Submission to the Australian Law Reform Commission's Inquiry

'Religious Educational Institutions and Anti-Discrimination Laws'

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Who we Are

The Institute for Civil Society (ICS) is a social policy think tank. ICS seeks to:

- Promote recognition and respect for the institutions of civil society that exist between individuals and the government. Included in this space are clubs, schools, religious organisations, charities and NGOs.
- Uphold traditional rights and liberties, including the freedoms of association, expression, conscience and religion.
- Promote a sensible and civil discussion about how to balance competing rights and freedoms in Australian society.

Mark Sneddon is the Executive Director of ICS. He has also been an Associate Professor of Law at the University of Melbourne, a partner in Clayton Utz, Crown Counsel Advisings to the Attorney-General and the Office of the Premier of Victoria. He currently leads the ICS and his own law firm, where he advises a range of clients, including Christian and Muslim schools, on discrimination and human rights issues.

The Terms of Reference

The Attorney-General, having regard to the Government's commitment to amend the Sex Discrimination Act 1984 (Cth) (**SDA**) and other Federal anti-discrimination laws (as necessary), including the Fair Work Act 2009 (Cth) **(FWA**), to ensure that an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed:

- must not discriminate against a student on the basis of sex, 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,

REFERRED to the Australian Law Reform Commission (ALRC) for inquiry and report, pursuant to subsection 20(1) of the Australian Law Reform Commission Act 1996 (Cth), a consideration of what reforms to Federal anti-discrimination laws (including section 38 of the Sex Discrimination Act 1984 (Cth) and the Fair Work Act 2009 (Cth)) should be made in order to ensure, to the extent practicable, Federal anti-discrimination laws reflect the Government's commitments (as set out above) in a manner that is consistent with the rights and freedoms recognised in the international agreements to which Australia is a party including the International Covenant on Civil and Political Rights.

In undertaking this reference, the ALRC should have regard to existing reports and inquiries, including state and territory inquiries or reviews, that it considers relevant. The ALRC should also have regard to the Government's commitment to introduce legislation to (among other things) prohibit discrimination on the basis of religious belief or activity, subject to a number of appropriate exemptions. In doing so, the ALRC should consider whether some or all of the reforms recommended as a result of this inquiry could be included in that legislation.

Overview of Submission

Thank you for the opportunity to make a submission to the ALRC review.

The definitions of and prohibitions on discrimination in the SDA are deliberately broad – by themselves too broad. For example discrimination in education (SDA s.21) includes "qualifying any benefit" or "imposing any other detriment". These definitions do not attempt any balance of prohibiting non-discrimination on SDA grounds with other human rights (for example freedom of expression or association) and other societal values (for example, safety and privacy).

Managing the balance between SDA non-discrimination prohibitions and other human rights and other societal values is left to the exceptions or balancing provisions in the SDA.

For associations which have the core purpose of expressing, modelling and promoting a particular world view and way of living ("way of life associations"), the association must

have the legal freedoms to determine its membership, staffing and conduct/culture rules to maintain the integrity of its purpose to model a way of life and to promote and express its organising beliefs and practices. This is true of way of life associations whether they are political parties, environmental or LGBTIQ lobby associations, religious associations or religious educational associations or cultural education associations of particular ethnic groups.

Currently SDA s.38 provides this legal freedom for religious educational associations. The current s.38(1) and (2) balancing provisions protect the religious educational institution from being forced by anti-discrimination law to hire and retain as leaders or staff people who do not share the religious values and ethos of the institution and who can promote views and conduct which are opposed to its religious values and ethos. The current section 38(3) protects the religious educational institution from being forced by law to accept student expression and conduct which is opposed to its religious values and ethos. These are necessary protections of the freedom of association of the people involved in religious educational associations.

Section 38 could be better drafted to more clearly provide these necessary protections.

But it would not be consistent with Australia's international human rights obligations or with the expectations of Australian society to simply repeal section 38 and give no substitute protections to the human rights (including freedom of association) supporting religious education institutions.

The best solution would be to amend the SDA to state clearly that specific defined conduct of religious education institutions, necessary to allow them to protect their freedom of association and integrity of their way of life mission, is not discrimination for the purposes of the SDA or FWA.

Proposed amendments to the SDA should state that the following specific conduct by religious education institutions and persons acting on their behalf **is not discrimination under the SDA or FWA.**

1. Conduct by or on behalf of a religious educational institution in teaching or expressing to a student, in good faith, the religious beliefs of the religious educational institution, whether in formal instruction or not and whether as part of the curriculum or not, is not discrimination under the SDA. [The ALRC proposal 7 to confine this protection to the content of the curriculum is flawed. In religious schools staff may express the religion's beliefs to students in informal conversations, in pastoral care discussions or student welfare meetings or at assembly or a religious service or in a school newsletter – none of these are part of the curriculum.[1]]

2. Religious educational institutions can make and apply student conduct policies which require students to study the religion and attend religious observances and which prohibit or limit students from advocating against or acting in a manner contrary to

[1] The ALRC concern that religious views may be expressed in a way that harasses or berates a student is not appropriately dealt with by treating such expression as possible discrimination but by dealing with it in terms of a possible breach of the duty of care or teaching standards.

the religious beliefs of the institution while the student is engaged in activities in the course of their education with the institution, on the premises of the institution, using institution equipment or facilities, or representing the institution. Outside of those contexts the policy may require that students not engage in conduct which would bring the institution or the religious beliefs of the institution into disrepute. The policy and its application are not discrimination under the SDA.[2]

[This ability of religious education institutions to regulate conduct of students to prevent them undermining the religious beliefs of the school while they are engaged in education activities or representing the school is necessary for institutions to be able to protect the integrity of their ethos and mission. See the example on the Gay Pride Student's Club below.]

3. Regarding admission decisions, we adopt the views of former Commission President Justice Derrington[3] who suggested that a person does not discriminate against another person by conduct within the meaning of the SDA when acting on behalf of a religious educational institution in relation to the admission (or non-admission) of a student to an educational institution if:
    - the conduct is consistent with religious beliefs and practices of the institution;
    - the conduct has the effect of preferring (or refusing to admit) a student on the grounds that the student (or his or her parents) are adherents of the religious beliefs and practices of the institution, and where necessary, the student is recognised by the institution as having the relevant religious status; or the prospective student conducts themselves in accordance with the religious beliefs and practices or religious purposes of the institution; and
    - the institution has a policy, to which it adheres, that sets out its position in relation to its religious beliefs and practices or religious purposes in the context of the environment of the educational institution.[4]

4. Religious educational institutions can give preference, in good faith, to persons who share and live out the same religious beliefs as the educational institution in the selection and promotion of staff and change of staff duties.
    a. For staff appointments, promotions and change of duties which occur after these amendments commence, the education institution may in good faith require such staff to affirm and live in accordance with the religious beliefs of the educational institution (including by a staff conduct policy as described in 5) and if they do not do so the institution may impose employment sanctions or terminate the employment. Such requirements and action taken in

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[3] Justice Sarah Derrington, 'Of Shields and Swords – Let the Jousting Begin!' Speech, Freedom19 Conference, 4 September 2019, https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-s-derrington/s-derrington-j-20190904.

[4] Such a section would respond to (and largely adopt) Recommendation 7 of the Religious Freedom Review. Its intended effect would be that no student could be discriminated against at the time of admission to an institution on the basis of any protected attribute alone.

accordance with the requirements do not constitute discrimination under the SDA.

b. For staff who were appointed before these amendments commence, the status quo continues (unless the staff member accepts a promotion or change of duties on the basis that 4.a. then applies). The status quo is that the existing employment contract applies on its terms with the added statutory term that the educational institution may engage in conduct in relation to the staff member in accordance with the terms of s.38(1) of the SDA (as it was before the amendments commenced). Action taken by the education institution in accordance with the added statutory term does not constitute discrimination under the SDA. This grandfathering of the status quo could be ongoing or could be time limited with all staff transitioning to arrangements under 4.a over time.

5. For staff appointments, promotions and change of staff duties which occur after these amendments commence, religious educational institutions may make and apply new staff conduct policies which require staff to affirm and live in accordance with the religious beliefs of the educational institution, to uphold the religious ethos of the institution and not to advocate against or act in a manner contrary to the religious beliefs of the institution. The institution may impose employment sanctions for the breach of such policies. Such policies and their application are not discrimination under the SDA.

6. If all of proposals 1-5 were enacted, section 38 of the SDA could be repealed.

The Issues Underlying this Reference – the Rights of Individuals to a Religious Educational Community's Integrity of Beliefs and the Rights of Individuals to Live Contrary to those Beliefs

At its heart this reference is about the clash between a liberal view of sexual morality, sexual relations, gender identity and family structures (which has gained greater currency in Western liberal democracies since the 1970s) and traditional, conservative views of appropriate sexual morality, sexual relations, gender identity and family structures. The traditional, conservative views are held and practised by communities based on traditional cultures (many of which are represented in Australia by immigrant communities) and by traditional religious communities.

Specifically, this reference is about whether and how a liberal democratic society with a commitment to democracy, pluralism and human rights can accommodate both:

(a) traditional religious and cultural communities which want to live by, promote and teach their children conservative views of (consensual and lawful) sexual morality, sexual relations, gender identity and family structures; and

(b) other communities which want to live by, promote and teach their children much more fluid and shifting views of (consensual and lawful) sexual morality, sexual relations, gender identity and family structures.

The answer should be that a liberal, democratic, pluralist, multicultural society should be able to accommodate both types of communities pursuing their different aspirations. A pluralist and multicultural society will contain many different communities representing different (and sometimes conflicting) traditions and values. Those communities will not necessarily be diverse within themselves in relation to those values (a Muslim school is unlikely to be internally diverse in its views on acceptable sexuality and neither is a LGB activist organisation) but the society is diverse because of the presence of many different non-diverse communities.

For associations which have the core purpose of expressing, modelling and promoting a particular world view and way of living ("way of life associations"), the association must have the legal freedom to maintain the integrity of the association and the integrity of the promotion and expression of it organising beliefs and practices through:

- being able to choose which persons can become and remain a member, a leader or an employee of the community association by reference to whether the person shares and acts consistently with the association's core beliefs and practices (this is true of way of life associations whether they are political parties, environmental or LGBTIQ lobby associations, religious or atheist associations or cultural associations of particular ethnic groups);
- having rules requiring leaders and employees (and in some cases members) to speak and act consistently with the association's core beliefs and practices and the ability to discipline or remove leaders and employees (and in some cases members) who do not.

These requirements of way of life associations are protected in human rights law by rights like:

1) **the freedom of association** (ICCPR Article 22) of individuals to choose to associate with and be led by and employ in their associations people who share and live out the same beliefs and not by people who people who do not share and live out the same beliefs;[5]
2) **the right of persons belonging to ethnic, religious or linguistic minorities, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion**. (ICCPR Art 27)).

[5] ICCPR Article 22 provides in relevant part:
1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

The right not to be discriminated against on various grounds (ICCPR Art 26) and domestic anti-discrimination law in its drafting focusses more on the rights of individuals than communities and associations of individuals.

As a result, anti-discrimination law, without exceptions or balancing provisions, would tend to force micro-diversity within communities and organisations (e.g. being a Buddhist is not a permissible legal reason to disqualify a person from leading or being employed in a Christian organisations and vice versa, being a political activist against unions is not a permissible legal reason to disqualify a person from leading or being employed in the ALP, being a gay man who advocates (for religious or non-religious reasons) that gay men should abstain from gay sex does is not a permissible legal reason to disqualify a person from leading or being employed in a gay rights organisation which takes the contrary view, being a lesbian who advocates for same sex sexual activity is not a permissible legal reason to disqualify a person from leading or being employed in a Christian or Muslim school which takes the contrary view).

That type of forced micro-diversity within way of life associations would damage the integrity of the association and its ability to express and promote its core beliefs and activities as well as multiplying conflicts. Many anti-discrimination laws foresaw this problem and added exceptions or balancing provisions to protect certain way of life associations from being forced to admit or hire or retain people who did not conform (or no longer conformed) to the core beliefs or attributes or way of life promoted by the association. For example:

- All States except NSW and South Australia prohibit discrimination on the ground of political belief or activity but provide an exception allowing political parties and MPs to discriminate on this basis in employing people;[6] Victoria permits clubs for a political purpose to exclude people from membership on this basis; and Queensland and the NT permit discrimination in the provision of goods and services by a non-profit association established for political purposes[7]
- Victoria, Queensland, Tasmania and the NT have an exception to allow clubs which preserve a minority culture to exclude from membership people without an attribute for whom the club was established; [8]
- Under the SDA voluntary bodies can discriminate on the basis of sex, pregnancy and breastfeeding in relation to membership and provision of benefits and services[9]

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[6] E.g. Equal Opportunity Act 2010 (Vic) Section 27: An employer may discriminate on the basis of political belief or activity in the offering of employment to another person as a ministerial adviser, member of staff of a political party, member of the electorate staff of any person or any similar employment.
Section 66A: A club, or a member of the committee of management or other governing body of a club, may exclude a person from membership on the basis of political belief or activity if the club was established principally for a political purpose.

[7] ADA(NT) s.41(2), ADA (Qld) s.46.

[8] E.g. Equal Opportunity Act 2010 (Vic) Section 66: A club, or a member of the committee of management or other governing body of a club, may exclude from membership a person who is not a member of the group of people with an attribute for whom the club was established if the club operates principally to preserve a minority culture.

[9] SDA s.39

- In South Australia, an association can limit its membership to persons of particular marital or domestic partner status, a particular gender identity, a particular sexual orientation (other than heterosexual) or intersex status
- The religion exceptions or balancing provisions in federal, State, Territory and federal discrimination law also protect the freedom of association of religious persons in religious associations and integrity of the promotion and expression of their organising beliefs and practices. This is one function of section 38 of the SDA – to prevent religious associations (including those for education) being forced by law to admit or retain as members or employees persons who do not accept and promote its core beliefs and practices and who might actively undermine them.

In human rights law, all rights need to be balanced with each other and the right of an individual not to be discriminated against is subject to reasonable limitations including the human rights of others. Some of those limitations flow from the rights of other individuals to choose to be part of a way of life association and protect the integrity of the association and the integrity of the promotion and expression of its organising beliefs and practices.

The Freedoms of Religious Educational institutions are supported by a range of human rights under Australia's international human rights obligations, not just Religious Freedom

The Consultation Paper frames the issues in the reference primarily as a competition between the right of staff and students not be discriminated against on SDA grounds and the right of religious communities and individuals to religious freedom. In fact the issues involve the consideration and balancing of a much broader set of human rights including:

1) **the freedom of association** (ICCPR Article 22) of religious individuals to choose to associate with and be led and instructed in their associations by people who share and live out the same religious beliefs and not by people who people who do not share and live out the same religious beliefs;[10]
2) **the educational liberty of parents and guardians** to ensure the religious and moral education of their children in conformity with their own convictions (ICCPR Article 18(4) and to provide direction to a child in the exercise of the child's freedom of religion (CROC Art 14)
3) **freedom to manifest religious belief in worship, observance, practice and teaching individually or in community** (ICCPR Art 18(3))[11]

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[10] ICCPR Article 22 provides in relevant part:
1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

[11] ICCPR Article 18:
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

4) **the right of persons belonging to ethnic, religious or linguistic minorities, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion**. (ICCPR Art 27)). [12]
5) **protection from discrimination (including by the State) on the basis of religious beliefs and conduc**t - protection of staff, students, parents and school communities from discrimination on the ground of religion (ICCPR Art 26)
6) **protection from discrimination on the grounds of sex, sexual orientation, gender identity, marital or relationship status or pregnancy** – protection of both students and staff (ICCPR Art 26)

The right of a religious community to establish and operate religious educational institutions which express and model the religion of the religious community is based on ***all*** the above listed rights (1) to (5), not just ICCPR Article 18.

Art 27 is relevant in the case of religious schools which profess and practice and model the religion and culture of a religious minority such as Sunni or Shia Muslims, Maronite, Coptic Orthodox, Greek Orthodox, different branches of Judaism and Seventh Day Adventists. Indeed all religions in Australia are religious minorities. According to the 2021 Census, the largest grouping of religions (Christianity) accounts for 43% of the population and the largest Christin denomination (Roman Catholics) accounted for 20% of the population.

The ALRC Consultation Paper did not discuss **the freedom of association** (ICCPR Article 22); **the right of ethnic, religious or linguistic minorities to profess and practise their own religion** (ICCPR Art 27)); or **protection of people from discrimination (including by the State) on the basis of religious beliefs and conduc**t (ICCPR Art 26). The Paper gave very limited attention to **the educational liberty of parents and guardians** (ICCPR Art 18(4)) relying on one opinion of one Special Rapporteur as to what it does not do without ever saying what rights it does give (Paper p.44)

One purpose of the current exemptions in SDA s.38 is to allow religious educational associations to protect the integrity of their association and their mission to express and model their religious beliefs and values both in teaching and in living them out in the shared life of its community of staff and students.

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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, which 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.

[12] ICCPR Article 27: In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

As Harrison and Parkinson have pointed out, religious associations (and schools) call on all their members (and students) to (for example) "be a Catholic" or "be a Muslim" and this goes beyond doctrinal propositions to include a holistic set of behaviours and attitudes for virtuous living including sexual behaviours and attitudes.[13] As Parkinson has stated:

> modelling [the religion] within a faith community is as important as teaching [the religion] within a classroom or from a pulpit. Indeed it may well be more important and have more impact on people's lives.

In similar vein Patrick Lenta wrote: "moral virtue is not simply taught, but is acquired by pupils through their association with teachers who are themselves virtuous, with the corollary that it is wrong to place pupils with teachers who are not virtuous… teachers teach moral values not didactically, as in the case of arithmetic, but through example".[14]

The current s.38(1) and (2) exceptions protect the religious school from being forced by anti-discrimination law to hire and retain as leaders or staff people who do not share the religious values and ethos of the institution and who can promote views and conduct which are opposed to its religious values and ethos. The current section 38(3) protects the religious school from being forced by law to accept student expression and conduct which is opposed to its religious values and ethos. This is a function of the freedom of association, a freedom not peculiar to religious associations.

The Consultation Paper does not accurately present relevant international human rights law

For the reasons set out at length in the submissions by Adjunct Professor Mark Fowler, Dr Paul Taylor and the Anglican Church Diocese of Sydney, the ALRC Consultation Paper does not accurately present the international human rights law applicable to Australia.

We do not repeat their detailed analysis but note a few matters. The Consultation Paper does describe the European Court of Human Rights decisions such as *Siebenhaar v Germany* (upholding religious kindergarten's institutional autonomy to dismiss a teacher because of contrary religious beliefs) and *Fenandez Martinez v. Spain* (upholding a Catholic secondary school's autonomy to dismiss a teacher who had married and had children while a priest and who made public statements contrary to Catholic beliefs) which are persuasive authority that international human rights law requires freedom of association protections from anti-discrimination law for employment decisions by religious educational institutions. These cases show that simply repealing SDA s.38 without putting other protections in place would not be compatible with Australia's international human rights obligations. (Decisions based on the ECHR carry some persuasive weight in terms of what Australia's human rights obligations to the extent the ECHR provisions match the ICCPR provisions.)

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[13] See Harrison and Parkinson, "Freedom beyond the Commons: Managing the Tension Between Faith and Equality in A Multicultural Society" (2014) 40 Monash University Law Review 413, 444.

[14] Lenta, "Taking Diversity Seriously: Religious Associations and the Work-Related Discrimination" (2009) 126 South African Law Journal 827, 853.

But the ALRC Consultation Paper then cites (and seems to prefer) contrary decisions of the European Court of Justice interpreting European Commission Directive 2000/78 (legislation) on discrimination – these decisions are not based on the ECHR but on Commission anti-discrimination legislation and have no persuasive force regarding Australia's international human rights obligations.[15]

We also adopt the criticisms made by the Anglican Church Diocese of Sydney submission of the Consultation Paper's selective use of quotes from reports of UN Special rapporteur on Freedom of Religion or Belief and other international law commentary.[16]

We also note that the Paper does not discuss human rights law under the Constitution of the USA, which has at least the same claim to persuasive weight by analogy as the ECHR.

In the USA, the Supreme Court has held that the First Amendment rights to free speech and assembly (association) include a constitutional freedom of people to gather in voluntary associations to express ideas—a right of expressive association. This is not based on the freedom of religion clause of the First Amendment but applies to all expressive associations, whether religious or not. The Supreme Court has held that the right of expressive association can override non-discrimination laws and government policies if the effect of non-discrimination laws or policies would be to force associations to include persons (as employees or members) and that would interfere with the ability of the association to consistently express its values.[17]

Protecting the human rights supporting Religious Educational Institutions is compatible with the government's policy objectives re SDA discrimination but more protection is needed if SDA s.38 is repealed

We share Adjunct Professor Mark Fowler's view that Justice Derrington, the former President of the Commission proposed a framework for law reform which satisfies all limbs of the government's policy.

> "Justice Derrington's framework turns on the critical distinction between the proposition 'that no person can be discriminated against in relation to their employment on the basis of any protected attribute alone' and the ability of a religious institution to act 'consistent [with] its religious beliefs and practices or its religious purpose'. Justice Derrington's proposal is that if the latter is proven, the former is met: a religious institution 'does not discriminate' where its acts are 'consistent [with] its religious beliefs and practices or its religious purpose'. To that extent Justice Derrington's proposal can be seen to directly resolve the tension within the three limbs of the current terms of reference."
>
> It can thus be said that Justice Derrington's regime holds the key to aligning limbs 1 and 2 (which require that a religious educational institution 'must not discriminate' on

[15] See Consultation Paper para A.21.
[16] Anglican Diocese of Sydney submission paras 28-32.
[17] Boy Scouts of America v Dale (2000) 530 US 640, Hurley v Irish-American Gay Lesbian and Bisexual Group (1995) 515 US 557. See also Rumsfeld v FAIR 126 S.Ct 1297.

> a range of protected attributes) with limb 3 (by which they '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'). It also aligns with the balance between the right to freedom from discrimination and religious freedom within international law, which I have outlined at paragraphs 26 to 35 of the attached article." [18]

However, it is necessary to go further than the government's policy objectives to ensure compatibility with Australia's international human rights obligations. While it is important in that religious educational institutions can 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, *more is needed than just preferencing in selection of staff* to satisfy Australia's international human rights obligations and the reasonable expectations of Australian religious people, parents and students.

Under international human rights law, religious education institutions (and with appropriate changes many other way of life associations) are entitled to exercise the following freedoms (which they can exercise to the extent they deem appropriate):

1. Give preference, in good faith, to persons who share and live out the same religious beliefs as the educational institution in the selection and promotion of staff

2. Require staff to affirm and live in accordance with the religious beliefs of the educational institution, to uphold the religious ethos of the institution and not to advocate against or act in a manner contrary to the religious beliefs of the institution.

3. Apply conformity of religious belief and conduct criteria to students and families in their decision whether or not to admit a person as a student

4. Teaching and express to students, in good faith, the religious beliefs of the institution, whether in formal instruction or not and whether as part of the curriculum or not and require students to participate in religious education and the usual observances of the religion.

5. Apply student conduct policies which prohibit or limit students from advocating against, undermining or acting in a manner contrary to the religious beliefs of the institution while the student is engaged in activities in the course of their education with the institution.

We consider that all of the above 5 above freedoms are compatible with Australia's international human rights obligations and if they were provided for in the SDA then s.38 could be repealed. However, if they were not all provided for and s.38 was repealed and the only additional provision was preferencing in the selection of staff, we consider that would not be compatible with Australia's international human rights obligations.

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[18] Submission of Adjunct Professor Mark Fowler at paras 10-11.

Proposed Amendments to the SDA and FWA

To provide for the above 5 freedoms for religious education institutions, we propose amendments to state that the following specific conduct by religious education institutions and persons acting on their behalf **is not discrimination under the SDA (or FWA).**

1. Conduct by or on behalf of a religious educational institution in teaching or expressing to a student, in good faith, the religious beliefs of the religious educational institution, whether in formal instruction or not and whether as part of the curriculum or not, is not discrimination under the SDA. [The ALRC proposal 7 to confine this protection to the content of the curriculum is flawed. In religious schools staff may express the religion's beliefs to students in informal conversations, in pastoral care discussions or student welfare meetings or at assembly or a religious service or in a school newsletter – none of these are part of the curriculum.]

2. Religious educational institutions can make and apply student conduct policies which require students to study the religion and attend religious observances and which prohibit or limit students from advocating against or acting in a manner contrary to the religious beliefs of the institution while the student is engaged in activities in the course of their education with the institution, on the premises of the institution, using institution equipment or facilities, or representing the institution. Outside of those contexts the policy may require that students not engage in conduct which would bring the institution or the religious beliefs of the institution into disrepute. The policy and its application are not discrimination under the SDA.

[This ability of religious education institutions to regulate conduct of students to prevent them undermining the religious beliefs of the school while they are engaged in education activities or representing the school is necessary for institutions to be able to protect the integrity of their ethos and mission. See the example on the Gay Pride Student's Club below.]

3. Regarding admission decisions, we adopt the views of former Commission President Justice Derrington who suggested that a person does not discriminate against another person by conduct within the meaning of the SDA when acting on behalf of a religious educational institution in relation to the admission (or non-admission) of a student to an educational institution if:

- the conduct is consistent with religious beliefs and practices of the institution;
- the conduct has the effect of preferring (or refusing to admit) a student on the grounds that the student (or his or her parents) are adherents of the religious beliefs and practices of the institution, and where necessary, the student is recognised by the institution as having the relevant religious status; or the prospective student conducts themselves in accordance with the religious beliefs and practices or religious purposes of the institution; and
- the institution has a policy, to which it adheres, that sets out its position in relation to its religious beliefs and practices or religious purposes in the context of the environment of the educational institution.

4. Religious educational institutions can give preference, in good faith, to persons who share and live out the same religious beliefs as the educational institution in the selection and promotion of staff and change of staff duties.

   a. For staff appointments, promotions and change of duties which occur after these amendments commence, the education institution may in good faith require such staff to affirm and live in accordance with the religious beliefs of the educational institution (including by a staff conduct policy as described in 5) and if they do not do so the institution may impose employment sanctions or terminate the employment. Such requirements and action taken in accordance with the requirements do not constitute discrimination under the SDA.

   b. For staff who were appointed before these amendments commence, the status quo continues (unless the staff member accepts a promotion or change of duties on the basis that 4.a. applies). The status quo is that the existing employment contract applies on its terms with the added statutory term that the educational institution may engage in conduct in relation to the staff member in accordance with the terms of s.38(1) of the SDA (as it was before the amendments commenced). Action taken by the education institution in accordance with the added statutory term does not constitute discrimination under the SDA. This grandfathering of the status quo could be ongoing or could be time limited with all staff transitioning to arrangements under 4.a over time.

5. For staff who are appointed, promoted or accept changed staff duties after these amendments commence, religious educational institutions may make and apply new staff conduct policies which require staff to affirm and live in accordance with the religious beliefs of the educational institution, to uphold the religious ethos of the institution and not to advocate against or act in a manner contrary to the religious beliefs of the institution. The institution may impose employment sanctions for the breach of such policies. Such policies and their application are not discrimination under the SDA.

6. If all of proposals 1-5 were enacted, section 38 of the SDA could be repealed.

Testing the Proposals with Case Studies

Case Study 1 – the Gay Pride Students' Club and Student Advocacy against the Religion

Example Religious School (ERS) is a co-educational religious high school. It has adopted a Statement of Religious Beliefs which includes the following beliefs:

- God loves all people. All people have turned their back on God and against God's ways to run their lives without relationship or obedience to God and that has caused all people to be broken in many aspects of their lives. Sometimes these symptoms of brokenness are called sin but they all stem from a person's fundamental rejection of relationship with God.

- God wants to be reconciled with all people, to forgive them and welcome them back into relationship with him and this requires all people to genuinely decide to change their ways and seek to live in relationship and obedience to God.
- God's plan for human flourishing and family formation is that sexual relations should only be between a man and woman in marriage and all other sexual relations (opposite sex or same sex) are contrary to God's plan for human flourishing.
- Same sex orientation is not wrong but engaging in same sex sexual relations and relationships is contrary to God's will.
- All forms of sin or brokenness (e.g. lying, cheating, greed, pride, selfishness, lust, sexual relations outside marriage, stealing, character assassination) separate people from God and others and if people genuinely decide to seek God and change their ways, God will forgive all these sins and help people to change and live in relationship with God.

A small group of same-sex attracted students ask the Principal for permission to start a Gay Pride Students' Club which would meet weekly during lunchtime, and promote awareness of and advocacy for responsible gay sexual relationships and gay rights issues on the student noticeboard/website and invite speakers to address students about these issues.

The Principal encourages the students to individually see the school's health and wellbeing counsellors if they wish to discuss their relationships, health or wellbeing. But the Principal refuses permission for the club because the aims of the proposed club include advocacy for positions contrary to the school's Statement of Religious Beliefs. There are other student clubs which meet to engage in hobbies and interests like an environment club (which includes advocacy for environment protection) drama, art, IT, debating, and religious activities like prayer and worship and serving the needy.

Does the Principal's Decision constitute Discrimination?

The SDA creates a very broad (and somewhat uncertain) definition of what constitutes discrimination in education. Section 21 (2) of the Sex Discrimination Act 1984 provides:

> *(2) It is unlawful for an educational authority to discriminate against a student on the ground of the student's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding:*
>
> > *(a) by denying the student access, or limiting the student's access, to any benefit provided by the educational authority;*
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> > *(b) by expelling the student; or*
> >
> > *(c) by subjecting the student to any other detriment.*

Some of the same sex attracted students lodge a complaint under the Sex Discrimination Act complaining that the Principal's refusal has subjected them to "any other detriment" and denied them access to the benefit of forming a club to pursue their interests, which other students have access to.

Current law

The Principal's decision may well be discrimination under SDA section 21(2) on the basis that it has subjected students to "any other detriment" or denied them access to a benefit.

Arguably the decision was made on the ground of the student's sexual orientation or a characteristic generally appertaining to people with same sex orientation (being a desire to discuss and advocate for (SDA s.5A)). Arguably the decision has treated the gay students less favourably than the principal would treat a person who has a different sexual orientation who applied to form a club with goals of advocacy about straight sexual relations, although that would need to be established.[19]

However, SDA s.38(3) is likely to operate to protect the school and the principal by making the decision not unlawful. This is because the decision discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of the religion or creed (by avoiding religious school-supported advocacy by students against the beliefs of the religion).

ALRC Proposals

Proposition A Proposal 1 would repeal section 38(3) SDA and put nothing in its place. The proposed protection of the content of the curriculum in proposal 7 has no effect in this Case Study. Assuming the decision is discrimination under SDA sections 21(2) and 5A and the protection of s.38(3) is removed, the school and principal would be liable for unlawful SDA discrimination.

In other words, the consequence of the ALRC Proposition A is that a religious school would face viable complaints of discrimination under the SDA from students who had an SDA protected attribute and wanted to advocate in school time using school resources in favour of that attribute contrary to the teachings of the religion. Whether such complaints ultimately succeeded would depend on the correct comparator analysis but, in practice, the complaint would be viable to run in the absence of section 38(3), and advocates against the school's religious beliefs could ensure that the school would face the legal and time costs of defending against the complaint and adverse media publicity. If the school settled the complaint, there would be nothing to stop another being brought.

The ALRC's proposed reform undermines the ability of a religious school to continue to build a community of faith if students receive legal protection to organise and advocate publicly to other students against the religion in school time on SDA grounds.

The ALRC has not explained how this Proposal could be consistent with ICCPR Article 18(4) (parental rights to ensure the religious and moral education of their children in conformity with their own convictions) or the freedom of association of staff and students and parents who choose to associate in an educational community which upholds, teaches, models and advocates for the beliefs of the religion.

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[19] Identifying the right comparator is often a difficult aspect of discrimination law analysis. If the correct comparator is a straight student who wants to form a club to discuss and advocate for responsible heterosexual sexual relationships (within the religious beliefs of the school) and that student would be permitted to start such a club, there would be less favourable treatment of the gay students.

Our Proposals

Under our proposals the school could have a student conduct policy which prohibited students from advocating against or acting in a manner contrary to the religious beliefs of the institution while the student was engaged in activities in the course of their education with the institution. If ERS had such a policy, the application of that policy to deny the request for the club would not be discrimination under the SDA. Or the school might allow a club for same sex attracted students as long as its activities did not involve advocating against or acting in a manner contrary to the religious beliefs of the school.

Case Study 2 – Staff in De Facto Relationships who Advocate Against the Teachings of the Religion on Relationships

Teacher A teaches Mathematics at ERS and lives in a heterosexual de facto relationship. Teacher B teaches Geography at ERS and lives in a same sex de facto relationship. Neither have specific roles in the teaching, observance or practice of the religion but both have agreed with and in their contract committed to uphold and teach in accordance with the ERS Statement of Religious Beliefs.

The living arrangements of Teacher A and B become apparent from their social media posts and become known to students and some other staff. When some students ask the teachers about the social media, they tell the students there is nothing wrong with their relationships and that religious beliefs to the contrary about extra-marital sexual relationships (and in B's case same sex relationships) are outdated and wrong.

Students ask their religious studies teachers about how those statements from Teachers A and B fit with what they are hearing in religious studies classes. This comes to the attention of the Principal who interviews A and B (separately) to ask about their statements to the students. Teachers A and B eventually confirm that they have told students that the religious views of the school about extra-marital sexual relationships (and in B's case same sex relationships) are outdated and wrong.

The Principal initiates employment disciplinary action against A and B for breaching their commitment to uphold and teach the Statement of Religious Beliefs – this involves a period of suspension while they consider whether they will change their minds and conform to and teach the religious beliefs of the school. A and B allege that they have been discriminated against by the school on the basis of their marital or relationship status and B also alleges discrimination on the basis of same sex sexual orientation.

Current law

The disciplinary action involves subjecting the employees to a detriment under SDA s.14(2) and if it was taken on the ground of the employee's marital or relationship status or sexual orientation would be discrimination under SDA s.14(2). There is a question as to whether the action was taken on those grounds or on the ground of A and B failing to uphold and teach the school's Statement of Religious Beliefs.

Section 8 of the SDA provides that the doing of an act by reason of a particular matter includes a reference to the doing of such an act by reason of 2 or more matters that include

the particular matter, whether or not the particular matter is the dominant or substantial reason for the doing of the act. So if the action was taken in part on the ground of the employee's marital or relationship status or sexual orientation, even if that was not the dominant reason, it would be SDA discrimination. This is still a question of fact.

Even if it is discrimination under s.14(2), it is probably not unlawful under s.38(1) because the Principal is probably discriminating in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed (these would be injured if teachers at the school were allowed to teach against and not uphold the religious beliefs of the school).

ALRC Proposals

Under Proposition B the religious school cannot discriminate against A or B on the ground of their marital or relationship status or sexual orientation. Section 38 is repealed.

If the Principal has taken action on the ground of A and B failing to uphold and teach the school's Statement of Religious Beliefs, that would not be a SDA discrimination ground.

But if the Principal has taken action on the ground of A's and B's marital or relationships status or B's sexual orientation (even if that is not the principal reason for the action) then there is SDA discrimination and s.38 would be repealed so the school would be liable.

However, the ALRC has made a strange statement under Proposition B with no apparent authority or justification that a LGBTQ+ staff member involved in teaching religious beliefs could provide alternative perspectives on religious doctrine in an objective manner and presumably that would made lawful under the proposed amendments. If that applied to A and B, they would be able to bring a discrimination complaint even if they were criticising the schools' religious doctrine and presenting alternatives (in an objective manner).

That result would mean the school could not stop a staff member criticising the schools' religious doctrine and presenting alternatives. That would severely undermine the ability of the school to maintain the integrity of its teaching and the associational freedom of staff, students, parents as a religious educational community. We consider that outcome would be inconsistent with Australia's international human rights obligations.

Our Proposal

If A and B were appointed or promoted or accepted new duties after the amendments commenced, the school could apply to them staff conduct policies which required them to affirm and live in accordance with the religious beliefs of the educational institution, to uphold the religious ethos of the institution and not to advocate against or act in a manner contrary to the religious beliefs of the institution. Such policies and their application would not be discrimination under the SDA.

If A and B were on staff before the amendments commenced, the status quo would apply. The school could rely on a statutory term of the contract equivalent to the repealed s.38(1).

A Comparison for Consideration

A LGBTQI advocacy organisation (LAO) sells training services to corporations on LGBTIQ issue awareness, LGBTQ inclusive practices and trans-awareness practices. LAO recruits

a trainer who is same sex attracted with training experience and, after training, assigns this person to teach the LAO curriculum on LGBTQ inclusive practices at a corporate client.

The trainer has a conviction (based on their religious belief and their own life experience) that it can be beneficial for same sex attracted people not to engage in same sex sexual activity but instead be sexually abstinent and have close non-sexual friends of the same sex. The trainer teaches the LAO curriculum but at various points in the training states (in an objective and respectful manner) the alternative viewpoint and provides links to resources about it.

Some gay people on the course complain about the alternative viewpoint being presented as it offends them. LAO investigates and dismisses the trainer for adding the viewpoint to the training. Given the ALRC's recommendation that teachers in religious schools need not agree with the religious beliefs of the school and that they can present alternative viewpoints to those religious beliefs in their teaching (in an objective manner), is there any reason in principle why the trainer should not be able to add religious alternative view points (in an objective manner), to the LAO training?

Case Study 3 – The student who identifies as a different gender to their sex

16 year old David, a natal male who has attended ERS for 3 years, announces that they have been diagnosed with gender dysphoria and will be using a new name - Danielle - and they wish to be identified and treated as a girl for all purposes at the school, including name, pronouns, uniform requirements, use of communal change room and bathroom, and participation in sports and other sex-based activities.

The School's Statement of Religious Beliefs states that it believes God made humans in God's image – male and female and there are only those two sexes and a person's gender is the same as their sex. Students will usually be expected to comply with school rules and expectations applicable to their sex. But the Statement also acknowledges that students can experience gender dysphoria which can create serious distress and commits to show the love of God in working compassionately with such a student and parents and medical professionals to help manage the student's distress by considering appropriate accommodations, taking into account the Statement of Beliefs, the best interests of the student and the best interests of all other students.

ERS works with Danielle and their parents to decide what accommodations might be made.

Discrimination in education is very broadly defined in s.21 to include "qualifying any benefit" or by "imposing any other detriment" on a student on SDA grounds.

"Qualifying a benefit" or "imposing any other detriment" would seem to include limiting access to student accommodation to persons of one biological sex. But sex-based segregation of student accommodation is apparently permitted by an exception in section 34(2), even if it might otherwise seem to be discrimination on the basis of gender identity.

The school decides that as a natal male student who identifies as female Danielle should wear the sports uniform (which is essentially the same for boys and girls) and should use a single person bathroom or change facility instead of the communal bathroom or change facility for natal female students to protect the dignity and privacy of all students.

Danielle objects to having to wear the sports uniform instead of the girl's uniform and wants to use the girls' communal bathroom and change facility "with the other girls". Danielle lodges a discrimination complaint.

Current Law

It is unclear if the school is discriminating on gender identity grounds by "imposing any other detriment" or qualifying any benefit under s.21 for Danielle as a student. This may turn on whether the school is engaging in direct discrimination which has no reasonableness defence or indirect discrimination based on a policy where the policy may be defended as reasonable.

If the school is engaging in discrimination under s.21, arguably the religious school could use the exception in s.38(3) that it is not unlawful discrimination because it is done in good faith in order to avoid injury to the religious susceptibilities of adherents of the religion or creed, given the school's religious beliefs about sex and gender.

ALRC Proposals

But under the ALRC proposals, if the school had engaged in gender identity discrimination, section 38 will be repealed with no replacement and the school will likely be liable for not making all the accommodations which Danielle wants (unless this were a case of indirect discrimination under a policy and the reasonableness defence applied).

Our proposals

If the school had a student conduct policy which prohibited students from acting in a manner contrary to the religious beliefs of the institution while the student is engaged in activities in the course of their education with the institution or on the premises of the institution, the school could require Danielle to comply with the accommodations proposed.

These are very practical issues for schools which the Consultation Paper does not address.