

RELIGIOUS EDUCATIONAL INSTITUTIONS AND ANTI-DISCRIMINATION LAWS

A SUBMISSION TO THE AUSTRALIAN
LAW REFORM COMMISSION

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1. Introduction

In November 2022 the Commonwealth of Australia referred a matter to the Australian Law Reform Commission (ALRC) for its review and recommendation. That referral was in relation to a proposed legislative framework to amend certain exemptions that currently exist in relation to the rights of Religious Education Institutions and how they operate vis-à-vis the overall Anti-Discrimination regime.

Specifically, the Government has proposed that a religious educational institution:

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

In January 2023 the ALRC issued a Consultation Paper setting out its preliminary response on the above and calling for submissions from interested parties.

The Australian Federation of Islamic Councils (AFIC) is the peak representative body for the Muslim community in Australia and pioneered the Islamic Education sector in this country. AFIC has grave concerns about the proposed reforms and while we acknowledge the position of the ALRC that:

“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.”²

With due respect we submit that consideration of this issue cannot be in isolation of the competing tension between the various human rights and our response below is based on this. For people of faith, of any faith we would submit, this is a critical foundational issue and not one just of legislative drafting.

Accordingly, as our position is one based on the underlying principles, we have responded below in relation to the four general propositions laid out by the ALRC in its discussion paper rather than the fourteen technical ones.

¹ <https://www.alrc.gov.au/inquiry/anti-discrimination-laws/>

² <https://www.alrc.gov.au/wp-content/uploads/2023/01/ALRC-Anti-discrimination-Laws-CP-2023.pdf> p.7

2. The Right to Practice Religion -v- The Right to Discriminate

As noted by the ALRC itself³ there have been many inquiries, reviews and reports into this issue in recent years and we note that all of them are phrased in such a way as to position this discussion in the context of the right of people of faith, and their institutions, to 'discriminate' against others who identify with one of the 'protected attributes' or the 'Sex Discrimination Grounds' as they are referred to by the ALRC.⁴

We believe this phraseology itself shows an inherent bias against religion, religious institutions, and people of faith and from the very outset establishes a mindset that 'religion' and the right of individuals and communities to create environments that foster their religions is something that is less worthy than other so called human rights.

When the discussion is phrased in this way people of faith and religious organisations are immediately seen as those with 'power' who are wanting to take something 'away' from someone with less power than them – hence they are 'discriminating' against those individuals. This position is fundamentally wrong.

In a secular liberal society, as Australia purports to be, religion does not hold positions of power in the public sphere such that it can be used against any individual in a negative way. People of faith and their organisations need to create private spaces where religion can be practiced. The debate is not in fact about whether religious organisations should or should not have the right to 'discriminate' against anyone but is actually whether or not religious organisations, and their members, should have the right to 'practice their religion'.

We as people of faith do not want, nor do we set out, to 'discriminate' against any person. What we want is to have the freedom to practice our religion. We accept in a society such as Australia today that there are limitations on this in the public domain so to be able to do this, we develop community institutions and infrastructure that allow us to facilitate this in a safe environment. Our religious organisations are exactly this – they are organisations and spaces created by a religious community to foster an environment and ethos that is based on our religious principles, and we ask nothing more than the right to be able to practice our religion in what are essentially non-public spheres created for this very reason. Individuals, be they religious or not, know what these religious organisations are and what they stand for. They know that in this space the religious principles of a particular faith group are what drive the culture and practices and policies of the environment – and most importantly they have a choice as to whether to be in that environment. This is not the case of service providers offering their services to the general public, or of individuals who have no choice but to interact with these organisations for whatever outcome they are after. There are many other education institutions, both public and private, that cater for students, parents or professionals who do not share the same values.

³ Ibid p.5

⁴ Ibid p.5

If people of faith cannot access education services that are entirely consistent with their religious principles, while students and teaching professionals can do so in many places, though not all, then where in fact is the discrimination occurring?

To introduce the proposed laws doesn't stop 'discrimination' at all. It in fact promotes discrimination against people of faith and religious organisations. It is tantamount to society saying even in your own private spaces you do not have the right to practice your religion.

As stated above this isn't a case of religious organisations wanting the ability to 'discriminate' against anyone but simply them wanting the right to practice their religion in a space that people can choose to be in or not.

3. Balancing the tension between Rights

In a pluralist diverse society, no right can be absolute. There will inevitably arise a tension between competing rights that will require those interests to be balanced out. How this happens and which rights are given priority is the important, albeit often difficult, question to determine.

The Ontario Human Rights Commission, quoting the Chief Justice of their Supreme Court, stated:

"Beverley McLachlin, the Chief Justice of the Supreme Court has long experience with human rights – and her approach is clear. She says:

*We need human rights. Whether we like it or not, religious, ethnic and cultural diversity is part of our modern world – and increasingly, part of our national and community reality. Human rights and the respect for every individual upon which they rest, offer the best hope for reconciling the conflicts this diversity is bound to generate. If we are to live together in peace and harmony – within our nations and as nations in the wider world – we must find ways to accommodate each other."*⁵

In that same 2010 paper the Ontario Human Rights Commission uses the metaphor of a sidewalk to illustrate the challenge of these functions of balancing human rights. They state:

*"The metaphor of the sidewalk moment reminds us that some basic rules or minimal ordering are required to govern the interaction of pedestrians going in opposite directions. The norm that might tell us to move to the right in order to avoid collision gives us only a skeletal picture of human relations and interaction. The sidewalk itself in this image is neutral background against which two similar users balance each other."*⁶

⁵ https://www.researchgate.net/publication/344906765_Balancing_Competing_Human_Rights p.4

⁶ Ibid p.6

They then proceed to use the example of the Hasidic Jewish community to illustrate how the simple use of the sidewalk may in fact represent two very different phenomena – one being an extension of the domestic sphere, for the Hasidic Jew, and the other being a public use by other pedestrians and the fact that with some careful thinking that dichotomy of use can be accommodated. They go on with the metaphor to say:

“When individuals bring claims of discrimination or the infringement of their fundamental rights, against either state or non-state actors, they rely on an explicitly articulated commitment to individual freedoms. The individual whose freedom has been violated can walk down the sidewalk, head held high, once those in his path have been told to step aside in the name of human rights protection.”⁷

In this metaphor, the religiously observant individual is commanded by the State to step aside, or even perhaps to walk on the street, so that the individual who has complained may proceed on the sidewalk unhindered.

In the present review, regarding education by religious organisations, the appropriate metaphor would be less the ‘sidewalk’ and more akin to a private ‘driveway’ because it is an environment which has been constructed by a particular (or members) of the community, to serve a particular purpose and is clearly identified as such. A general member of the community in choosing whether to enter the ‘driveway’ to access what is inside clearly understands that they are traversing across a boundary from the public to the private; that the environment they are entering is different and that what they may have been permitted to say or do on the ‘sidewalk’ may in fact not be so once they enter the ‘driveway’. This is fundamentally a question of intent and choice – which party should be the one who gives way on a private driveway?

4. The Right to Freedom of Religion

Article 18 of The Universal Declaration of Human Rights, which was proclaimed by the United Nations in 1948 as ‘a common standard of achievement for all peoples and all nations’, 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.

These rights are also recognised in the International Covenant on Civil and Political Rights, which was adopted by the United Nations in 1966. Australia ratified this Covenant in 1980. Therefore, the Australian Government has obligations under this covenant to respect and protect the civil and political rights of individuals.

⁷ Ibid p.7

Article 18 of the Covenant states:

1. *Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*
2. *No one shall be subject to coercion that would impair his freedom to have or to adopt a religion or belief of his choice.*
3. *Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.*
4. *The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.*

The above declarations and covenants are broad and far-reaching and the UN itself has warned against their limitation and the discrimination of religious minorities generally. Given that Australia has ratified the ICCPR, the rights articulated in that Covenant should therefore be the starting point for any consideration of religious freedom in this country.

The right to hold religious beliefs is absolute and without limitation in the ICCPR. A person's right to hold a religious belief or ethos is unquestioned and should be without any limitation or interference. Without legislation to give effect to the subject matter of such conventions, their applicability is often a matter of dispute and conjecture.

The most important aspect of the above, in our submission, are the words from sub-clause 1 which refers to the right ***"...either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching."***

The proposal being reviewed in this instance, we would submit, would go to the very heart of this freedom that Australia has committed to. It would clearly prevent individuals, and whole communities, from manifesting their beliefs in environments which can hardly be considered public.

If we continue with our sidewalk/driveway metaphor it would be analogous to a general member of the public parking their car in a homeowner's driveway and insisting they have the right to do so because they have the right to park their car on the roadway in front of the house. The homeowner may not like someone parking in front of their home but must accept that their rights, in that case, are overtaken by the general right of road users to park their cars where it is legal to do so. But surely the homeowner has the right to determine who parks in their driveway, under what circumstances they do so and how they must do so.

Hence AFIC's principal submission is that these proposals are misguided. Education by religious organisations is not a case of them seeking to discriminate but seeking to create an environment where the values and principles of that religious organisation govern the whole environment. In that context we do not propose to respond to the propositions put forward in the discussion paper in detail because we do not believe that any reform to the legislative framework will in fact protect the freedom of religion for the impacted organisations and their communities. We, however, do make some broad high-level observations.

5. Consideration of the Discussion Paper Propositions

AFIC makes the following observations in relation to the above proposal.

Proposal A

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

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.*

AFIC's response:

- a. A religious education organisation should be free to have the rules, policies and procedures, of the education institution in accordance with the principles of that religion without exception.
- b. The treatment of any individual student or employee should be fair and consistent in accordance with the stated rules, policies and procedures.
- c. No individual should be adversely treated based on the characteristics of any other individual.
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.*
- d. AFIC agrees with the above proposition.
3. *Religious educational institutions should be permitted to teach religious doctrines or beliefs on sex or sexual orientation in a way that accords with their duty of care to students and requirements of the curriculum.*

AFIC's response:

- e. Religious educational institutions should be free to teach religious doctrines in relation to the above in a manner that is consistent with their religious values and principles.
- f. In teaching such doctrine religious educational institutions shall have regard to the impact this may have on any individual who does not share those religious values and shall take appropriate measures to alleviate such impact within the framework of their religious beliefs.

Proposal B

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

- 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.*

AFIC's response:

- g. A religious education organisation should be free to have the rules, policies and procedures of the education institution in accordance with the principles of that religion without exception. This should include policies in relation to recruitment as well as conduct within the environment of the educational institution.
 - 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.*
- h. AFIC agrees with this proposition.
 - 3. *Religious educational institutions should be able to require staff involved in the teaching of religious doctrine or belief to teach religious doctrine or 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.*
- i. AFIC agrees with this proposition having regard to points (e) & (f) above

Proposal C

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

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; and*
 - 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.*

AFIC's response:

- j. Religious educational institutions should be free to preference staff based on their religious beliefs during the recruitment process without limitation.
- k. The treatment of all employees, regardless of religious belief, shall be in accordance with the policies and procedures of the organisation and the requirements of all employment laws and regulations.

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.*

- l. AFIC submits this is not required having regard to points outlined above.

Proposition D

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

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.*
- m. AFIC agrees with the above proposition.
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.*

- n. AFIC agrees with the general proposition subject to the responses made to the previous propositions.
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.*

AFIC's response:

- o. Conduct within the environment of the religious educational institution and at events, functions or other related matters should be in accordance with the policies and procedures of the religious education institution which may include directions as to dress, behaviour, statements that may or may not be made that are in accordance with the religious ethos of the institution.

6. Conclusion

AFIC does not support the propositions put forward in the ALRC Discussion Paper except where they maintain the current rights and freedoms of religious education institutions as outlined in the responses above.

These institutions exist for the sole purpose of providing educational services for specific religious communities in accordance with their religious values and principles. They were created for this purpose by those communities themselves. Such institutions do not hold themselves out as anything other than religious institutions and have very clearly communicated positions in relation to the so called 'heads of discrimination'. Individuals, either students or teachers, have access to many other education institutions if they do not agree with those values and principles.

Any attempt to impose the stated propositions on religious education institutions would be severely limiting the right to freedom of religion for the constituents of those organisations in a manner that is not consistent with the international covenants that Australia has endorsed. There needs to be a clear delineation between those spaces where the stipulated 'heads of discrimination' have a primacy when being balanced against the right to freedom of religion and when freedom of religion takes priority. Where that line exists at a macro level is complex and beyond this submission but religious educational institutions, in our submission, clearly fall into that category where freedom of religion **must** take priority in order to remain fit for and true to purpose.

Yours faithfully



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