Submission to the Australian Law Reform Commission

Consultation Paper on Religious Educational Institutions and Anti-Discrimination Laws

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Introduction

My name is Mark Edwards, and I am the Senior Pastor of Cityhope Church in Ipswich Queensland, affiliated with **Australian Christian Churches (ACC)**. This submission is made on behalf of the ACC of which I am their representative on matters of Religious Freedom.

ACC is the largest Pentecostal movement in Australia, comprised of more than 1,000 churches, 3,300 credentialed pastors and 400,000 constituents.

The **Australian Law Reform Commission (ALRC)** released a Consultation Paper for its current reference on 'Religious Educational Institutions and Anti-Discrimination Laws' on the 27th of January 2023 with an invitation for public submissions.

At the outset of this submission, ACC believes that the recommendations of the Consultation Paper and the basic premise underpinning those recommendations are inconsistent. The ALRC states in **Principle 2** (under the heading 'Principles'), 'All human rights engaged by this Inquiry are fundamentally important' and it is also acknowledged that religious freedom and parental rights are important. Yet, the Consultation Paper recommends the removal of existing 'balancing clauses' currently embedded in Commonwealth legislation to protect those institutions operating in accordance with their religious beliefs.

Diversity, inclusion and equitable principles, which form the foundations of a free democratic society, and which have operated successfully in Australia since Federation, are demolished for no sound reason. In fact, the Consultation Paper seems to be endorsing a 'uniformity' which would be compulsory and as a result the existence of faith-based educational institutions would be gravely at risk. The question must be asked, 'Why is there such a need for this dramatic societal change in relation to existing legislation, without evidence that change is needed?'

The purpose of faith-based schools is not only to impart intellectual knowledge, but also to instil the values and ethos of the school, especially in terms of religion. In addition to teaching the prescribed curriculum, they provide religious activities that seek to demonstrate to students what a life lived in accordance with the relevant religion looks and feels like in practice.

It is essential therefore, to have teachers and other staff at the school who can participate in these activities as a faith community, whether these staff are engaged in religious teaching or not. Of course, this assists the realisation of the school's religious purpose, and to develop an understanding by students that religion is not merely an adjunct to core activities, but an integral part of them and their personal development.

These are among the reasons why many parents choose to send their children to religious schools. The right of parents to do so is enshrined in international law as I will outline below in more detail.

It seems that the importance of all human rights has not been paid sufficient attention by the ALRC.

These proposals would place unnecessary and unreasonable restrictions on the freedom of religious schools to give effect to the international human right of parents and guardians to ensure the religious and moral education of their children in conformity with their own convictions.

General Comments on the Consultation Paper

Religious Freedom as a Human Right

In the High Court of Australia – *Church of the New Faith v Commissioner of Pay Roll Tax* (1983) 57 ALRJ 785 at 787, per Mason ACJ and Brennan J, it was stated, '**Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society.** The chief function in the law of a definition of religion is to mark out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint. Such a definition affects the scope and operation of s. 116 of the Constitution and identifies the subject matters which other laws are presumed not to intend to affect. Religion is thus a concept of fundamental importance to the law.'

Religious Freedom is indeed one of the oldest human rights. As early as the 2nd century the son of a Roman Centurion, Tertullian, a Roman citizen, lawyer and historian wrote, 'Rome should allow Christians to exercise their faith because religious freedom was an essential component of human nature…. Every person should be able to worship according to (their) own convictions.' This is the first and oldest recorded written statement that expresses the need for religious freedom to be an essential human right.

Without progressing into a thesis on Religious Freedom and its acceptance throughout history, there are now numerous international treaties, declarations and other instruments which seek to protect Religious Freedom. Australia is a party to some and without doubt has an obligation in international law to comply with them.

Certainly, the most well-known of these international 'accords', in a modern context, in terms of the protection of Religious Freedom, is the **1948 United Nations Universal Declaration of Human Rights (Universal Declaration)**. Passed by the UN General Assembly, including Australia, the Universal Declaration has not become part of Australian law but surely this must influence lawmakers in considering any proposed legislation or changes to existing legislation, in relation to religious freedom or discrimination.

Several of the Universal Declaration's provisions relate to Religious Freedom. However, for the purpose of this submission, **Articles 2 and 18** are the most significant.

Article 2 prohibits discrimination in a number of areas including religion. However, one must note that the prohibition of discrimination is found in numerous international treaties and documents.

Article 18 states, 'Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.'

Freedom of Religion is not, with respect, subject to 'pragmatic elasticity' and 'trade offs' as stated in Principle 3 of the Consultation Paper. There are limits for all freedoms being exercised. In the case of Religious Freedom, **Article 18(3)** imposes limits on the practice of religion if it can be justified as prescribed by law 'where this is necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'. The acceptance of such limits (in accordance with other UN documents, such as the *Siracusa Principles*) must be shown to be 'necessary' and 'proportionate', with a key question being whether, if there are limits imposed for a specific reason, that the limits be as least restrictive as possible.

One must have regard to **Article 18 (4)** of the **International Covenant on Civil and Political Rights (ICCPR)** that parents and legal guardians must have the freedom to choose the 'religious and moral education of their children in conformity of their own convictions'.

The removal of all existing protections from religious educational institutions in relation to Religious Freedom conflicts with the principles outlined above.

Inconsistency between Commonwealth and State Laws

In Paragraph 29 at the second dot point on page 13, the Consultation Paper asserts that, if a State or Territory law on a topic is more restrictive than a Commonwealth law on the same topic, 'duty holders must apply with the most restrictive law'. The explicit example given is that of an educational institution in Queensland where certain conduct is prohibited under Queensland law, but not Commonwealth law, where it is said that the body must comply with Queensland law.

This proposition does not appear to be correct in law. The Commonwealth Constitution provides for this exact situation. Pursuant to **Section 109 of the Constitution** a Commonwealth law must be given priority if there is an inconsistency with State law. It is well established law that if the Commonwealth provides a right or a defence to a party in relation to a certain matter, that cannot be taken away by an inconsistent State law on the same matter. Professor Neil Foster articulates this proposition clearly, that Section 109 applies to discrimination laws involving religion, in his article entitled, 'Religious Freedom, Section 109 of the Constitution, and Anti-Discrimination Laws' (2022 1 Australian Journal of Law and Religion 36-56). There is no case law to the contrary.

Specific Recommendations of the ALRC

In the recommendations made by the Consultation Paper, at almost every point, balancing clauses currently in force to allow religious schools and colleges to operate in accordance with their faith, are to be abolished. **The Commission sets out 4 major 'Propositions'**, and outlines several 'Proposals', which amount to specific legislative amendments. My summary of those propositions are as follows.

Proposition A: Religious schools and colleges can no longer apply conduct rules relating to **student behaviour** in the area of sexual activity or gender identity, except for theological colleges training clergy for formal ordination. Schools and colleges can, however (very carefully) still teach their religiously based views on appropriate sexual behaviour.

Proposition B: Religious schools and colleges can no longer "discriminate" against staff in relation to their teaching or conduct in the areas of sexual activity or gender activity, except for theological colleges training clergy for formal ordination. However, staff can be asked to teach the doctrines of the religion on these issues.

Proposition C: Religious schools and colleges can require **staff** to share the **religious outlook** of the body, or preference such staff in appointments, but only where participation in teaching religion is a "genuine requirement" of the position and the differential treatment is "proportionate". In making these decisions, however, no consideration may be given to staff behaviour, views or identity relating to sexual activity, or orientation, or gender identity.

Proposition D: Staff at a religious school or college can be required **not to 'actively undermine'** the ethos of their employer, but no criteria relating to sexual activity or orientation or gender identity can be imposed.

Before commenting briefly on the four Propositions, it might be useful to comment on a question posed by Justice Rothman AM to the group discussion that I participated in before the Commission.

'Why does a maths teacher need to be a Christian in a Christian school?' This question seems to be at the heart of all four Propositions.

In all my years of pastoring people, I have spoken to hundreds of parents seeking guidance on the educational needs of their children. The parents will always, without exception, look for an educational institution whose ethos, values, principles, and convictions are those which conform to their own values and beliefs. For people of faith, parents will therefore be prepared to pay school fees, above their taxes, for their children to be educated at a school or institution that will promote the values that they, as a family, deem appropriate to their family's beliefs.

This is the family's primary aim, and its primacy rises above enquiries about the quality of individual teachers teaching specific subjects. In other words, in all my years as a Pastor I have never had a family ask me about a specific teacher at a school as opposed to the more pressing, urgent, and critical question about the school's ethos, values, principles and convictions, which are paramount for any parent or legal guardian.

In making this choice there is an express understanding or, at the very least, an implied understanding on behalf of the parents that the teaching staff will adhere to the ethos, values, principles, and convictions of the school. The unity of teacher and school's ethos, values, principles and convictions is not just desired by parents, it is expected.

This expectation overrides whether an individual teacher is, for example, 'a good maths teacher' irrespective of that teacher's personal beliefs. Parents expect competent teaching staff but not at the expense of the modelling of the school's ethos, values, principles, and convictions by the teaching staff.

The reason for this argument is further enhanced by the fact that teachers 'come and go'.
In other words, the teacher may change employment from a particular school however the ethos, values, principles, and convictions of the school itself are consistent over time and do not change.

Therefore, because of the transient nature of all employment including teaching, this is not a situation where **Article 18(3)** would apply, if it does indeed apply to educational freedom of choice.
The teacher's personal beliefs must always be subservient to the ethos, values, principles, and convictions of the school. Otherwise, the culture that the ethos, values, principles, and convictions produces are at risk of erosion – and with it, the very quality that attracts parents to a faith-based education for their child. Parents express their desire to see the ethos, values, principles and convictions by their decision to pay for an education over and above what they have already contributed through their taxes. If the culture of faith-based schools did not matter, parents would not "vote with their feet" in the enormous number they do.

Concerns Relating to Proposition A – Students

1. While Proposition A contemplates that schools can continue to teach religious doctrine, the Commission in its Consultation Paper says that the school must ensure it is done in a way that 'respects its duty of care to students'. No school would deny that it owes a duty to be careful not to cause physical or psychological harm to students. However, to imply, as this proposition does, that the communication of a religious doctrine might cause relevant 'harm' has no foundation in truth.

To construct the potential confrontation of a student by a principle of religious doctrine that they find uncomfortable, challenging, or with which they disagree as a potential 'harm' at law would misunderstand the work of faith-based schools, as well as harmfully reduce the degree of resilience one expects from participants in a pluralistic society. It is imperative all Australians, including students, to be able to engage with ideas that challenge them, or with which they disagree, without construing it as psychological harm. To do otherwise encourages a fragility that undermines our society and leads to the indirect censorship of otherwise respectfully expressed doctrines, shared in good faith, that have been orthodox for centuries.

Further, it misunderstands the manner in which questions of deviation from doctrine are handled in faith-based schools. The approach taken in faith-based schools is one of pastoral support, rather than exclusion, and it is an approach adopted for all people, in all walks of life. The beliefs and doctrines being upheld by this approach are known to and agreed by the parents of students at faith-based schools, and indeed, the schools are selected because they uphold them. To interfere with the clear wishes of parents, manifesting beliefs genuinely held to be in the interests of their child, would be nothing short of allowing Government to determine the content of religious instruction.

2. In relation to the proposal for a school to be unable to refuse to accept as school captain, for example, a student identifying as LGBTIQA+, it is important to be transparent about the environment in which such a potential situation might occur. In faith-based schools where such a decision might be contemplated, clear, established tenets and beliefs are in place, and are expressly accepted by parents and/or legal guardians *before* the child is enrolled. The issue here is whether a student who has decided to announce and celebrate their LGBTIQA+ orientation, can be held up by the school (as school captains usually are) as an 'example' and 'role model' to other students, when to do so is contrary to the religious teachings that underpin all the school's activities. Those teachings and boundaries are made clear to students and families before enrolling, and are accepted as a condition of enrolment. It is not unreasonable to expect that agreement to be honoured. A school must have the right to appoint a 'school captain' who adheres to the ethos and principles of the school. Just as a CEO must believe in the values of the company he or she leads, and a political staffer must believe in the philosophy of the party to which their employer belongs, so too must those who lead a school community as a 'captain' embody the values that the school wishes to promote and uphold.

Concerns relating to Proposition B - Staff

1. Traditionally a religious school is set up and funded (with the assistance of funding by State and Federal Governments), by members of a particular religion to provide education for children in accordance with their beliefs, whether it be a Christian school, a Muslim school, a Jewish school, or one from another religious tradition. As a consequence, a religious community takes very seriously the content and quality of the teaching of their faith by the school. Those teachings are, without exception, well documented and not secret in any way. The consequence is very clear to anyone who enrols a child in the school and any person who seeks to become a teacher at that school.

   Religious beliefs are to be taught and lived out in everyday life. There must be a consistency between what is taught in the classroom and what is 'lived' by example. A member of staff who displays inconsistency undermines the ethos and mission of the school; after all, nothing undermines the credibility of teaching more than a person who does not attempt to 'practice as they preach'. A student club that advocates during school hours or on school property against the views of the religious tradition would similarly undermine the ethos and mission of the school. Religious belief is wholistic in the sense that words and actions of an individual must be uniformly consistent. There cannot be exceptions to this principle.

2. The Commission's paper proposes that a religious school can require a LGBTIQA+ teacher to 'teach the school's doctrine' on sexual issues, but qualifies it by requiring the provision of 'objective information about alternative viewpoints'. This is a troubling proposal for the intrusion of government into the teaching of religious doctrine and curricula for faith-based schools. It is difficult to contemplate that any Government would consider such a serious over-reach as to undermine the right of parents to decide what sort of teaching on moral issues they want their children to receive. It is deeply troubling to think that any bureaucrat or political party could consider this consistent with our free and democratic society.

3. The Commission contemplates a situation in which a teacher, who has been employed at a school for a period pursuant to a 'statement of faith' that the school later wishes to update or amend. In such a situation, I contend that 'the right to continued employment' is fundamental on the basis of the terms and conditions agreed at the time the employee commenced. Therefore, I submit that a school can set a statement of faith and apply it at the time of employment, however if that statement of faith were to be changed, the employment of the teacher should continue on the basis of the original statement of faith unless the new statement were to form the basis of an amendment to the contract of employment with the consent of the employee.

Concerns relating to Proposition C - Preferencing Staff and Teaching Religion

Examples given at paragraph 60 of the Consultation Paper appear to be framed in relation to the current law (where, at the Commonwealth level, religious discrimination prohibitions only arise under the *Fair Work Act 2009* (Cth)), but also in relation to a possible future Commonwealth law forbidding religious discrimination. These examples seriously impact Religious Freedom, as I outline below.
A school can preference staff who will adhere to specific religious forms of dress or diet, however they cannot choose to ask staff to sign a statement affirming religious doctrine. The Consultation Paper proposes that the right of religious schools to show preference in the selection of staff to people of their faith be limited to teaching roles where the 'teaching, observance, or practice of the religion is a genuine requirement of the role, having regard to the nature and ethos of the institution'. For every other teaching role, it would be become unlawful for the school to give preference to employing teachers who share or are willing to commit to supporting the religious beliefs of the school.

If this proposal was implemented, it would introduce a new test into employment law. There appears to be an absence of detail about how this principle would even be applied. In any given case, the onus would be on the school to prove that it satisfied the test. It is not unreasonable to suggest that this would increase the scope for future litigation and would thus deter any religious school from attempting to engage teachers who share the religious beliefs of the school. Religious schools must have the unrestricted right to preference teachers in employment who share the same ethos and values of the school, no matter the discipline they teach. For the reasons outlined above, it is essential to ensuring the ethos, values, doctrines and principles of the school are modelled by those who lead it as the adults responsible for setting the culture of the institution.

The Commission proposes that even staff who are engaged to teach religious beliefs, if such teaching involved comment on sexual behaviour, must be 'permitted to objectively discuss the existence of alternative views about other lifestyles, relationships or sexuality'. This represents another extraordinary overreach of the Commission and Government into the domain properly in the rights of parents. Parents know the faith base of a school before enrolment, and indeed choose to do so because of the culture and ethos that the tenets of that faith produces. Parents and guardians make a voluntary choice that the school's religious ethos is what they want for their child. If they do not agree with the ethos and principles of the school, then there is a choice available to parents and carers to not enrol their children at that school.

Concerns relating to Proposition D - Staff to Respect Religious Ethos

Proposition D1 outlines that staff must not 'actively undermine' the ethos of the school. This is appropriate, however, it sets such a low threshold of conduct that it is less than any other organisation would expect from their staff. For example, a corporation would not be expected to continue to employ staff who refuse to advance the goals and principles for which it is established, nor would Government contemplate allowing a corporation's staff to assist competitors in their non-work time. Yet, that is exactly what this proposition tacitly endorses.

Propositions D2 and D3 warrant comment. In proposition D2, codes of conduct for staff are permitted but 'subject to… prohibitions of discrimination on other grounds'. An example of this is outlined in paragraph 66 – 'Examples: What could it mean in practice?' and states 'A school could not terminate the employment of a lesbian teacher on the grounds that she was actively undermining the religious ethos of the institution merely by entering into a marriage with a woman.'

The example here seems to accept the fact that a teacher, in these circumstances, is undermining the ethos of a religious institution by ignoring one of its clearly expressed tenets, expressly accepted by that teacher at the time of employment. If a teacher is adopting a lifestyle that is contrary to the ethos, values and principles taught in the school, this would be of serious concern to the school. A teacher is not merely employed to transmit technical content. Their role is also to model behaviour, to assist with the development of students' character and social skills and help them to integrate the faith on which the school is founded as they go about their daily lives. Accordingly, a teacher's behaviour, conduct or status outside the 'classroom' speaks as loudly as words from the teacher 'inside the classroom'.

If the above example is accepted, then Proposition D3 referring to the Educational Institutions 'not requiring employees to hide' their 'private life circumstances' is very problematic.

Comments in relation to the rationale of the conclusions of the Consultation Paper

Each of the Propositions noted above has material in the Consultation Paper which aims to justify the removal of important provisions which have protected the ethos of faith-based schools and colleges for many years. This is a major departure from existing laws.

The National Catholic Education Commission states that the 'proposed reforms fail to provide real protections for religious schools to effectively operate and teach according to their religious beliefs and ethos, and that if the proposed reforms were adopted it would be a major blow to authentic faith-based education in Australia.'

This comment is in no way an exaggeration or a misrepresentation of the situation that would be faced if the Propositions suggested by the ALRC are accepted.

The purpose of religious schools is not only to impart intellectual knowledge, but also to instil religious values. That's why parents and guardians send their children, at additional cost, to these schools.

In addition to teaching the prescribed curriculum, these schools provide religious activities that seek to demonstrate to students what a life lived in accordance with the relevant religion looks and feels like in practice. Having teachers and other staff at the school who participate in these activities as a faith community, whether these staff are engaged in religious teaching or not, helps to realise the school's religious purpose, and to develop an understanding by students that religion is not merely an adjunct to core activities, but an integral part of their learning and personal development.

As I have previously said, the right of parents to decide upon the religious and moral teaching of their children is enshrined in international law. The consultation paper and its propositions seemingly ignore the long-standing and internationally accepted importance of the human right that is religious freedom, and seems to treat it as a right secondary to others. The Commission should reject any notion of a hierarchy of rights. The ALRC proposals would place unnecessary and unreasonable restrictions on the freedom of religious schools to give effect to the international human right of parents and guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Indeed, over time the Commission's proposals would lead to the erosion of the culture and ethos that makes for a distinction between faith-based and public schools, with the consequence that fewer people would choose to make the financial investment needed to provide a faith-based education. That would have serious financial consequences for state governments, who would struggle to accommodate and resource the work that is currently done by faith-based schools.

The Consultation Paper continually cites the restrictive laws in Queensland and Tasmania as a basis for its claim. It is suggested in the Consultation Paper that these laws "indicate ... that such reforms would not significantly undermine the ability of religious schools to maintain their religious ethos." With respect, this is not correct. Religious schools in those States rely upon the current exemptions in **Section 38 of the *Sex Discrimination Act 1984* (Cth) (SDA)** and depend upon those exemptions overriding the State laws to maintain their religious ethos. I have previously indicated the effect of Section 109 of the Constitution in this area.

The Commission correctly says that these changes have 'the potential to interfere with institutional autonomy connected to the right of individuals to manifest religion or belief in community with others, parents' freedoms in relation to their children's religious education, and freedoms of expression and association'. Further there is an acknowledgment that 'staff may act as important role models in faith formation'.

The Consultation Paper uses the word 'potential'. This is an understatement of the greatest degree. There is absolutely no doubt that the proposed reforms would **substantially** interfere with the religious freedom of the institutions and the parents of the children who attend those schools.

The Consultation Paper correctly acknowledges a significant burden on the educational institution. However, the Consultation Paper then states, 'it [the reform] does not burden **the essence of the rights** in the way that allowing discrimination on [SDA] grounds would.' (emphasis added).

I am assuming that by 'rights' the ALRC means 'religious rights or freedom'. Therefore, what then, according to the ALRC, is the 'essence' of religious freedom?

Does the ALRC hold the limited and, with respect, incorrect view that religious freedom is *really* only about whether or not one can go to church or the mosque or the temple, and all other claims about practicing one's religion in community with others are just peripheral? This would be completely contrary to international law statements such as **Article 18(1) of the ICCPR**, which clearly refers to the right to "practice" religion. The ICCPR, even though it is not binding in this nation, cannot be ignored. That, again with respect, is what appears to be the assumption that sits behind the propositions I have discussed above.

The Appendix, with more detailed comment on these issues, does not really make the case any stronger. Against the substantial burden imposed on the school or college to accept staff who disagree with their ethos on sexual matters, paragraph A.40 indicates that discrimination on SDA grounds '**may** impact on their rights to equality and non-discrimination, employment, health, privacy and freedom of thought, conscience and religion' (emphasis added).

The uncertainty expressed by 'may impact' can be contrasted with the clear detrimental effects on religious freedom which I have outlined above. A teacher whose beliefs do not align with the ethos of a school has other teaching roles available in the market that are likely to be a good 'fit'; a school stripped of its faith-based foundation ceases to meaningfully fulfil its purpose.

Conclusion

The ALRC recommendations will seriously impact the rights of religious schools and colleges, established to educate in accordance with a specific religious view of the world, to operate in accordance with their doctrines, tenets and beliefs.

In addition, any amendments to Commonwealth legislation would also be unnecessary for the reasons articulated in the paragraph above.

Section 116 of the Constitution is there for a reason. Freedom of Religion was important to the authors of the Constitution. This section forbids the Commonwealth Parliament from enacting laws for 'prohibiting the free exercise of any religion'.

I accept that case law on this section on prohibiting this freedom has, so far, been fairly narrowly interpreted. However, any intended legislation which aims to remove religious freedom rights which have been exercised by schools and colleges for generations seems to be not in accordance with Section 116 and the 'undue' infringement of religious freedom (*Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116 per Latham CJ at 128). It is certainly against the spirit of that provision.

There is some merit in Proposal 7 (reinforcing that it is not unlawful for religious schools to merely teach religious doctrines) and I accept this proposal.

The ACC's position is that the recommendations of the ALRC Consultation Paper should not be adopted, and the ACC rejects the changes proposed in the ARLC Consultation Paper. There should be no changes to the balancing provisions in Commonwealth law until:

- There are comprehensive national protections for people of faith from religious discrimination; and
- Adequate protections are established for faith-based institutions to ensure that they can genuinely remain a 'community of faith'.

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