

## **A submission by Moore Theological College to the Australian Law Reform Commission in relation to its Consultation Paper *Religious Educational Institutions and Anti-Discrimination Laws***

We are grateful that the Australian Law Reform Commission has addressed itself to this important question. We recognise the difficulty associated with competing visions of how various aspects of our life as human beings lived within overlapping networks or communities should be related to one another. Moore College respects the worth and dignity of every human being, something which unequivocally extends to all irrespective of their beliefs, customs and practices. How we treat those with whom we might disagree is of particular importance. We are encouraged to make this submission, first because we are a religious educational institution, albeit a highly specialised one as a theological college. Secondly, the Consultation Paper explicitly refers to theological colleges at a number of points (paras 48, 54) and so expects its proposals to include us and not simply the broad educational sector.

While appreciative of the complexity of the task, nevertheless, at a number of significant points we believe the Consultation Paper is seriously inadequate in a way that leads to highly problematic proposals. We have sought to group our concerns together in order to assist the Commission.

### *1. A narrow view of education*

We submit that education needs to be seen more holistically than it is in the Consultation Paper. Education is more than the transfer of information because the student is more than a receptacle of knowledge. Education impacts the whole person. It is modelled by teachers as well taught by them. It involves how you live not just what you know. The most effective teaching is deeply and inherently relational and engages students at multiple levels. In the context of an institution such as a school, the context of learning, the co-curricular activities, interactions with fellow students, teachers and staff outside of the classroom, what is taught and how it is taught, each have a role to play. The Consultation Paper does not attend to this profound dimension of effective education.

A faith-based educational institution is what it is not simply because of the subject matter that is taught, but by the coalescence of factors such as those mentioned above. Faith or religion is integral to its entire identity, not quarantined in a particular subject area. Any attempt to confine faith and religion in this way would blur the distinction between a religious educational institution and a public educational institution where a religious practitioner is allowed to visit periodically to impart religious instruction to co-religionists. Where the governance, administrative staff, teaching staff and ancillary staff of a school share the same religious convictions and seek to live with integrity within those convictions, the school is enabled to provide the students who choose to attend it a learning experience that is rich and rewarding and prepares them well to live in the modern world with integrity and respect for others.

The availability of genuine choice promotes freedom. The existence of religious educational institutions alongside public educational institutions provides parents and students with choice. If a religious educational institution openly and transparently advertises itself as a school in a particular religious tradition, then those who choose to attend, or send their children to attend, ought to expect that the school will promote and seek to embody the doctrines, tenets, beliefs or teachings of that faith tradition. That does not mean that those students who choose not to embrace that faith should suffer any sanction or prejudice if they continue to act appropriately within the institution (e.g. with respect and due consideration of those—fellow students, teachers and staff—who do embrace that faith).

Education in Australia typically takes place at a stage of life where highly significant existential questions are being asked: who am I? where do I belong? what do I believe? how will I relate to those around me? what will I do with my life? Understandably such questions have the potential to create turmoil, anxiety and in some cases distress. In such cases pastoral care and compassionate consideration by those administering the institution's policies is critical. It is not only the teachers who are involved in this, let alone just those who teach religious studies.

A little more specifically, a huge body of literature exists, for instance, about the nature of Christian education in a primary, secondary or tertiary setting. This explores the distinctiveness of approach in subjects such as mathematics, English literature, art, etc. — and not just Christian studies — when Christian faith is taken as a starting point. It points to the intellectual origins of scientific method, why we believe in the inherent intelligibility of our world. It encourages a self-awareness of how our particular location in history and culture shapes our learning in both positive and negative ways. Many seminal works in this area have been produced by Australian educationalists. Their basic argument is that faith-based education is not simply secular education with faith as one among many fields of study, but instead an approach that infuses the entire curriculum. This is, admittedly, acknowledged in passing in paragraph 58 of the Consultation Paper, but this is only in passing and there may be some confusion in that paragraph between “educational institutions” in general and “religious educational institutions” in particular.

A theological college presents a special case. Students are typically older, interact with a wider range of personnel (academic registry, accommodation officers, library staff, kitchen staff, maintenance staff, etc.) and understand their time of training in a more wholistic manner. How they live alongside each other in this context is not incidental but a vital part of the educational experience.

From the vantage point of a generally recognised and more wholistic view of education, the Consultation Paper's proposal to limit the requirement for faith to just those who directly teach religious education is seriously problematic.

## 2. *A misunderstanding of the nature of faith*

We submit that the Consultation Paper operates with a reductionist view of faith. Faith seems to be understood in largely intellectual terms, as an implicitly abstract set of doctrines, tenets, beliefs or teachings. Yet each of the major faith traditions has a long history and a substantial body of literature which demonstrates an inseparable connection between belief and behaviour or faith and life. Our convictions have consequences in everyday life.

This makes deeply problematic the Consultation Paper's insistence in paragraph 59 that “a religious educational institution could not refuse to consider a person as a ‘practicing’ member of its religion because the person was LGBTQ+ or in a same-sex relationship, where the person adhered to other religious criteria that the institution reasonably applied”. The paper does not consider that other religious criteria might “reasonably” be in conflict with such behaviour or life situation. If, for example, the “other religious criteria” included an acceptance of the abiding and final authority of divine revelation, and if that revelation prohibited same-sex sexual activity, it would be very difficult to be in such a relationship and adhere to “other religious criteria that the institution reasonably applied”. This integration of faith and life, where not only faith directs life but life reflects faith in a way that makes the two inseparable, and to an important extent mutually constitutive, needs more extensive consideration and might reasonably be expected to modify the proposals of the Consultation Paper.

Faith, particularly as understood within the Christian tradition, is much more than intellectual assent to a set of doctrines, tenets, beliefs or teachings. It embraces the whole of life with its affective, volitional, intellectual and behavioural aspects. By operating with a reductionist view of faith, the Consultation Paper is able to distinguish between what is taught and what is lived in a way that would be unrecognisable in any of the major faith traditions.

### 3. *A diminished view of a community of faith*

We submit that the Consultation Paper is deficient in its approach to the idea of a “community of faith”, which is explicit in its terms of reference. However, there would appear to be some tension between the third of the terms of reference and the attitude towards the idea of a community of faith in the Consultation Paper.

The reference reads “to ensure that an educational institution conducted in accordance with the doctrines, tenets, beliefs or teaching of a particular religion or creed ... 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”.

The Consultation Paper observes that some stakeholders argued for the need “to create a community of faith” or “to maintain a ‘critical mass’ of co-religionists where staff are seen as authentic role models for living a religious life” (para 57), but then immediately goes on to say “However, preferencing staff on the grounds of religion disadvantages those who are not of the same religion”. While this might seem to be a simple matter of fact, the question remains whether that disadvantage is reasonable given the circumstances.

At this point the Consultation Paper introduces the principle of “proportionality” and therefore opines that such a preferencing of co-religionists “is generally considered reasonable where a job has explicitly religious or doctrinal content” (Proposition C, para 57). It appears the Consultation Paper deems it sufficient that other staff “cannot publicly denigrate or ridicule the religion of the institution (as practised in that institution)” and are required to give “appropriate respect ... to religious observances and practices within the school” (Proposition D, para 66). Strangely, in what appears as somewhat of a stretch, an appeal is made to Irish law at this point to provide an example of the “merit in maintaining a distinction between preferencing in respect of certain staff where religious considerations are a genuine occupational qualification, and action that can be taken in relation to all staff to maintain the ethos of the institution” (p. 26, para 66).

The Consultation Paper suggests that “an enterprise agreement for a group of religious educational institutions could include selection criteria for senior leadership roles that give preference to practicing members of religion, if the staff in those positions are expected to play a role in religious practice and/or in shaping the religious ethos of the school”. This seems a small concession. What would this mean for a Board of Governors? What of the Principal of a school who did not preach in chapel or teach religious studies?

Proposals C and D, which the Consultation Paper admit “adopt a different approach to current state and territory laws” amount to a diminishment of the idea of a “community of faith”. If only some, perhaps a small number, of the members of staff are themselves adherents of the faith which is the public context in which the school’s educational activities are conducted, then it is hard to see how the school will be free “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”, as envisaged by the terms of reference.

#### 4. *Recommending the legislative restriction of what may be contained in a statement of faith*

We submit that the Consultation Paper is seriously problematic when it suggests that a school (and presumably other religious educational institutions) “could not require, as a condition of appointment, any staff member or prospective staff member to sign a statement of belief by which they had to affirm that homosexuality is a sin (because this would be discriminatory against an LGBTQ+ applicant)” (p. 24). The related footnote explains “This is intended to ensure that a criteria that would be discriminatory in relation to someone with a protected attribute cannot be applied, even to people without that protected attribute.”

As a matter of principle, this represents a dangerous interference in what any religious body may or may not include in its statement of belief. In the interests of freedom and transparency, public statements of faith enable people to choose whether or not they wish to align themselves with any particular institution. Declarations of human rights the world over have sought to safeguard the free expression of religious conviction. The history of the last century makes clear the danger when this free expression is replaced with state-determined expression or state-sanctioned expression.

It could, of course, be argued that this is only restricting such a statement “as a condition of appointment”. In saying this, it might be argued that the Consultation Paper is not seeking to deny the right to have a statement of faith, or even to insist upon a statement of faith as a condition of employment. Instead, it simply insists that a statement of faith could only be used in the selection of staff if it does not have such a clause. However, the net result is still the same: the state would now be directing what may or may not be included in a statement of faith by a religious body (and so infringing any idea of a separation of church and state for the protection of both).

We are told that a statement of faith could not include this particular clause because it would be discriminatory against those who do not believe it or whose lives are ordered in a way that may conflict with it. However, to insist that such a clause be removed amounts to discrimination against those who believe it in a way that not only undermines freedom of religion and freedom of religious expression, both guaranteed in numerous ratified international rights agreements, but also freedom of thought and speech.

Some of the issues canvassed earlier in this submission are relevant here, especially the integrated nature of belief and behaviour and the relation of statements on human sexuality to other statements of doctrine (revelation, theological anthropology, etc.). What if this particular religious conviction is a specific entailment of other religious convictions held by this particular faith tradition?

#### 5. *An unrealistic view of theological education*

The Consultation Paper allows that a theological college could select staff on the basis of sex or sexual orientation “where the staff member was to be involved in the training of ministers” (para 54). There are two problems with this. The first, as mentioned above, is the narrow view of education and training. In a theological college, many more are involved in the training of the potential graduate than just the faculty. Interaction with a host of others is part of the educational experience. The Governors of the College, for example, exercise their role with explicit engagement with the religious direction and ethos of the College.

The second problem is the potentially narrow definition of “ministers”. Later in the Consultation Paper, in the discussion of Proposal 3, the definition is unpacked. Differential treatment is not unlawful in relation to

- the ordination or appointment of priests, ministers of religion, or members of any religious order;
- the training or education of persons seeking ordination or appointment as priests, ministers of religion, or members of a religious order; and
- the selection or appointment of persons to perform duties or functions for the purpose of or in connection with, or otherwise to participate in, any religious observance or practice.

This is helpful as far as it goes. However, most theological colleges enrol some students, perhaps many, who have not yet decided whether or not they will seek ordination or be involved in any full-time or vocational capacity as a “priest, minister of religion or member of a religious order”. Furthermore, some adherents of various religions may seek out theological training in communities of faith with which they choose to identify, with an explicit intention to remain in secular employment and assisting in ministry in a lay capacity. After all, in many religious communities, the distinctions made in the Consultation Paper with regards to ordination, membership of religious orders, and formal ministry roles are simply not relevant. It is not at all clear that the third bullet point above would catch up such people or whether the Consultation Paper envisages that they would be excluded from any requirement to believe and live out their belief as part of their selection. In addition, the impact of having behavioural requirements for some students which do not apply to all has not been considered. From a practical point of view this would seem to be seriously unworkable.

Rather than attaching the requirements to the intended future role of the student (as at the time of enrolment), with all the complications this introduces, it would seem wiser to attach them to the purpose of the College. If a theological college or seminary is established for the purpose of providing a theological education and vocational training for religious ministry, ordained or lay, then this should be sufficient to explain why it is an appropriate expectation that students should believe and behave in accordance with the doctrines, tenets, beliefs or teachings of that faith tradition in which they will be trained.

#### *6. Specific instances of an unargued appeal to necessity*

As each of the Propositions are discussed in the Consultation Paper, an effort is made to demonstrate that they are both necessary and proportionate. However, at points the arguments for necessity are either tendentious or at least unpersuasive. Proposition A suggests the necessity arises from the need to protect the fundamental rights and freedoms of students. However, some of the buttressing arguments fall short of convincing. For example, “The availability of alternative options for education should not take away from the necessity because this may not be a realistic option”. Exclusion of some may have “potentially harmful impacts of exclusion on prospective and enrolled students”. Evidence for these statements is not provided.

In relation to Proposition B, the Consultation Paper suggests that the necessity arises from the necessity to protect the rights and freedoms of students and staff. Once again this conclusion is not argued for, nor is the suggestion that the availability of alternate employment be dismissed “given the significant burden on rights that exclusion puts on both staff and students”. In addition, the argument for proportionality admits that “the burden on the autonomy of the institution is significant” but continues “it does not burden the essence of rights in the way allowing discrimination on Sex Discrimination Act grounds would”. This is simply stated without argument.

In discussion of Proposition C & D it is repeatedly acknowledged that what is suggested “has the potential to interfere with institutional autonomy” (paras 70, 71). However, it is simply asserted that by “allowing an institution to maintain its religious ethos by allowing reasonable and proportionate policies and practices that ensure staff respect that ethos” (para 70) sufficient protection is retained. Once again there is no attempt to argue how this might be the case. It is simply asserted.

What we submit are flaws in the main body of the Consultation Paper flow through into the fourteen technical consultation proposals. The result is a heavy-handed repeal of sections to the *Sex Discrimination Act 1984* which were intended to protect religious freedom in a pluralist society without putting any alternatives in place. The Paper proposes other sections of the Act (and the *Fair Work Act 2009*) should be amended to explicitly exclude educational institutions from existing exceptions, with no protections for those institutions, their autonomy and freedom, put in their place.

We are grateful for the opportunity to respond to the Consultation Paper and acknowledge the substantial amount of work that has gone to producing it. The worth and dignity of all human beings is something that should be protected, and we must be careful lest we simply replace one form of discrimination with another. Religious educational institutions need more protection than these proposals would afford, particularly in a context in which it is increasingly easy to demonise those with whom we disagree. In the light of the difficulties with the Consultation Paper as it is currently drafted, we respectfully ask that it be substantially revised and a more even-handed proposal be brought to the Government.

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*On behalf of the Moore Theological College Governing Board*