HRLA
HUMAN RIGHTS • LAW ALLIANCE

21 February 2023

Australian Law Reform Commission
PO Box 12953,
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Queensland 4003

BY E-MAIL: antidiscriminationlaw@alrc.gov.au

Dear Sir/Madam,

RELIGIOUS EDUCATIONAL INSTITUTIONS AND ANTI-DISCRIMINATION LAWS – CONSULTATION PAPER

We refer to the ALRC's invitation for submissions in response to the January 2023 Consultation Paper. HRLA welcomes the opportunity to provide submissions to the Commission.

HRLA is Australia's only religious freedom law firm specialising in the areas of freedom of thought, speech and conscience. We regularly have carriage of matters in all States and Territories under Anti-Discrimination and Equal Opportunity Acts.

We enclose our submission with this letter. We are happy to appear for any oral hearing to speak to our submission.

Yours sincerely,

[redacted]

John Steenhof
Principal Lawyer

Human Rights Law Alliance Submission on the Consultation Paper: Religious Educational Institutions and Anti-Discrimination Laws

Summary Submission

1. HRLA does not support the Propositions A to D, or the 14 technical proposals for reform. They are heavily and unjustifiably weighted against the interests of Christian schools, in favour of particular LGBT+ activist agendas. If enacted, the proposals will pose an existential threat to many Australian Christian Schools. We recommend that the Government reject the approach taken in the Consultation Paper in its entirety, and reconsider the question of federal exemptions for religious educational institutions in conjunction with its promised Religious Discrimination Bill.

2. If the Paper's proposals are implemented:

    2.1. they are likely to produce radical, adverse and permanent changes in the character and operations of many schools with a Christian ethos.

    2.2. Christian schools are likely to become targets of litigation by activists, including those who aim to eradicate Christian beliefs on marriage, sexuality and identity.

    2.3. Christian schools will be compelled to allow staff and the school to promote extreme LGBT+ ideology which fundamentally contradicts orthodox Christian beliefs.

    2.4. Christian schools will be unable to maintain a distinctive religious ethos and Christian culture through staff recruitment and retention, to the point that many Christian schools may no longer be able to fulfil their foundational mission and continuing purpose. There would be no point in many of them continuing.

3. In our view the proposals result in unwarranted restriction on:

    3.1. the freedom of Australians to promote and practise their religion by establishing and maintaining schools according to a religious ethos, bearing in mind that the right in article 18.1 of the International Covenant on Civil and Political Rights (ICCPR) includes "freedom to establish…religious schools"[1]

    3.2. the respect which Australia must have for "the liberty of parents…to ensure the religious and moral education in conformity with their own convictions" (a right in article 18.4 of the ICCPR, which cannot be restricted at all – something the Consultation Paper fails to mention because it is preoccupied with minimising the importance of that right).[2]

[1] *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, CCPR/C/21/Rev.1/Add.4, (General comment 22), para 8 refers specifically to "the freedom to establish seminaries or **religious schools**".
[2] General comment *22*, para 8 ("The freedom from coercion to have or to adopt a religion or belief and the liberty of parents and guardians to ensure religious and moral education cannot be restricted.")

4. The Consultation Paper makes extensive reference to Australia's international law human rights obligations but, with respect, in our view:

   4.1. its coverage is not even-handed, and the resulting proposals depart from those obligations.

   4.2. it has insufficient substantive regard for the factors which constrain Australia's ability to restrict religious freedom.[3] The analysis is superficial where it most matters, and the recommendations are compelled by foregone conclusions, rather than the strict application of fundamental principles.

   4.3. the Inquiry approach unjustifiably applies differential standards to the harms associated with "interferences with religious freedom" and "discrimination,"[4] suggestive of a failure to grasp the nature and importance to many Australians of religious doctrines, tenets and beliefs; how they uphold the dignity of the person; the vital importance of religious identity and practice to individuals; and the essence of the moral and ethical frameworks which parents seek to provide for their children in Christian schools. Instead, such matters in this context are regarded with suspicion, if not contempt, as inherently discriminatory in nature.

5. On the Australian law implications, in our view the Consultation Paper:

   5.1. seemingly fails to appreciate that, for many religious schools in states and territories that have already lost their anti-discrimination law protections, the *Sex Discrimination Act 1984* (Cth) (SDA) is the only means by which religious schools can support their ethos at a basic level.

   5.2. wrongly suggests that if state and territory anti-discrimination provisions are more restrictive than a counterpart Commonwealth provision (in the SDA),[5] the more restrictive provision will prevail, notwithstanding the operation of s.109 of the Commonwealth Constitution to the contrary.

   5.3. makes proposals which are diametrically opposed to the recommendations of the 2018 Expert Panel Report on the Religious Freedom Review, in particular the recommendations:

      (a) to reflect in anti-discrimination legislation "the equal status in international law of all human rights, including freedom of religion" (this presupposes that protection for freedom of religion will continue in, and not be substantively removed from, such anti-discrimination legislation.[6]

      (b) to regularise the freedom of religion provisions of the SDA for religious schools with that in mind.[7]

[3] E.g. the requirement that any restriction on the right to manifest religion or belief be objectively justified on specified grounds, and measured by what is 'necessary', according to concepts of proportionality with the legitimate aim pursued, adopting the least restrictive means possible etc.
[4] P.7.
[5] P.13.
[6] Religious Freedom Review Report Recommendation 3.
[7] Recommendation 5.

Considering that the Expert Panel recognised the failure of Australian law to protect religious freedom, the Consultation Paper proposals would exacerbate an already thoroughly unsatisfactory position.

6. As to the need for reform at all, in our view:

   6.1. Christian schools have relied on the exemption regime in section 38 of the SDA for many years which, in spite of its inadequacies, has been serviceable.

   6.2. there is no need, based on human rights, for the current exemptions for faith-based schools to be removed. Quite the reverse. A conscientious regard for the promotion of all human rights would result in a positive commitment to enhance the exemptions.

   6.3. a purely political imperative does not provide a principled basis for reform of the kind envisaged here.

7. The Consultation Paper does not mention any specific proposal to apply definitions of "sexual orientation" and "gender identity." We would be extremely concerned if they were to align with those found in the *Equal Opportunity Act 2010* (Vic) and *Public Health Act 2005* (Qld).[8] We believe it is crucial that the Inquiry's intention in this respect be disclosed, together with detailed explanation and frank disclosure of the full implications.

8. In short, our view is that the Consultation Paper proposals should be rejected and rethought in their entirety. They should be reconsidered in conjunction with the Religious Discrimination Bill which the Government committed to introduce.

9. We expand on these points in our detailed submissions below.

Detailed Submissions

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

10. *Proposition A* imposes anti-discrimination obligations towards *students* on grounds of gender and sexuality etc. It also requires that religious doctrines or beliefs on sex or sexual orientation be taught in a way that accords with the school's "duty of care to students and requirements of the curriculum".

11. We express real concern at some assumptions, reflected in the Consultation Paper, concerning an alleged propensity for Christian teaching to be inherently discriminatory and to cause other harms. Such a narrative also informs the "duty of care" owed to students. We note that the Consultation Paper pejoratively positions the "teaching of religious doctrines or beliefs on sex or sexual orientation" in the category of "discrimination against students." Such attitudinal predisposition taints the Paper's conclusions in Proposition A. The Consultation Paper is written from a perspective which reflects anti-Christian assumptions. To those familiar with Christian schooling it seems far-fetched to suggest that Christian teaching of the

[8] *Equal Opportunity Act 2010* (Vic) definitions; *Public Health Act 2005* (Qld), ss s.213E and 213G.

sort provided in most Christian schools could expose students to discrimination or other risk. There is a serious perspective mismatch between anti-Christian ideological assertion and reality, which needs to be bridged.

12. It is astonishing that the Consultation Paper does not mention the legislative definitions of "sexual orientation" and "gender identity" which are to apply under its proposals, since these have undergone recent change in state and territory legislation. It is obviously of crucial significance if those definitions are to align e.g. with Victorian and Queensland legislation, since the consequence will be as follows:

    12.1. In the definition of "sexual orientation"

        (a) "sex" would be replaced with "gender", and "gender" would have uncertain meaning, as it is no longer linked to biological or natal sex

        (b) "orientation" would extend beyond mere "sexual orientation" in its former usage, to mean (following Victoria's definitions):

        "a person's emotional, affectional and sexual attraction" to those of a different gender or the same gender or more than one gender

        and behavioural aspects of their sexuality, namely,

        "intimate or sexual relations with" those of a different gender or the same gender or more than one gender.

    12.2. The SDA definition of "gender identity"

        (a) has already been amended so that it has no longer relates to "sex" in an objective or biological sense, or even "gender" as ordinarily understood, because it refers instead to "gender-related" matters.

        (b) would be extended to a wider range of specified "gender-related" characteristics than "gender-related identity, appearance or mannerisms" to cover "a person's gender-related identity, which may or may not correspond with their designated sex at birth, and includes the personal sense of the body (whether this involves medical intervention or not) and other expressions of gender, including dress, speech, mannerisms, names and personal references."

13. Existing definitions in the SDA are already problematic. Extending these definitions in this way would enable students in Christian schools to assert that:

    13.1. certain sexual behaviours, including those with others, form part of their asserted "sexual orientation," even though it would be necessary and a matter of a school's duty of care to prevent such behaviours.

    13.2. any conceivable gender-related expression forms part of their "gender identity" that the school is not entitled to regulate, or that school regulations offend the student's personal sense of the body.

14. This has the capacity to disable Christian schools from regulating sexual relations and other sexual behaviour, or placing appropriate bounds on gender-related expressions. It would

instead require schools to allow certain conduct that is completely inconsistent with Biblical beliefs which the school was founded to promote. Christian schools are not into that sort of inauthenticity.

15. Christian schools face heightened risk of legal sanction for discrimination, or breach of their duty of care, if they discipline a student in circumstances where SDA prohibited grounds are engaged and it is alleged such behaviours contravene the school's ethos.

16. The Consultation Paper puts no clear parameters around such obvious issues as the use of female bathroom and change facilities by biological males, the rights of biological males to compete in female teams, and appropriate approaches to a student experiencing gender incongruence.

17. Proposition A will require Christian schools to permit Biblical ethics and morals – part of the fundamental teachings of a religion – to give way to inconsistent moral and ethical beliefs and practices.

Proposition B: Discrimination against staff

18. *Proposition B* involves:

    18.1. a general prohibition of discrimination against any staff (current or prospective) on the grounds of sex, sexual orientation, gender identity, marital or relationship status, or pregnancy; and

    18.2. a concession, allowing a requirement to be imposed on staff who teach religious doctrine or belief to do so, on issues of sex or sexuality, as set out by the school. But because the concession represents an imposition on *staff*, it is also subject to the duty of care owed to them.

19. The requirement that teaching in Christian schools must be in accordance with the duty of care to students and staff, and the requirements of the curriculum, is ostensibly neutral. However, it exposes schools to unacceptable intrusion into what is taught, including through administrative regulation, without objective justification.

20. This discrimination prohibition comes without any workable exemption, and is the death knell for lifestyle requirements that until now demonstrated staff commitment to religious ethos for many schools. All that remains is the school' s ability to preference staff within the limited range allowed by *Proposition C*, based on their "religious belief or activity."

21. In a bizarre twist, one consequence of the fact that staff are likely to have no genuine commitment to ethos is that they are also more likely to have to teach on issues of sex or sexuality, as set out by the school, against their conscience. The Consultation Paper obligingly proposes relief for them by stating that "a school could require a LGBTQ+ staff member involved in the teaching of religious doctrine or beliefs to teach the school's position on those religious doctrines or beliefs, as long as they were able to provide objective information about alternative viewpoints if they wished." No such protection on issues of conscience are given to staff with religious convictions in secular schools. We also observe the lack of similar

availability of conscience accommodation in Australian law more broadly for those with religious conviction.

22. Like Proposition A, Proposition B will require Christian schools to permit Biblical ethics and morals – part of the fundamental teachings of a religion - to give way to a teacher's expression of sexual orientation or gender identity, against the risk of legal sanction.

23. Proposal B demonstrates the degree of policy determination to remove every meaningful support for institutional ethos in religious schools. Similar concerns are being expressed by Jewish and Islamic groups.

Proposition C: Preferencing staff based on their religious belief or activity

24. *Proposition C* proposes to allow Christian schools "to preference staff based on the staff member's religious belief or activity" while removing any substantive capacity for the school to ensure that sincere Christian teachers are hired.

25. This Proposition reduces the criteria for staff preferencing to the nominal assertion of religious belief or activity, rather than the substance of their faith, and their commitment to modelling it in the school. It is far too narrow to have any practical worth for many Christian schools.

26. *Proposition C* does not address termination of employment at all, even where the preferential basis on which a staff member was appointed (their religious belief or activity) has vapourised. This allows little redress for sham applications, even where a staff member immediately recants their asserted religious belief upon appointment.

27. Preferencing of staff is subject to conditions which are self-defeating.

    27.1. Participation of a person in the teaching, observance, or practice of the religion must be a genuine requirement of the role. This role-confining condition threatens the very character of "community of faith" schools, in which all staff have a mission role.

    27.2. The differential treatment (i.e. the expectations of staff in terms of their religious belief or activity) must be "proportionate" to the objective of upholding the religious ethos of the institution (as determined retrospectively by a court) in their teaching function.

    27.3. Preferencing staff on the basis of their "religious belief or activity" must not amount to discrimination on another prohibited ground (e.g. sex, sexual orientation, gender identity, marital or relationship status, or pregnancy).

        (a) This means that the SDA prohibitions apply with full force against Christian schools, with no ethos-based relief, even if a staff member or candidate contradicts their asserted "religious belief or activity" through particular expressions of their sexual orientation, gender identity, or relationship status. The proposed preferencing scheme has no value, as is no doubt the intention.

        (b) This condition would have proper force, and would be more workable, if *Proposition C* allowed preferencing on the basis of genuine, demonstrable, all-of-life, commitment to the institutional mission, rather than superficial nominal

adherence. *Proposition C* already has the life wrung out of it before it even gets to this condition.

28. In support of Proposition C, the Consultation Paper explains that:

> "preferencing staff on the grounds of religion disadvantages those who are not of the same religion, and can have particular impacts on those from minority religious communities, so such preferencing must be justified as reasonable, entailing consideration of proportionality. In the context of employment by religious institutions, such preferencing is generally considered reasonable where a job has explicitly religious or doctrinal content."

29. This illustrates a failure to grasp what is obvious to those institutions seeking self-autonomy according to their own religious self-understanding. What matters to them is the belief system shared by those in the community. It is self-evidently not shared by those "who are not of the same religion". Further, the asserted impacts on "those from minority religious communities" have no real basis, since such individuals generally have no appetite to serve in a Christian school with a strong faith-based ethos.

30. On the broader issue of proportionality, very few individuals from any background would be precluded by a proper faith-based requirement for all employees, given that very few schools seek it in support of a strong ethos, and the range of choice available to those seeking employment would not be materially affected.

31. The Consultation Paper condemns any condition of appointment that requires affirmation by a staff member that "homosexuality is a sin". Implicit in this ALRC example is a caricatured, decontextualised view of Christian theology and a mischaracterisation of Christian school practice. It is a cheap attempt to frame orthodox Christian moral teachings as discriminatory. It is simplistic, and infused with an assumption that the law should police a school's theology and Christian practice. It reveals a failure to understand the environment in which these important proposals are advanced, and fundamental rights are restricted.

32. Proposition C offers nothing at all to Christian schools. If enacted, it would mean that schools cannot effectively preference on the basis of genuine, demonstrable, authentic, commitment to Christianity. Schools cannot require teachers to be sincere Christians and must accept superficial nominal adherence. It demonstrates a fundamental misunderstanding of religion, religious belief and the educational goals of parents.

Proposition D: Respect for institutional ethos

33. *Proposition D* is in two parts, to the effect that religious educational institutions:

    33.1. should be able to expect all staff to respect their institutional ethos; and

    33.2. should be able to take action to prevent a staff member from actively undermining their institutional ethos.

34. There is no equivalence between these two limbs. Any comfort derived from the expectation that staff should respect institutional ethos is decimated by the suggestion that recourse is only available in the extreme circumstances where a staff member "actively undermines institutional ethos." It gives with one hand, and takes back that and more with the other.

35. The notion of "respect for institutional ethos, and the illustrations provided, show just how far the Consultation Paper deliberately goes in eradicating all means for ethos-based schools to function. Proposition D demonstrates that a school is prevented from terminating or disciplining a staff member for conduct which falls short of their "actively undermining their institutional ethos." The school is prevented from taking any such corrective action even if the staff member's conduct conflicts with their employment obligations concerning the "teaching, observance, or practice of the religion" of the school. This is because such obligations are only relevant to preferencing, which only applies to "selection, appointment and promotion," not disciplinary matters.

36. In short, both Proposition C and Proposition D strip Christian schools of the necessary freedom to which they are entitled, to make staffing decisions to ensure that they can be authentically Christian in culture and practice.

International human rights

37. The international human rights coverage of the Consultation Paper is detailed. Although a considerable amount of material is tabled, the analytical treatment it receives is heavily freighted to diminish the importance of the fundamental human rights which justify generous religious exemptions. The case is not put even-handedly.

38. For example, the Consultation Paper is selective and asymmetrical in its use of international human rights cases. Fairly read, these cases negate, rather than support, the Consultation Paper's position.

39. There is not space here to provide a comprehensive analysis of the shortcomings in the Consultation Paper's human rights analysis, but a sample follows.

40. The Consultation Paper mentions, but sidelines, the European Convention case of *Siebenhaar v Germany*, a decision in which the European Court found the dismissal of a kindergarten teacher was not a violation of any of her rights, in circumstances where her employment contract required staff loyalty to institutional ethos (in terms similar to that applied in many Christian schools in Australia), by virtue of the "mission of proclaiming the Gospel in word and deed [requiring e]mployees and employers [to] place their professional skills in the service of this goal and form a community of service independent of their position or their professional functions."

    40.1. It was misleading of the Consultation Paper to discount *Siebenhaar*, especially since the European Court crucially observed this in answer to the employee's claim: "That the termination of employment in question was based on conduct by the applicant outside the professional sphere can have no weight in this case. The [European] Court noted that the particular nature of the professional requirements imposed on the applicant were due to the fact that they were established by an employer with an ethos based on religion or belief."[9]

[9] *Siebenhaar* [46].

40.2. It was also not accurate of the Consultation Paper to assert that in "the very limited number of individual cases…concerning schools, the schools at issue were state-run schools that had teachers employed specifically to teach religion, etc."[10] This is not true of the kindergarten in *Siebenhaar* run by a Protestant congregation.

40.3. The Consultation Paper should also, in fairness, have mentioned the following highly relevant principles recalled by the European Court in *Siebenhaar*:

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

41. The Consultation Paper mentions EU Council Directive 2000/78/EC of 27 November 2000 for the proposition that "*preferencing* by religious bodies on the grounds of religion or belief can only be done where religion or belief is a 'genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos'."[12]

41.1. The Consultation Paper here uses its terminology, "preferencing" (central to Proposition C), but unfamiliar to the Directive. The occupational requirements contemplated by article 4 of the Directive extend well beyond "preferencing".

41.2. The proviso to article 4 also clarifies that "Provided that its provisions are otherwise complied with, this Directive shall thus 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."

41.3. The European Court recognised the terms of the Directive in numerous decisions, including in *Siebenhaar v Germany*, in which it found the German court's findings were not unreasonable, including its assessment that the bonds of loyalty were acceptable. It was in specific reference to the Directive that the European Court noted that the requirements imposed on the employee were due to the fact that they were established by an employer with an ethos based on religion or belief.

42. The Consultation Paper states that "at least two UN treaty bodies have given strong indications that they would not consider institutional autonomy considerations to permit

[10] Consultation Paper, pp.42-43.
[11] *Siebenhaar* [41].
[12] P.24.

discrimination against students or staff on Sex Discrimination Act-type grounds in educational institutions." That is, at the very least, an overstatement.

42.1. One of those treaty bodies was the Human Rights Committee when reviewing of Ireland's ICCPR compliance. The Consultation Paper quoted the Committee's "concern that…religious-owned institutions, including in the fields of education and health, can discriminate against employees." This selective quotation ignores the context of the Committee's comment, clearly stated in the same paragraph cited, namely "the slow progress in increasing access to secular education through the establishment of non-denominational schools," and the need to "ensure that there are diverse school types and curriculum options available throughout [Ireland] to meet the needs of minority faith or non-faith children."[13] In Australia there is no equivalence to that extreme situation of Catholic-saturated education. Secular education is abundantly available in Australia. In Australia's very different circumstances, Christian schooling of the sort now threatened by these proposals would, if anything, provide the benefits propounded by the Human Rights Committee, i.e., would "ensure that there are diverse school types and curriculum options available."

42.2. The other was the 2018 periodic review by the Committee on Economic, Social and Cultural Rights which recommended that Germany "ensure that no discrimination is permitted against non-ecclesiastical employees on grounds of religious belief, sexual orientation or gender identity." This was based on "reports" of discrimination, not more concrete findings or conclusions, and no further detail was provided of the situations concerned.[14] The Consultation Paper fails to make out the relevance of the German situation to Christian schools. This is an especially clear failure when no such concern was expressed at all by the Human Rights Committee during its 2021 review of Germany's ICCPR compliance, even when that Committee specifically mentioned the General Equal Treatment Act of 2006 in other contexts.[15]

43. The following materials are also highly relevant but not mentioned by the ALRC.

43.1. The UN Special rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt, in a 2014 report gave detailed thought to the scope of the right of religious institutions to burden employees. He acknowledged:

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

[13] CCPR/C/IRL/CO/4, para 21.
[14] E/C.12/DEU/CO/6, para 22.
[15] CCPR/C/DEU/CO/7.

> to manifest a religious conviction that differs from the corporate (i.e., religious) identity of the institution.[16]

43.2. In his 2013 report the same Special Rapporteur said this on the position of religious organisations that function in conformity with their religious self-understanding:

> Freedom of religion or belief also covers the right of persons and groups of persons to establish religious institutions that function in conformity with their religious self-understanding. This is not just an external aspect of marginal significance. Religious communities, in particular minority communities, need an appropriate institutional infrastructure, without which their long-term survival options as a community might be in serious peril, a situation which at the same time would amount to a violation of freedom of religion or belief of individual members. [The Consultation Paper quoted this much of para 57 but not what follows….]
>
> .. Moreover, for many (not all) religious or belief communities, institutional questions, such as the appointment of religious leaders or the rules governing monastic life, directly or indirectly derive from the tenets of their faith. Hence, questions of how to institutionalize religious community life can have a significance that goes far beyond mere organizational or managerial aspects. Freedom of religion or belief therefore entails respect for the autonomy of religious institutions.[17]
>
> It cannot be the business of the State to shape or reshape religious traditions, nor can the State claim any binding authority in the interpretation of religious sources or in the definition of the tenets of faith. Freedom of religion or belief is a right of human beings, after all, not a right of the State. As mentioned above, questions of how to institutionalize community life may significantly affect the religious self-understanding of a community. From this it follows that the State must generally respect the autonomy of religious institutions, also in policies of promoting equality between men and women….
>
> …freedom of religion or belief includes the right to establish new religious communities and institutions. The issue of equality between men and women has in fact led to splits in quite a number of religious communities, and meanwhile, in virtually all religious traditions, reform branches exist in which women may have better opportunities to achieve positions of religious authority. Again, it cannot be the business of the State directly or indirectly to initiate such internal developments, which must always be left to believers themselves, since they remain the relevant rights holders in this regard. What the State can and should do, however, is to provide an open framework in which religious pluralism, including pluralism in institutions, can unfold freely. An open framework facilitating the free expression of pluralism may also improve the opportunities for new gender-sensitive developments within different religious traditions, initiated by believers themselves.[18]

44. The Consultation Paper relies heavily on a UN Guide[19] to suggest that the usual justification for differential treatment, in order to amount to discrimination under international law "will not extend to differential treatment or detriment on Sex Discrimination Act grounds".[20] Yet the cited Guide does not stand for any such proposition. The cited Guide also mentions that

[16] A/69/261 (2014), para 41.
[17] A/68/290 (2013), para 57.
[18] A/68/290 (2013), paras 59-61.
19 Consultation Paper, pp. 27 and 40, citing Office of the United Nations High Commissioner for Human Rights, Protecting Minority Rights: A Practice Guide to Developing Comprehensive Anti-Discrimination Legislation (United Nations and Equal Rights Trust, 2022, p. 149.
[20] P.29.

"[s]uccessive Special Rapporteurs on freedom of religion or belief have set out that women's right to non-discrimination takes priority over 'intolerant beliefs that are used to justify gender discrimination' and that freedom of religion or belief can never serve as a justification for violations of the human rights of women and girls."[21] Among the authorities it relied on (all to similar effect) is the 2013 Special Rapporteur's report, which at the relevant paragraph (30) is concerned with:

> "…such harmful practices as female genital mutilation, forced marriage, honour killings, enforced ritual prostitution or denying girls their rights to education [which] are defended in the name of religious traditions. Such defence is frequently controversial within the various religious communities themselves, and many followers of the respective communities… If those still performing harmful practices try to invoke religious freedom for their actions, this must become a case for restricting the freedom to manifest one's religion or belief." [22]

45. The context is far removed from SDA prohibited grounds, opening this part of the Consultation Paper to the accusation of exaggeration.

46. The Consultation Paper mentions the Siracusa Principles as an authoritative guide to the justifications needed to support restrictions on rights, in this context, ICCPR article 18(3) on freedom of religion. A more authoritative and directly relevant source would be the strict standards established by the Human Rights Committee, including in General Comment 22.

47. We would comment as follows on the relevance of the Siracusa Principles, and how the Consultation Paper addressed them.

A "limitation on a right recognised in the ICCPR must:"

47.1. "*be provided for by law*"

(a) This is not controversial.

47.2. "*pursue a legitimate goal, as set out in the relevant article*"

(a) There is no doubt that the SDA exemptions allow for the exercise of freedom of religion as recognised in General Comment 22 in the "freedom to establish…religious schools." The removal or diminution of the exemptions represents a restriction on that freedom.

(b) The Consultation Paper could have been clearer as to how the international law principles apply to the proposed contraction of SDA exemptions. The result is to limit freedom of religion. The legislative aim pursued is to safeguard "the rights and freedoms of others", i.e., mainly their non-discrimination freedom. The scope of those rights needs to be considered. When determining what constitutes discrimination, there is no dispute that the relevant standard is that "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant".[23] This is important to the question of the scope of the "rights and freedoms of others," and when considering to what

[21] P. 149.
[22] A/68/290 (2013), para 30.
[23] This principle is noted at p.39.

extent the operation of Christian schools impinges upon the non-discrimination rights of others.

47.3. "*be necessary — that is, respond to a pressing social need*"

(a) It is appropriate to ask what evidence was relied on when drafting the Consultation Paper for any "pressing social need" to deprive the exemptions of all material value, when they are already inadequate to support freedom of religion for Christian schools? Freedom of religion has no real protection in Australia except through such measures.

(b) Is all such evidence relied on by the ALRC credible, sincere, academically rigorous, ethical, objective, verifiable, and unbiased? Or is it based on a selective enquiry and driven to particular conclusions? Does it take account of all contrary evidence? To what extent have the authors of the Consultation Paper examined the evidence critically in answer to such questions?

47.4. "*be proportionate to the specific need it is aimed at addressing"…having regard to…*.

(a) "*whether there are other less restrictive ways to achieve the same aim"/"whether there are effective safeguards or controls over the measures, including the possibility of monitoring and access to review*"

For the reasons already given, the proposals deprive Christian schools of any substantive means by which they can operate as a community with a particular ethos, contrary to the support given under international law for them to do so. None of the Propositions put forward in the Consultation Paper has any practical value for Christian schools (the preferencing and respect proposals are worthless).

The justifications for the proposals reflect unequal weighting of competing factors. They disclose a consistent tendency to: maximise the assertions of harm based on discriminatory enrolment practices towards students and staff, which are unfamiliar to most Christian schools (so do the illustrations provided); apply differential standards when weighing balancing interests; dismiss viable options as unworkable (such as transparency in school policies) by overcomplicating them (suggesting this could "entrench discriminatory beliefs by requiring schools to explicitly write them down and have prospective students and parents agree to them"); minimise the reality that staff and students can avoid Christians schools if they wish; and overstate the residual protection available under the SDA as sufficient ("the [SDA] definition of indirect discrimination allows differential treatment where it can be shown to be reasonable, and proportionate"). The international law arguments are stretched (predominantly in support of the Consultation Paper proposals) by phraseology like "it can be argued that," "there is an argument that," etc.

The main objection to Christian schools seems to be their mere existence, given their distinctive religious ethos. That ethos is represented in the most negative

way as bigoted, discriminatory and harmful. The Consultation Paper echoes this, displaying little knowledge of day-to-day life in Christian schools (see Conclusion below). Policy which restricts fundamental human rights should not be based on misplaced supposition.

(b) "*the extent of any interference with human rights — the greater the interference the less likely it is to be considered proportionate*"

The outcomes of these proposals are dire. The effect would be: to deprive many Christian schools of their purpose; to expose them to a wider range of anti-discrimination claims than secular schools, particularly in an antagonistic environment to which the Consultation Paper contributes; to require them to be the vehicles for staff to promote ideals contrary to the school's foundational beliefs; and to cause them to discontinue. Why should Christian schools be put in such a position, when ordinary schools endure no such conditions. The discriminatory impact of the proposals on Christian communities has not been weighed at all by the Consultation Paper.

(c) "*whether affected groups are particularly vulnerable*"

Christian beliefs are now under assault in Australian culture like never before. They are the subject of caricature, ridicule and hostility.[24] Christian parents and children have few opportunities to nurture and form life in faith communities, and Christian schooling offers one means for doing so. Until now.

(d) "*whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case*"

The measures proposed in the Consultation Paper would result in the total loss of freedom to uphold religious ethos in schools, and the loss of those schools which exist for that purpose. There is no flexibility in the proposals of the type required.

48. The additional constraints on interference with freedom of religion mentioned in General Comment 22 include:

48.1. "*States parties should proceed from the need to protect the rights guaranteed under the Covenant*"

The Paper cited the comments of different Special Rapporteurs concerning the misuse of freedom of religion, as the basis for *limiting* the freedom:

> "limitations to a right are necessary to protect the fundamental rights of others…The aim is to 'preserve the substance of human rights … of *all the legitimate human rights concerns at issue* in a particular case — to the maximum degree possible"…."In the context of considering rights relevant to this Inquiry, the…Special Rapporteur…explained: The legally instituted limits on manifesting freedom of religion or belief reflect the fact that an essential part of the right to freedom of religion or belief is that freedom of religion or belief must not be used for ends that are inconsistent with the United Nations Charter or relevant human rights instruments. Both Article 30 of the [Universal Declaration of Human Rights] and

[24] For an example of a recent study on the prevalence of religious bullying in schools see https://www.eternitynews.com.au/australia/religious-bullying-in-australian-schools-uncovered/

> Article 5 of the ICCPR further clarify that no human right may be invoked to destroy another human right."

The instances already mentioned of "female genital mutilation, forced marriage, honour killings, enforced ritual prostitution" mentioned earlier provide relevant examples, not the mundane functioning of Christian schools.

If it is the Consultation Paper's purpose to dismiss the human rights enjoyed in Christian schooling, by suggesting this involves "inconsistency" with human rights instruments or the destruction of rights, the Consultation Paper's comments are severely misplaced.

48.2. "*Limitations imposed…must not be applied in a manner that would vitiate the rights guaranteed in Article 18*"

See the above comments on the loss of freedom to uphold religious ethos in schools, and the loss of those schools which exist for that purpose.

48.3. "*Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner*"

(a) The Consultation Paper is tainted with assumptions concerning the inherent discriminatory nature of Christian schooling, and its supposed harms. This does it no credit. It casts doubt on the very legitimacy of the current attempt to limit the freedom of religion which is the basis for Christian schooling. When those of faith are marginalised by a strongly secular culture, the role of government is not to fuel stigma against them, but to uphold their fundamental rights.

(b) See also the above comments on the adverse position of Christian schools, if the proposals were to be implemented, relative to ordinary schools.

Miscellaneous

49. We are concerned that the Government has decided to separate its consideration of federal exemptions for religious educational institutions, and its promised Religious Discrimination Bill.

50. The issues are inextricably linked across both regimes, as is clear from the cross-referencing needed in the Consultation Paper to future religious anti-discrimination legislation.[25] We consider it is necessary to postpone the present religious education proposals so that the two legislative regimes may be addressed in tandem.

Conclusion

51. In our view, the Consultation Paper proposals will deliver nothing good for Christian schools.

52. We consider that the proposals, if implemented, would:

[25] See e.g. Consultation Paper pp. 25, 26, 27, 34, and 35.

52.1. deprive many Christian schools of their very raison d'être, by stripping them of any meaningful freedom to recruit and retain staff in support of a Bible-based institutional ethos.

52.2. permanently change the character of many schools established and/or operated in accordance with that ethos.

53. The proposals should be considered against a background of Australia's failure to provide proper legislative protection at all for freedom of religion, except inadequately in the exemptions to the SDA which are now to be gutted. We consider this to be a time for the Government to reflect on that failure and to correct, not exacerbate, that situation. It is the obligation of the Australian Government to uphold international human rights standards, particularly for fundamental freedoms like freedom of religion, even when it is unpopular to do so. Responsible government should give the highest priority, not the lowest (as here), to legislative measures that correct Australia's long-standing failure with regard to freedom of religion.

54. The implications of these proposals are profound. The Consultation Paper fails to acknowledge that the fundamental importance of preserving Christian schools extends well beyond matters of political tribalism, to the very composition of Australia's multicultural and multireligious society.

55. The Consultation Paper wrongly attributes to Christian schools an attitude of unbending condemnation of individuals on the basis of their sexuality and gender. It is untrue. The real reason for ethos-based schooling is different. It is to promote an awareness of the dignity of every individual, as someone made in the image of God, and to convey certain Biblical foundations that would equip each student in life.

56. Christian schools with a Biblical ethos simply differ from the cultural mainstream in that they do not follow the belief system that the most important human characteristics are sexual or gender identity, or that sexual expression of those characteristics is to be encouraged in the way that certain cultural movements maintain. Such a position does not constitute discrimination, or involve teaching that is inherently discriminatory. It merely represents a different voice.

57. We thank the Australian Law Reform Commission for the opportunity to make a submission and welcome any opportunity to appear in support of this submission.

Yours sincerely,

[redacted]

John Steenhof
Principal Lawyer