



Law, Religion, and Heritage Research Program Team

**Submission to the Australian Law Reform Commission
Consultation Paper: 'Religious Educational Institutions
and Anti-Discrimination Laws'**

24 February 2023



About Us

The Law, Religion, and Heritage Research Program Team (LRH RPT) at the University of Southern Queensland is a group of scholars who share a passion for researching the fascinating intersections of law, history, and faith. The LRH RPT is the largest concentration of researchers in this field in Australia, with an extensive publication record. In addition, the group sponsors major scholarly colloquia, presents their research at conferences around the world, supports an elective on law and religion, sponsors the *Australian Journal of Law and Religion*, and much more. The group was formally recognised by the University of Southern Queensland in 2018. Appendix 1 lists current members.

Disclaimer

This submission represents only the majority position of the LRH RPT. Any statements made in this submission should not be taken as officially endorsed by or made on behalf of the University of Southern Queensland or any individual member of the LRH RPT.

Introduction

The relationship between religious educational institutions and anti-discrimination laws in Australia has become the subject of extensive political and legal debate. In response to this controversy, on 24 November 2022, the Attorney-General of Australia referred the subject to the Australian Law Reform Commission (ALRC) for study. On 27 January 2023, the ALRC produced a consultation paper listing four general propositions and fourteen technical proposals for legislative reform in this area.

In response to the consultation paper, the LRH RPT has prepared the present written submission. It contains three main points. First, that taken as a whole, the positions expressed in the consultation paper are pragmatic, feasible, and strike a reasonable balance between the fundamental rights of religious freedom and equality. Second, that religious educational institutions need better guidance on which staffing roles and activities are subject to protection by anti-discrimination provisions in the proposals. Third, that additional safeguards should be instituted in regard to Proposal 7 so that LGBTIQ+ students are better protected from a pervasive atmosphere of discrimination and hostility that could result from a religious educational institution's delivery of curriculum content on matters of sexuality and gender. Below, each of these points is discussed in further detail.

Submission # 1: As a whole, the consultation proposals are feasible, pragmatic, and strike a reasonable balance between the fundamental rights of religious freedom and equality.

Freedom of religion is a fundamental human right. Not only is it recognised as such in the foundational documents of international human rights law such as the *United Nations Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*, it is expressly guaranteed in the Australian Constitution. Freedom of religion includes the right of parents to direct the religious upbringing of their children and the associational right of believers to come together and form organisations, including religious educational institutions, to disseminate the shared ethos of the faith. The legislative reforms proposed in the present ALRC Consultation Paper must comply with the fundamental principles of religious freedom.

Likewise, international and domestic human rights law evinces a deep commitment to asserting the fundamental equality of all human beings. This shared commitment to human dignity means that individuals should not be denied the equal protection of the laws due to foundational aspects of their being and identity, including their race, ancestry, religion, sex, sexual orientation, and gender identity. Domestically, this commitment to equality is incarnated through anti-discrimination laws in every State and Territory in Australia. The legislative reforms proposed in the ALRC Consultation Paper must comply with the fundamental principles of ensuring the equal dignity of all persons.

In the particular context of religious schools and anti-discrimination law, these two fundamental rights are in tension. An absolutist and uncompromising vision of religious freedom would allow religious schools to exclude students or staff for any perceived violation of the school's religious ethos, an outcome that would have serious negative effects on adolescent students grappling with their sexuality or gender identity as well as on employees' ability to form relationships, have children, express their identities, and adopt different beliefs. Similarly, an absolutist and uncompromising vision of equality would seriously disrupt the ability of religious schools to inculcate a shared ethos, including on such important topics as marriage, chastity, fidelity, and what it means to be born male or female. Neither of these two outcomes are acceptable. Instead, the rights of religious schools to maintain their ethos and the rights of individual students and staff members to be treated with equality must be carefully balanced with a conscientious regard to the value of each right.

Taken as a whole, the proposals contained in the Consultation Paper are feasible, pragmatic, and strike a reasonable balance between religious freedom and equality. The ALRC's proposals were designed to fit into the background umbrella of State and Territory laws applicable to the controversy. Most importantly, the proposals have been carefully designed to ensure that religious schools will maintain the fundamental ability to disseminate their views on sexuality and

gender identity while simultaneously ensuring that individual LGBTIQ+ students and staff members will be protected from adverse discriminatory treatment and open hostility. Neither “side” in this controversy will receive everything it wants, but this is inevitable in a modern, multicultural nation that values pluralism and diversity. A well-considered compromise is the only path forward to help resolve the simmering and highly publicised tension in this area.

Submission # 2: Religious educational institutions need better guidance on which staffing roles and activities are subject to protection by anti-discrimination provisions in the proposals.

The ALRC Consultation Paper makes several proposals that would alter the ability of religious educational institutions (‘REIs’) to preference some staff for religious reasons or to discipline or exclude some staff for actively undermining the ethos of the REI. Detailed consideration is given to these proposals below.

Proposition C – Preferring Staff involved in the teaching, observance, or practice of religion on religious grounds (Proposals 8 and 10)

In its current form, Proposition C states that REIs would be allowed to preference staff on religious grounds if the participation of the individual in religious teaching or activities is a genuine occupational requirement of the role, the differential treatment is proportional to the objective of upholding the religious ethos of the institution, and the preferencing would not amount to de facto discrimination on the basis of a prohibited ground such as sexual orientation, gender identity, pregnancy, etc.

In some cases, determining whether participation in religious activities or teaching is a genuine occupational requirement of the role will be easy and obvious. For example, chaplains, religious doctrine instructors, ministers, and so forth will clearly fall within this category. Similarly, some staff roles that feature limited or no interaction with students or the public will clearly fall outside this category, such as accountants, night security, or groundskeepers.¹

The difficulty arises for REIs in understanding what the proposal would require for numerous employees who do not fall so clearly within either category. This is because, in creating a faith community or culture within REIs (which is an important part of giving effect to the right to manifest religion or belief in community with others), it is necessary that more than a few core employees share the values of the community. Whilst many REIs may not see it as necessary that all or even a majority of employees are members of the same denomination (or even have religious beliefs at all), it is submitted that REIs should have a substantial degree of autonomy to determine which positions need to have a

¹ It is acknowledged that some religious groups hold the position that every single employee of an REI must share in its ethos for a “community of faith” to be effective. However, given the need for compromise discussed in Submission # 1, this view must be rejected.

religious preference (providing this does not discriminate on the basis of protected grounds).

Absent Commonwealth religious anti-discrimination legislation, it is also unclear what criteria might be used to determine whether 'a job has explicitly religious or doctrinal content', and whether 'participation of the person in the teaching, observance, or practice of the religion is a genuine requirement of the role'. This is likely to cause uncertainty for REIs who may be unsure whether, for example, preference may be given where a science teacher is required to teach a curriculum that includes creationism, or where a maths teacher is expected to give a daily devotion as part of a pastoral care group. In many REIs, it may be difficult to separate out those roles that are involved in disseminating explicitly religious content and those that do not. Given that Proposition C is that REIs may not discriminate against protected attributes in any event, it is submitted the uncertainty caused by these additional restrictions is problematic. Additional clarification must be provided to REIs along with a measure of deference to the choices they make in good faith.

Proposition D – Ongoing requirements on all staff to respect the religious ethos of the educational institution (Proposal 9)

In its current form, Proposition D of the Consultation Paper states that REIs should be able to take reasonable and proportionate action to prevent any staff member from actively undermining the institution's ethos, so long as employees are not discriminated against on the basis of protected attributes.

Absent future Commonwealth religious anti-discrimination legislation, however, it is unclear what 'actively undermining' an REI's religious ethos might mean. Moreover, the requirement that staff be 'actively undermining', 'actively converting (to another religion)' or 'publicly denigrating' (in the examples) before the REI can take appropriate action sets the bar too low. For example, a flat refusal by a religious studies teacher to convey core beliefs of the REI's ethos might be characterised as 'passive' but such inaction should still be subject to reasonable and proportionate action by the REI. In other words, actions *or omissions* by an employee may compromise the ethos of an REI, and thus Proposition D should be reworded accordingly.

Submission # 3: Additional safeguards should be instituted that LGBTIQ+ students are better protected from a pervasive atmosphere of discrimination and hostility that could result from a religious educational institution's curriculum on matters of sexuality and gender.

The ALRC Consultation Paper suggests an amendment to the *Sex Discrimination Act 1984* to exclude curriculum content from being found discriminatory. This proposal is discussed below.

Proposition 7: Amend the *Sex Discrimination Act 1984* to clarify that the content of the curriculum not subject to the Act.

Proposition 7 seeks to uphold the rights of religious schools to decide their curriculum and to teach their doctrines and beliefs on human sexuality and relationships. It is constructive in its objective to remove the potential of uncertainty in relation to religious schools' entitlements to determine curriculum content.

However, ambiguities remain in relation to the explanatory text accompanying the proposal which articulates a distinction between the *content* of the curriculum and how that content is *delivered*. For example, reference is made in the discussion to the model provided in the *Equality Act 2010* (UK). This model recognises religious schools' freedom to decide upon and disseminate content while simultaneously creating a requirement that individual pupils should not be subject to discrimination because of it. Subsequently, it remains unclear in Proposition 7 whether religious schools that include the view that LGBTIQ+ expressions are immoral, perverse, or inherently sinful may be regulated in the dissemination of this curriculum content in order to preclude harm to the emotional wellbeing of LGBTIQ+ students.

Under the *Equality Act 2010* (UK), conveying curriculum content in a way that involves haranguing, harassing, or berating of individuals is likely to be unlawful. However, these examples only comprise *explicit* examples of discriminatory behaviour. The law does not appear to acknowledge the need to protect young persons from *implicitly* injurious discriminatory behaviour such as the creation and maintenance of a hostile and pervasive atmosphere of disdain, contempt, or even hatred toward LGBTIQ+ students that can be deeply traumatising and damaging to their physical, emotional, and mental health. Consequently, Proposal 7 should be revised to provide additional safeguards to reduce this very real risk by reminding religious schools that their duty of care towards students in how curriculum content is delivered remains.

Conclusion

Law reform in this controversial area is difficult but necessary. Legislation that alters the relationship between religious freedom and equality must be drafted carefully after a well-considered examination of the various issues and interests involved. The LRH RPT is grateful for the opportunity to provide feedback on the consultation paper and would be pleased to assist the ALRC further as the process continues.

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Appendix 1: LRH RPT Current Membership

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Dr Rhett Martin
Dr Sarah McKibbin
Professor Noeleen McNamara
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Dr Jeremy Patrick
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