Victorian Equal Opportunity & Human Rights Commission

Submission to the Australian Law Reform Commission's Religious Educational Institutions and Anti-Discrimination Laws Inquiry

24 February 2023

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Australian Law Reform Commission
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(Submitted via website)

Dear Commissioners

Submission to the Australian Law Reform Commission's Religious Educational Institutions and Anti-Discrimination Laws Inquiry

The Victorian Equal Opportunity and Human Rights Commission (**the Commission**) was part of the Australian Law Reform Commission's (**ALRC's**) consultation on this issue and welcomes this subsequent opportunity to make a submission to the Inquiry.

As Victoria's independent statutory human rights authority, the Commission supports any move to end discrimination against LGBTQ+ students and staff, while also ensuring that religious educational institutions can operate in accordance with the doctrines, beliefs or principles of their religion where reasonable and appropriate to do so.

We firmly believe that this is not an either-or proposition.

Victoria's *Equal Opportunity Act 2010* (**EOA**) was amended in 2022 to ensure a fairer balance between the right to religious freedom and the right to be free from discrimination.

In the Commission's view, our recommendations in relation to the ALRC's proposals for reform would provide greater alignment between Victorian and federal discrimination frameworks as well as ensuring a more fair, safe and inclusive community where every person is respected and treated with dignity.

Proposals 1–5

Proposals 1 to 4 remove exceptions in the *Sex Discrimination Act 1984* (Cth) (**SDA**) that enable religious educational institutions to discriminate in relation to staff, students and the provision of accommodation. Similarly, Proposal 5 would amend the *Fair Work Act 2009* (Cth) (**FWA**) so that exceptions for religious bodies do not apply to educational institutions to ensure consistency between the SDA and the FWA.

The Commission welcomes these steps towards ensuring the rights of LGBTQ+ students and staff, and bringing federal laws up to the standard set by a majority of states and territories. We consider that religious educational institutions would still be able to hire and maintain a workforce that shares the religious doctrines and beliefs where it is proportionate and reasonable to do so.

Accordingly, the Commission supports Proposals 1, 2, 3, 4 and 5.

Proposal 6

Proposal 6 recommends that the SDA be amended to extend anti-discrimination protections to prohibit discrimination against students and prospective students on the grounds that a family member or carer of the student has a protected attribute.

The Commission welcomes this protection for students with family members or carers with protected attributes. However, limiting the protection to certain categories of relationships could still lead to a situation in which a student is discriminated against because of a personal association, for instance they are friends with a person with a protected attribute.

The ALRC noted that the broader protection provided in other states and territories may have merit but referred it to future consideration due to complexity. We consider that bringing federal law in line with state and territory laws is the most sensible way to avoid such complexity. This can be done by extending the protection to encompass the broader category of 'personal association' from the outset. This would bring the SDA in line with s 6(q) of the EOA, which protects a person from discrimination based on personal association (whether as a relative or otherwise) with another person who has a particular protected attribute.

Furthermore, the issue of personal association discrimination is not limited to students. A staff member may also be subject to unfair treatment on the grounds of the personal association. A staff member should be protected in this situation too.

Recommendations

Proposal 6 be amended to extend anti-discrimination protections to students, prospective students and staff who have a personal association with a person with a protected attribute.

Proposal 7

Proposal 7 recommends that the SDA is amended to clarify that the content of the curriculum is not subject to the Act.

The Commission queries whether Proposal 7 is a necessary and proportionate response to the issues of religious educational institutions being able to set the content of their curriculum.

The consultation paper notes that the issue of religious educational institutions being able to teach their religious beliefs 'does not, in practice, appear to have been an issue in states and territories that have long-standing protection on Sex Discrimination Act grounds for students and staff'. Indeed, the Commission is unaware of any complaints of religious educational institutions teaching curriculum in accordance with their doctrines or beliefs in Victoria.

The consultation paper also notes that 'the content of the curriculum is subject to requirements of state and territory educational authorities, which may include requirements around how curriculum in relation to sexuality or protected attributes is taught. Schools will also remain bound by their duty of care to students and staff, and other accreditation requirements.'

In Victoria, section 83 of the EOA ensures that any discriminatory material is directly related to the doctrines, beliefs or principles of the religion, and is a reasonable and proportionate means to teach that material.

Further, with no current protection from religious discrimination at a federal level, religious institutions already have the ability discriminate on the basis of religious belief or activity under federal law in the curriculum without the need to carve out protections on the basis of other attributes. For instance, a student of one religion attending an institution of a different religion currently has no legal protection from religious discrimination at a federal level.

While there is no evidence to suggest that religious educational institutions will be unable to set their curriculum in accordance with their doctrines and principles, we are concerned that Proposal 7 could instead have the unintended consequence of curriculum authorities no longer having obligations under the SDA as service providers and as administrators of Commonwealth laws and programs.

Recommendation

Remove Proposal 7.

Proposal 8

Proposal 8 recommends preferencing on the ground of religion in selection of employees in the FWA. Specifically, Proposal 8 suggests amending the FWA so that a term of a modern award or enterprise agreement does not discriminate merely because it gives more favourable treatment on the ground of religion to an employee of an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed where:

1. the treatment relates to the selection of employees;
2. participation of the employee in the teaching, observance or practice of religion is a genuine occupational requirement, having regard to the nature and ethos of the institution;
3. the treatment does not constitute discrimination on any other ground prohibited by ss 153(1) or 195(1), respectively; and
4. the treatment is proportionate in all the circumstances.

Proposal 8 seeks to implement Proposition C, which outlines that 'the nature and religious ethos of the educational institution should be taken into account in determining whether participation of the person in the teaching, observance, or practice of the religion is a genuine requirement of the role'.

As the ALRC has commented, Proposal 8 'would introduce greater complexity into what is already a complex relationship between anti-discrimination laws and the Fair Work Act, and introduce inconsistency between the treatment of religious educational institutions and other religiously-affiliated service providers'.

We agree that Proposal 8 would introduce greater complexity into these laws. We consider it preferable to avoid such complexity.

Religious ethos

The Commission is concerned that assessing the genuine occupational requirements of the role by reference to religious ethos opens it up to subjective interpretations of an institution's 'ethos', irrespective of whether this aligns with the school's particular religion or creed.

The ALRC's proposal explicitly draws on a provision in the Irish *Employment Equality Act 1998* (s 37(1)(b)) regarding the inclusion of an 'ethos' component of the test. 'Ethos' is not defined in Ireland's *Employment Equality Act 1998*, and the term does not have a long history of jurisprudence that is determinative of its scope. At the Act's inception, the term was considered by some in the Irish Senate to be particularly problematic due to its fluid meaning.[1] 'Ethos' is a broad concept, which has given rise to uncertainty in Ireland due to its ambiguous meaning.[2] The Supreme Court of Ireland has equated it with the 'general atmosphere' of a school.[3]

Victoria's comparative provision, by contrast, refers to the 'conformity with the doctrines, beliefs, or principles of the religion'.[4] This provides greater certainty by naming the elements of an overall 'ethos', which is a far broader and ambiguous term.

Inherent requirements versus genuine occupational requirements

The Commission considers that inherent requirements, which is the threshold under the religious exceptions in the EOA, is a preferable test to genuine occupational requirements as it provides a higher bar for religious institutions in allowing what would otherwise be discrimination to occur. The Commission considers that a higher test would be better able to strike a balance between protecting the privacy of employees of religious institutions and promoting their personal autonomy, while also ensuring religious schools and organisations can uphold their doctrines, beliefs and principles.

In *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, the High Court held that the 'inherent requirements' of a particular employment means 'something essential' to, or an 'essential element' of, a particular position. Gaudron J suggested that: 'A practical method of determining whether or not a requirement is an inherent requirement, in the ordinary sense of that expression, is to ask whether the position would be essentially the same if that requirement were dispensed with'.[5]

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[1] For instance, Senator David Norris, in a debate on the Irish legislation in 1998, referred to 'the huge battles we had in this House to tease out the meaning of the word "ethos"', Seanad Debates vol 157 col [246], 18 November 1998. NB: 'Seanad' is the Irish word for 'Senate'.

[2] Mark Coen, 'Religious ethos and employment equality: a comparative Irish perspective' Legal Studies Volume 28, Issue 3, p. 452–474, 2008.

[3] See page 26 of the Supreme Court case of *Campaign to Separate Church and State in Ireland Ltd and Jeremiah and Minister for Education* [1998] 3 IR 321: '… but the Constitution cannot protect him from being influenced, to some degree, by the religious "ethos" of the school. A religious denomination is not obliged to change the general atmosphere of its school merely to accommodate a child of a different religious persuasion who wishes to attend that school.' In Campaign to Separate Church and State in Ireland Ltd and Jeremiah [1998] 3 IR 321.

[4] S 83 of the *Equal Opportunity Act 2010* (Vic).

[5] *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, 295.

In the Victorian Civil and Administrative Tribunal case of *Davies v State of Victoria (Victoria Police)* [2000] VCAT 819, the Tribunal found that 'genuine and reasonable requirements of the employment' was a wider test than 'inherent requirements', covering the whole range of what a job requires to be done and not just the essential requirements.[6] This means, in a Victorian context at least, that the bar is higher for employers in establishing that a requirement is 'inherent' to the job, versus a genuine requirement.

Constitutional inconsistency

The Commission is concerned that Proposal 8 has the potential to impact the operation of the EOA if awards or enterprise agreements made in accordance with the proposed preferencing provision contain terms that allow conduct that may amount to discrimination under the Victorian framework.

In comparison, the EOA allows a religious educational institution to discriminate in hiring staff where:

a) conformity with the doctrines, beliefs or principles of the religion in accordance with which the educational institution is to be conducted is an inherent requirement of the position; and

b) the other person cannot meet that inherent requirement because of their religious belief or activity; and

c) the discrimination is reasonable and proportionate in the circumstances.

Given the Constitutional principle that Commonwealth laws override state laws, and modern awards and enterprise agreements have been interpreted by courts to be able to constitute Commonwealth laws, there is a significant risk that any discriminatory conduct authorised under any awards or enterprise agreements made following the proposed reforms to the FWA would limit the operation of the EOA and other state anti-discrimination laws.

It may be possible to guard against the impact on state anti-discrimination laws if a caveat were placed on the proposed exceptions to discriminatory terms in awards and enterprise agreements that made it clear it does not intend to override state and territory discrimination laws (similar to the provision in s351(2)(a) of the FWA). However, this may compound an already complex system, and express provisions are not a guaranteed way of mitigating constitutional inconsistencies.[7]

The preferred approach is to bring the proposed wording into line with best practice state and territory laws, such as section 83A of the EOA.

Observance or practice

There is an issue of ambiguity of the phrase 'participation of the employee in the teaching, observance or practice of religion is a genuine occupational requirement'. The addition of the words 'observance or practice' creates an extremely broad interpretation of when this discriminatory selection of staff would be allowed, and may include personal adherence to the religion in situations that do not relate to teaching.

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[6] *Davies v State of Victoria (Victoria Police)* [2000] VCAT 819, 12.
[7] See Mason J in *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545 [29].

This would not be in line with inherent or genuine occupational requirements of the role.

The Commission considers that it would be sufficient to limit this exception to selection of staff members where it is an inherent requirement of a role that includes teaching of the institution's religion.

Recommendations

Amend Proposal 8 to align with the test in section 83A of the Equal Opportunity Act and restrict the operation of Proposal 8 to the Fair Work Act, making it clear that the changes do not over-ride state anti-discrimination laws. This could be done by amending s 153(2) of the Fair Work Act to clarify that the provision 'does not authorise discrimination that is unlawful under any anti-discrimination law in force in the place where the action is taken[8]'.

Proposal 9

Proposal 9 recommends allowing termination related to religion in some circumstances under the FWA. Termination would be allowed where:

1. the termination is necessary to prevent an employee from actively undermining the ethos of the institution;
2. the treatment does not constitute discrimination on any other ground prohibited by ss 153(1) or 195(1), respectively; and
3. the termination is proportionate to the conduct of the employee – including by reference to:
    a. the damage caused to the ethos of the educational institution;
    b. the genuine occupational requirements of the role, having regard to the nature and ethos of the educational institution;
    c. alternative action the employer could instead reasonably take in the circumstances;
    d. the consequences of termination for the employee; and
    e. the employee's right to privacy.

The intention of Proposal 9 in relation to section 772 of the FWA appears to be to add an exception to the protection contained in that section of the FWA, which protects against termination on certain grounds. Therefore, it would not directly impact the EOA. However, in relation to the proposed changes to sections 153 and 195 of the FWA, this proposal could pose similar constitutional issues as outlined under our discussion of Proposal 8 if it authorised conduct that would amount to discrimination under the EOA. Therefore, we consider it necessary that an amendment to the FWA makes it clear that this exception does not override state laws.

Further, Proposal 9 includes a proportionality assessment in reference to 'damage caused to the ethos of the educational institution' which, for the reasons stipulated above, does not provide certainty. 'Ethos' is a broad term that is not easily defined, which also makes it difficult to determine when behaviour or religious belief can be said to be damaging.

[8] Based on section 351(2)(a) of the *Fair Work Act 2009*.

Once again, the Commission considers that the wording of Proposal 9 is out of step with current tests contained in the FWA, as well as state and territory anti-discrimination laws. Bringing the test in line with section 83A of the EOA would simplify the amendments.

Recommendations

Amend Proposal 9 to align with the test in section 83A of the Equal Opportunity Act and restrict the operation of Proposal 9 to the Fair Work Act, making it clear that the changes do not over-ride state anti-discrimination laws by amending s 153(2) of the Fair Work Act as outlined under the recommendation in Proposal 8.

Proposal 10

Proposal 10 recommends exceptions for religious educational institutions in future legislation. Specifically, it is proposed that, subject to limitations on such exceptions contained in Proposals 8 and 9, religious educational institutions should be allowed to operate in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed to:

1. give more favourable treatment to an employee or prospective employee (and contract worker or prospective contract worker) on the ground of religion in relation to selection; and
2. take action that is reasonably necessary to prevent an employee or contract worker from actively undermining the ethos of the institution.

As outlined in our discussion for Proposals 8 and 9, we consider it necessary for any amendment to the FWA to specify that it does not override state laws. Furthermore, the wording of any future exceptions should be in line with the FWA, as well as best practice state and federal discrimination laws.

Recommendations

Amend Proposal 10 to align with the test in section 83A of the Equal Opportunity Act and also make clear that this is an addition to s 772 of the Fair Work Act and does not apply to state laws.

Proposal 11

Proposal 11 recommends that the *Australian Human Rights Commission Act 1986* (Cth) should be amended so that religious educational institutions are subject to the Act.

This would allow the Australian Human Rights Commission (**AHRC**) to monitor unlawful discrimination, including individual acts of discrimination or systemic issues.

We support the AHRC having powers in relation to religious educational institutions.

Proposals 12–14

Proposals 12–14 relate to functions of the AHRC, guidance to assist educational institution administrators and the public, and consultation and consultation for further reforms to simplify and strengthen Commonwealth anti-discrimination law.

Although these proposals would occur after the current legislative changes, the Commission agrees in principle.

The Commission welcomes the opportunity to contribute to the ALRC's consideration of these important issues.

If you would like to discuss any of these points further, please contact me at [redacted]

Yours sincerely

[redacted]

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Victorian Equal Opportunity & Human Rights Commission

Contact us

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