in Commonwealth legislation providing such a protection for parental choices, the aforementioned exemptions have shown that faith-based organisations have had limited ability to exercise some restrictions in hiring practices.
13. Appreciating that there are limitations for the freedoms envisaged within Art. 18 of the ICCPR and Art. 26 of the UDHR which could result in a potential restriction of religious freedoms, it is our view that any additional curtailment could result in a

limitation of those freedoms which Australia is obligated to provide within the international human rights framework as it relates to religious and parental freedoms.

14. Faith-based educational institutions seek to shape the identity of their students through the theological and moral framework of their faith which is why many parents choose such schools.
15. The ALRC's proposals could threaten the right of parents to raise their children in accordance with their own religious views and beliefs as many parents choose to enroll their children in educational institutions with a religious ethos to assist with this objective.

## **BUILDING A "COMMUNITY OF FAITH"**

16. The Terms of Reference seeks to protect the right of faith-based educational institutions to continue to give preference to those who share their religious ethos.
17. Rather than protecting that right, the Consultation Paper proposes to limit it by allowing religious educational institutions to preference only where "the teaching, observance or practice of religion is a genuine occupational requirement". At paragraphs [57], it is argued that "...preferencing is generally considered reasonable where a job has explicitly religious or doctrinal content."<sup>1</sup>
18. The ALRC's view assumes that religious schools operate on the premise that there is a clear division between secular education and religious theology, practice and observance. Rather, they have been established to convey secular knowledge within the context of a religious worldview, and to engage students in providing a moral framework according to the tenets of the religion that the institution represents in addition to teaching religious theology and practice.
19. In contrast, the state school system is governed by secular principles<sup>2</sup>. Government educational institutions do allow "Special Religious Instruction" on condition that '...school staff, contractors, volunteers and visitors must abide by this overarching principle of secularity'<sup>3</sup>.
20. One of the ways religious schools seek to instill the tenets of their faith to the community and their students is through the modelling behaviour of teachers and staff. Being forced to hire someone who does not share the institution's values will ultimately cause detriment to the school, parents, students and the employee.
21. In an employment law and recruitment context, organisations focus on "culture" when considering candidates and make certain demands on prospective employees and stakeholders as way of maintaining their identity. Employees will also be considered more productive when they fit in with the culture of the organisation. Seeking to

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<sup>1</sup> Australian Law Reform Commission, Religious Educational Institutions And Anti-Discrimination Laws: Consultation Paper (2023) Commission Reference: ALRC Consultation Paper 2, 2023

<sup>2</sup> *Education Act 1990* (NSW), section 30

<sup>3</sup> *Victoria - Department of Education and Training, Special Religious Instruction Policy* - <https://www2.education.vic.gov.au/pal/special-religious-instruction/policy>

attract the right talent for the organisation is the normal practice whether they are businesses or non-profit organisations.<sup>4</sup>

22. We submit the right of faith-based educational institutions to preference staff that embody those tenets is reasonable and proportionate in the context Australia's international human right obligations and we oppose the ALRC's proposal to restrict this right through propositions B and C in the Consultation Paper.

## **STUDENTS AT RELIGIOUS SCHOOLS**

23. The Proposal A calls for removing the exceptions, currently included in section 38(3) of the SDA, in the provision of religious education to students.
24. At the outset, we note that the Consultation Paper, at paragraph [48], recognises that there would be no or minimal effect of implementing Proposal A as this proposal is generally consistent with the law, as currently in force, in a number of States and Territories. Further, the exceptions under section 38(3) cover limited grounds and do not extend to all of the SDA grounds of discrimination prohibited by section 21.
25. Notably, the Consultation Paper, at para [49], provides that similar reforms have existed in Queensland and Tasmania, for more than two decades, which have experienced positive results. However, the Paper fails to provide those results or elaborate how they differ from the experiences of religious education in New South Wales and South Australia, where such reforms currently do not exist. This is an important consideration given the absence of any notable evidence provided to indicate the differential treatment of students by religious educational institutions relying on the s38(3) exemptions to the SDA grounds of discrimination.
26. Principally, the MLN supports equal access to the Australian education system for students of all backgrounds. However, we do not consider the Proposal A to be an adequate reform proposal as it is oblivious to the experiences of religious education and fails to address the complexity of the issues involved.

## **HOW THE CURRICULUM IS TAUGHT**

27. The contemporary societal approach towards diverse genders and relationships is distinct to the traditional teachings and interpretations of various religions. Parents choose to send their children to faith-based schools so they can teach these issues in a manner which is sensitive to their beliefs and practices.
28. We note that the ALRC does not advocate for changing the religious curriculum related to gender and sex education. Rather, the Technical Proposal 7 calls for further amending the SDA to clarify that the curriculum is not the subject of the Act. Nonetheless, religious schools owe a duty of care to their students to teach issues related to sex education and diverse relationships, which would likely be invoked and

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<sup>4</sup> Natalie Baumgartner, Harvard Business Review, *Build a Culture That Aligns with People's Values*, 8 April 2020 - <https://hbr.org/2020/04/build-a-culture-that-aligns-with-peoples-values>

contested once the proposals outlined in the Consultation Paper are thoroughly implemented. As discussed below, this would likely hamper the ability of these schools to provide education of their traditional religious beliefs.

29. As the Consultation Paper foreshadows at paragraph [92], even if the religious curriculum is exempted from the operation of the SDA, the way it is delivered would fall within the ambit of the SDA. It is our opinion that this separation of the curriculum content and the way it is delivered, as suggested by the ALRC, has not been dealt with in sufficient detail and foresight, leaving potential for conflict for religious educational institutions between their freedom of religion and duty of care to students.
30. At paragraph [91], the ALRC considers the above concern briefly and then states that “This does not, in practice, appear to have been an issue in states and territories ... such as Queensland and Tasmania” but fails to substantiate its assertion with any supporting evidence.
31. It is unfeasible to envisage that all religious schools would be able to accommodate this regulation and provide for a separate, but religiously acceptable, method for delivering certain topics of the religious curriculum relating to sex and sexual orientation to students from diverse gender and relationship backgrounds. Consequently, if they are to teach all students uniformly and abide by their duties of care to these students, the schools would be compelled to make adjustments to the curriculum. We expect such adjustments would be out of line with fundamental religious tenets as well as parental, student, and community expectations. It would also unduly encroach on the right to a religious education.
32. In view of the above, the MLN submits that Proposal A should be revisited in its entirety in consultation with religious leaders and educationists as well as parents and other professionals who work with children and diverse communities.

## **CONCLUSION**

33. In summary, the MLN views the ALRC’s proposals in the Consultation Paper as disrupting the current balance in place between different human rights recognised in various international conventions to which Australia is a signatory.
34. Religious educational institutions have a right to practice and promote their founding religious values. Parents also have a right to ensure a safe, religious education for their children. The proposals to restrict the right of religious institutions in relation to employment undermines the rights of religious schools and parents. The proposals also will not allow schools to operate in line with the expectations of parents, students and their communities.
35. The MLN is more than happy to respond to any questions by the ALRC or any other stakeholders regarding these submissions.