

# Submission to Australian Law Reform Commission

## Religious Educational Institutions and Anti-Discrimination Laws

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### 1. Preliminary

I am a Senior Lecturer in the Law School at the University of Western Australia and an Honorary Research Fellow at the Centre for Muslim States and Societies. I have published extensively on matters relating to the intersection between law and religion and have made written and/or oral submissions to numerous government inquiries into issues related to freedom of religion and religious discrimination. A full list of my publications and submissions can be accessed on the University of Western Australia's [Research Repository](#).

### 2. The Role of Religious Exemptions

The majority of the Consultation Paper concerns what are usually referred to as 'exemptions' for religious schools and educational institutions in relation to otherwise applicable provisions of the *Sex Discrimination Act 1984* (Cth). These clauses are also referred to as 'balancing clauses', a term which more accurately reflects their role in the law – the promotion of freedom of religion.<sup>1</sup>

While Australia does not have a national bill or charter of rights containing a freedom of religion provision, freedom of religion is an important principle which is a fundamental aspect of the Australian character. As Acting Chief Justice Mason and Brennan stated, 'Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society.'<sup>2</sup>

The role of these clauses, therefore, is not to provide religious schools with exemptions for the law *per se*, but to provide a balancing mechanism to balance the important human rights not to be discriminated against and the human right to freedom of religion and belief (FoRB). FoRB is protected in international law in provisions such as article 18 of the International Covenant on Civil and Political Rights ('ICCPR'), article 18 of the United National Declaration of Human Rights ('UNHDR') and article 14 of the Convention on the Rights of the Child ('CRP'). It is important to note in this context that children, as well as parents, hold these rights.

It is worth emphasising that children have both the right not to be discriminated against and the right to freedom of religion. While the nature of the child's right to freedom of religion may be contested,<sup>3</sup> it should not be dismissed. In the context of exemption or balancing clauses, therefore, the need to balance one child's right to freedom of religion as against their classmates or teachers' right not to be discriminated against needs to be kept at the centre of discussions. The parliamentary debate surrounding the failed Religious Discrimination Bill was replete with examples of members of parliament discussing discrimination against children and teachers on the basis of their sexuality or gender. What was absent was a robust discussion of FoRB of children. Both need to be at the centre of the discussion.

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<sup>1</sup> See Neil Foster, 'Freedom of Religion and Balancing Clauses in Discrimination Legislation' (2016) 5 *Oxford Journal of Law and Religion* 285 – 430

<sup>2</sup> *The Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120 ('*The Scientology Case*')

<sup>3</sup> Renae Barker, 'The Place of the Child in Recent Australian Debate about Freedom of Religion and Belief' (2022) 11 (6) *Laws* 83.

Having said that, I am generally in favour of exemptions that are as narrow as considerations of FoRB will permit. To borrow from the language of article 18(3) such exemptions or balancing clauses should only be as wide as are ‘necessary,’ conversely, they must also be as wide as is ‘necessary’ to enable FoRB. In this instance the general anti-discrimination laws are consistent with international law because they are ‘necessary’ in many circumstances to protect, inter alia, the rights and freedoms of others. However, it must not be forgotten that such laws must only be as wide as are in fact ‘necessary’. It is a balancing act – hence the alternative term balancing clauses – which in my view the current recommendations have tipped too far towards prohibiting discrimination and too far away from FoRB. While some narrowing is arguably not only required but desirable, we must be careful not to go too far in attempting to correct the imbalance that arguably exists at the moment.

Taking the above into consideration it is also worth noting that not all religious schools make use of the exemptions in the *Sex Discrimination Act 1984* (Cth). For example in 2018 the Anglican Archbishop of Peth, The Most Reverend Kay Goldsworthy AO, published a letter outlining the Anglican School Commission’s approach to this issue. In her letter she stated that:

The ASC’s current Strategic Plan is very clear on this topic. One of ASC’s five core activities is ‘inclusion’. The plan states that ASC schools are inclusive schools which proactively outreach to create opportunities and an inclusive supportive environment for students and staff who identify as LGBTI.

Further she ‘[did] not anticipate any changes in the approach of the Anglican Schools Commission (ARC) schools take in relation to either staff or students.’

Similarly, in response to the publication of the recommendations of the Religious Freedom Review and community concern about the exemptions which allowed religious schools to expel LGBTI students several religious leaders indicated that their schools did not use or want this exemption. For example, Archbishop Mark Coleridge, on behalf of Catholic schools, has stated ‘we have not sought concessions to discriminate against students or teachers based on their sexuality, gender identity or relationship status.’<sup>4</sup>

However, just because some religious schools do not make use of the exemptions does not mean that others do not. It is unclear how many schools do in fact make use of the exemptions and how many do not. There is no way, other than via ad hoc comments from religious and school leaders to determine the extent to which religious schools make use of these provisions.

### **3. The Nature of Religious Belief and Practice**

Tan important aspect of the issues raised by the Consultation paper, but to adequately address it, is the nature of religion and therefore the nature of religious belief and practice and FoRB.

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<sup>4</sup> Jewel Topsfield and Michael Kozoil, ‘Catholic Schools say they don’t discriminate on sexuality’ (10 October 2018) *The Sydney Morning Herald* (online) <https://www.smh.com.au/politics/federal/catholic-schools-say-they-don-t-discriminate-on-sexuality-20181010-p508vp.html>.

The legal definition of religion was considered by the High Court in *The Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* ('*The Scientology Case*').<sup>5</sup> the Australian High Court offered three definitions of religion.<sup>6</sup> Ultimately, the conclusion that Scientology was a religion for the purposes of *Pay-roll Tax Act 1971* (Vic) did not hinge on which definition was legally correct. The definitions from the case have been applied multiple times both in Australia and overseas in a number of different contexts.<sup>7</sup> While all three definitions have their merits it is that offered by Mason ACJ and Brennan J in their joint judgment which has been most pervasive:

for the purpose of the law, the criteria of religion are twofold, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief, although canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion.<sup>8</sup>

The definition from the joint judgment of Wilson and Deane JJ has also been relied upon on several occasions.

More recently Lord Toulson of the United Kingdom Supreme Court has offered a more modern formulation of Mason ACJ and Brenna J's definition:

a spiritual or non-secular belief system held by a group of adherents, which claims to explain mankind's place in the universe and relationship with the infinite, and to teach its adherents how they are to live their lives in conformity with the spiritual understanding associated with the belief system.<sup>9</sup>

Although, it was the definition from Wilson and Dean JJ which Lord Toulson singled out for particular praise. He however, rejected the use of the term 'supernatural' 'because it is a loaded word which can carry a variety of connotations.'<sup>10</sup>

These however, are legal definitions. While any definitions of religion used when applying the provisions of the Australian anti-discrimination law must be a legal one it is not necessarily what ordinary people will have in mind when they think about the application of the law. When people think about religion they think about the things people do and say in the name of their religion. In other words, they focus on the manifestation of religion or the practice of religion rather than the belief. However, as Latham CJ observed in *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth*:<sup>11</sup>

almost any matter may become an element in religious belief or religious conduct. The wearing of particular clothes, the eating or the non-eating of meat or other foods, the observance of ceremonies, not only in religious worship, but in the everyday life of the individual - all of these may become part of religion.<sup>12</sup>

The effect of this in the context of the Australian anti-discrimination law is that, theoretically, almost anything may be covered by the concept of religion and therefore any religious exemptions or

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<sup>5</sup> *The Scientology Case*.

<sup>6</sup> Renae Barker, '*Church of the New Faith v Commissioner of Pay-roll Tax: Defining Religion for the World?*' in Renae Barker, Paul Babie and Neil Foster (eds) *Law and Religion in the Commonwealth: The Evolution of Case Law* (Hart, 2022)11.

<sup>7</sup> Ibid

<sup>8</sup> *The Scientology Case*, 136 (Mason ACJ and Brennan J).

<sup>9</sup> *R (Hodkin and another) v Registrar General of Births, Deaths and Marriages* [2014] 1 All ER 737, 752.

<sup>10</sup> Ibid.

<sup>11</sup> *Adelaide Company of Jehovah's Witnesses Inc V Commonwealth* (1943) 67 CLR 116

<sup>12</sup> Ibid 124 (Latham CJ).

balancing clauses<sup>13</sup> that may be included in the law. Religious manifestation is much more than going to mosque, temple, church or synagogue on the relevant holy day. Religion touches upon almost all aspects of a person's life. It may influence what they eat and drink, what they wear, who they associate with, how they raise their children, when they wake up and when they go to sleep, which day they work and which they rest.<sup>14</sup> It can even influence who they interact with in civil society and, in a democracy, who they vote for. In the context of the consultation paper religious belief and practice will influence which school they select for the children and what they teach their children about sexuality, gender, and sexual ethics.

In some cases, these religious practices will be out of step with general societal expectations. For example, religious practice can include a male child refusing to shake the hand of a female teacher.<sup>15</sup>

The all-encompassing nature of religious belief and practice is undermined by recommendations in the Consultation Paper which suggest that Religious Schools and Educational Institutions be able to preference staff or students on religious grounds 'as long as this did not amount to discrimination on the Sex Discrimination Act grounds.' This suggests that aspects of a person's religious belief and practice should be hived off from other aspects.

This problem is best illustrated by the question of who determines if a prospective staff member is of a particular faith. Determining who belongs to a particular religion is therefore a wholistic analysis. Different religions take different approaches to determining membership. This will be a necessary pre-condition to the workability of a religious preference clause. For example, Jewish school may look to familial decent while a Catholic school may require proof of Catholic baptism or conversion. This in itself is not problematic. However, for some religions religious identity may be determined by holding particular beliefs or engaging in particular practise at the time of determining whether or not they 'belong' to that religion. This may be subjective rather than objective and not something apt for latter adjudication by a judge. While for some religions belonging is a matter of self-identification for others it will be determined by others having regard to the persons beliefs and conduct. Having passed through various religious rituals may not be enough if the person has changed their beliefs since engaging in those rituals. Further with in religions such as Christianity and Islam the different denominations or sects may have very different understandings of whether or not a person is of their faith. For example, while one Christian denomination may accept infant baptism as conclusive evidence of religious identity others may require actual acceptance of certain religious beliefs and practices at the time of identifying the person with the particular denomination. As alluded to above this may include beliefs about sexuality, gender and sexual ethics.

If a school is to be allowed to preference staff and students on the basis of religion must include all aspects of religious faith – including those society finds out of step with modern expectations. To do otherwise risks undermining FoRB which exemption or balancing clauses seek to uphold. It is impossible to say that a person's religious identity is to be determined by excluding aspects of their identity. Further requiring schools to do so places them in a difficult position where they rely on certification from a religious authority to determine religious identity. For example, a religious school may require that a prospective staff member or student provide a letter of recommendation from a religious leader of the relevant religion, denomination or sect confirming that they are of the same religion as the school. In such a case the school could not be sure that failure to receive such an

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<sup>13</sup> See Neil Foster, 'Freedom of Religion and Balancing Clauses in Discrimination Legislation' (2016) 5 *Oxford Journal of Law and Religion* 285 – 430.

<sup>14</sup> *Adelaide Co. of Jehovah's Witnesses Inc. v. Commonwealth* (1943) 67 CLR 116, 124.

<sup>15</sup> See Gabriel Samuels, 'Muslim Schoolboys who refused to shake hands with female teachers lose appeal' (2016, September 21) *Independent* <https://www.independent.co.uk/news/world/europe/muslim-schoolboys-handshake-female-teacher-refuse-appeal-lose-a7319986.html>

endorsement did not include consideration of matters which would amount to discrimination under the Sex Discrimination Act.

An alternative approach is to permit religious schools and institutions to preference those of their religion on all aspects of religion or belief but require them to do so consistently. For schools where maintaining a tight community of faith is important, they would need to choose to only enrol and employ people of their faith while those schools that wanted to operate with a religious ethos but offer education to a wider segment of the population would need to do so in a manner consistent with all aspects of Australian anti-discrimination law. This approach is not unproblematic but does provide an alternative.

#### **4. Objective vs Subjective Assessments**

A number of the recommendations, particularly those relating to staff, include requirements that and requirements by the school that a person be a of a particular faith be 'justified' or be a 'genuine requirement.' My main concern with these requirements is whether they are to be subjectively or objectively determined?

While those of no particular faith and those who embrace atheism or agnosticism may not see the need for those fulfilling an ostensibly secular role to comply with the beliefs of the religious organisation employing them this only highlights an important difference between those of faith and those who are not. Taking the example of a gardener a person who has no religion is likely to see the role as being the care and maintenance of the school's grounds and gardens. However, the care of the natural environment can also be seen as a profound act of worship or spiritual fulfilment in honouring God's creation. Similarly, the role of school receptionist is likely to be seen by those with no religion as an administrative role involving answering the telephone, greeting people and attending to general administrative tasks. For a religious school the role could be seen as the first contact with families and the school and therefore having a receptionist who is of the same faith as the school is important in setting the tone of the relationship with that family into the future. Similarly, the maths teacher at a religious school is often used as an example of a secular role where the person fulfilling that role does not necessarily need to comply with the religious ethos of the school in order to fulfil the requirements of their job. However, as with the administrative assistant or gardener, discussed above, the role of maths teacher may be seen by religious people very differently to those from a secular background. As with other teachers the maths teacher is likely to be approached by students for guidance on a range of issues, not just trigonometry or algebra. They may also be required to participate in religious activities of the school. A teacher whose belief and values, including those related to gender and sexuality, conflict with the religious ethos of the school is unlikely to be able to do either of these things both in line with the school's religious ethos or authentically.

The difficulty faced by those of faith in understanding the religious nature of ostensibly secular roles is summed up in the quote from Thomas Aquinas:

To one who has faith, no explanation is necessary. To one without faith, no explanation is possible.

Therefore, it is important to clearly articulate whether the need for religious requirements to be justified or a genuine requirement of the role should be judged subjectively or objectively. An objective judgment on secular grounds will result in less schools being able to hire staff who have

beliefs and values consistent with the school while a subjective assessment would take into account the school's view of the nature of these roles which may include a religious or spiritual element.

## 5. An Alternative – Transparency

I have previously argued that the use of transparency requirements may be a solution to the need to balance the right to FoRB and the right not to be discriminated against. In my submission to the Freedom of Religion Review I recommended that the following provision be inserted in anti-discrimination legislation:

Where a religious organisation intends to rely on [insert relevant section and subsection number] of the Act in relation to employment a statement in the following form must be included in the advertisement of the position of employment.

*[name of religious organisation] may make use of the exemptions provided in [insert relevant section and subsection number] of the [insert name of Act].*

Another possibility is for those schools registered with the Australian Charities and Not-for-profit Commission to be required to state, as part of their registration, whether or not their school made use of the exemptions. The ACNC has brought much needed transparency to the Not-for-profit and charity sector through its transparency requirements.<sup>16</sup> As a government organisation to which many religious schools already report this may be another vehicle for transparency in the use of exemptions.

I do not believe that families or students should be subjected to the requirement to sign 'statement of belief' or other similar documents. Given the views outlined above from leaders of religious schools following the release of the Religious freedom Review the proposed ability to enable schools to preference students of their own religion should be sufficient in relation to students to balance the right to FoRB and the right not to be discriminated against. However, the important leadership role that staff play in establishing the community of faith suggests that a different approach may be needed.

Permitting schools to continue to make use of exemption or balancing clauses in relation to staff in a much wider range of circumstances than students while requiring them to be transparent in doing so has a number of advantages. Transparency opens up the use of exemptions to scrutiny. While religious organisations may be making use of an exemption they also may not be. It is only when a dispute arises, where an individual believes that the exemption applied by the religious organisation was done so unlawfully, that public debate and therefore scrutiny can occur. Equally where a religious organisation chooses not to make use of an exemption this too would be a matter of public record. Those who interact with these religious organisations would then have the necessary knowledge to make informed decisions about their continued interactions.

At its recent Synod the Anglican Diocese of Sydney passed the *Sydney Anglican Use of Church Property Ordinance 2018* which made explicit that '[a] Diocesan body must only use or allow the use of Church property for acts or practices which conform to the doctrines, tenets and beliefs of the [Sydney] Diocese.' This includes a prohibition on church property being used for, inter alia, same-sex weddings and other events. The Anglican Diocese of Sydney received significant criticism in the press over its decision, including the impact such a policy would have on Anglican schools with in the

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<sup>16</sup> Renae Barker, *State and Religion The Australian Story*, above n 3, 311 – 320.

Diocese. However, such criticism was only possible because the Diocese was transparent and clear about its policy and stance in relation to these matters.

Transparency will also allow those schools which do not make use of the exemptions to distinguish themselves from those that do. Parents could then vote with their feet and enrol their children in schools which conform to their values. If the sentiment of the public really is against the continuation of such exemptions religious schools which continue to use them may well find themselves with less pupils.

Transparency would also allow staff applying to religious schools to know in advance if they may be subject to discrimination on the basis of an attribute otherwise protected in the *Sex Discrimination Act*. The advantage of such a requirement is that potential employees are alerted to the fact that they may be lawfully discriminated against before they submit an application to the religious organisation. In effect they can choose not to waste their time applying for a position they are unlikely to be selected for.

An additional benefit of transparency is that it would enable the debate about the role, place and funding of religious schools to be carried out with all the relevant facts on the table. As I outlined above we do not currently know how many, if any, religious schools actually make use of the exemptions contained in the *Sex Discrimination Act*. Without this information it is impossible to have a fully informed debate about religious schools. A common argument against the funding of religious schools is that it amounts to ‘tax payer funded discrimination.’<sup>17</sup> This assertion however rests on an assumption that all or most religious schools make use of the exemptions. This may or may not be the case.

## 6. Final Comments

I am generally in favour of narrowing exemptions where it can be shown that such exemptions are no longer necessary to balance the right of FoRB and the right not to be discriminated against. However, we must be careful in doing so not to tip the balance too far the other way. FoRB remains an important right both in international law and in secular Australia. The exemption or balancing clauses in Australia’s anti-discrimination law, including the *Sex Discrimination Act 1984* (Cth), make up an important and central element of Australia’s state-religion relationship. In the absence of a national bill or charter of rights they assume a more important role than in other jurisdictions. Reform must therefore be considered very carefully as the impact will be felt far beyond the immediate law amended.<sup>18</sup>

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<sup>17</sup> Clair Moodie, ‘Teacher who lost school job after revealing he was in same sex relationship warns of impact of religious views’ (12 October 2018) *ABC News* (online) <https://www.abc.net.au/news/2018-10-12/gay-teacher-attacks-push-for-religious-school-discrimination/10365816>.

<sup>18</sup> See Renae Barker, ‘Pluralism versus Separation: Tension in the Australian Church State Relationship’ (2021) 16(1) *Religion and Human Rights* 1 – 40.