

24 February 2022

Proper Officer
Australian Law Reform Commission
PO Box 12953
George Street Post Shop Queensland 4003
By email only: antidiscriminationlaw@alrc.gov.au

Dear Proper Officer,

Re: Submission on the Religious Educational Institutions and Anti-Discrimination Laws: Consultation Paper (2023)

We welcome the opportunity to make a submission on the Religious Educational Institutions and Anti-Discrimination Laws: Consultation Paper (2023) (the **Paper**). We consent to this submission being published. For all case studies in this submission, names and identifying information have been changed to protect confidentiality.

About Kingsford Legal Centre

Kingsford Legal Centre (KLC) is a community legal centre, providing free legal advice, casework, and community legal education to people in south-east Sydney. We specialise in discrimination law and run a state-wide Discrimination Law Clinic. In 2022, we gave 189 discrimination advices and provided intensive assistance with 60 discrimination matters.

KLC also has a specialist Employment Law Clinic (ERLS) and Sexual Harassment Legal Service Clinic (SHLS). These clinics provide free legal help and assistance to migrant workers and other vulnerable workers experiencing social and economic disadvantage in NSW. Our ERLS is a collaborative partnership between KLC, Inner City Legal Centre and Redfern Legal Centre.

KLC is part of the UNSW Sydney Faculty of Law & Justice and provides clinical legal education to over 500 of its students each year. We have been part of the south-east Sydney community since July 1981.

Due to time constraints, we have focused on key aspects in relation to the Paper.

Key concerns and recommendations

1. Need for a National Human Rights Act in Australia

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KLC has long supported the need for federal laws that protect persons from religious discrimination for people of diverse religions and no religion. However, we argue that this must be done in conjunction with Australia legislating a comprehensive, integrated federal human rights act. Australia's leading NGOs and community legal centres have been calling for this for many years.¹ The necessity for this is particularly demonstrated by Australia's long and complex history of attempting to create federal laws to prohibit discrimination on the basis of religion.

KLC, like many other legal centres, has made numerous submissions on proposed federal religious discrimination bills. In recent years, these have included our letters in 2021 on the Religious Discrimination Bill 2021, submission on the Anti-Discrimination Amendment (Religious Freedom and Equality) Bill 2020, submission on the Religious Freedom Bills – Second Exposure Draft, and submission on the Religious Freedom Bills – First Exposure Draft.² Each parliamentary process has been criticised for failing to look at human rights collectively in Australia, and in particular the rights of LGBTQIA+ people, women, and people with disabilities.

The nature and scope of prohibitions on discrimination on religious grounds is a complex area of law that requires an integrated approach. This is especially the case given that a number of issues in relation to protecting freedom of religion, raise issues of how to balance competing human rights in Australia. Until Australia adopts a federal human rights act that looks at human rights holistically and includes mechanisms to assess competing rights (such as proportionality tests), Australia will continue to struggle to effectively legislate to protect a range of human rights in Australia, including freedom of religion.

Recommendation 1: Australia must enact a federal human rights act that comprehensively recognises human rights in Australia and includes mechanisms for balancing competing rights.

2. Prohibit all forms of discrimination against students in religious educational institutions

The United Nations Convention on the Rights of the Child unambiguously provides that States Parties to the Convention, such as Australia, must respect and ensure the rights of children, including the right to education³, without discrimination “of any kind.”⁴ The Committee on the Convention on the Rights

¹ See most recently, Joint NGO Submission on behalf of the Australian NGO Coalition (April 2020), Australia's 3rd Universal Periodic Review, 3.

² These submissions are all publicly available on our website: <https://www.klc.unsw.edu.au/publications/law-reform-submissions>.

³ Article 28.

⁴ Article 2(1).

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of the Child has stressed that “discrimination on the basis of any ground” listed in the Convention “offends the human dignity of the child and is capable of undermining or even destroying the capacity of the child to benefit from educational opportunities.”⁵

At present, section 38(3) of the *Sex Discrimination Act 1984* (Cth) (the SDA) provides that it is not unlawful for an educational authority in Australia 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 if the discrimination is “in good faith” and “in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.”

There is no compelling justification for this under international law or domestic law. Religious educational institutions should not be able to discriminate against students (current or prospective) on the basis of any protected attribute, but in particular because of their sexual orientation, gender identity, marital or relationship status, pregnancy or on the grounds that a family member or carer has one of those attributes. No child should experience discrimination because of their identity or any aspect of it, including in the form of being refused admission into a school, being expelled from a school, or being denied any opportunities or benefits at school. In addition to there being no legal justification for this treatment, excluding children from educational institutions or their benefits because of their background and identity can be profoundly harmful to them.

Anil's story

Anil and his family are Sikh. Anil went with his parents to enrol at their local catholic religious school. Anil liked the school and was looking forward to applying. When his parents picked up the application form from the school, they were told that Anil would not be admitted to the school because of his head covering (his Patka). They said Anil would need to cut his hair and remove his Patka in order to be admitted into the school. Anil was excluded from his local school and became nervous about applying to other schools in his area for fear of rejection. KLC assisted Anil and his family with lodging a discrimination complaint.*

**Name changed to protect confidentiality.*

Further, we submit that having students of all backgrounds and identities in religious educational institutions is necessary to promote the rights of all

⁵ Committee on the Convention on the Rights of the Child, *General Comment No 1(2001): Article 29(1): The Aims of Education*, [10].

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students, including the right of children to develop respect for human rights,⁶ their cultural identity⁷ and to be prepared for responsible life in a free society.⁸

We support the recommendation of the Paper on this issue, which recommends the removal of section 38(3) of the SDA.

Recommendation 2: section 38(3) of the SDA should be repealed. Federal discrimination laws must ensure that children cannot be discriminated against by religious educational institutions on the basis of any protected attribute, including their sexual orientation, gender identity, marital or relationship status or pregnancy.

3. Prohibit all forms of discrimination against teachers and other school staff in religious educational institutions

Federal discrimination laws must also be revised to prohibit all forms of discrimination against teachers and other staff in religious schools. At present, section 38(1) and (2) of the SDA makes it not unlawful for an educational institution to discriminate against employees on the basis of their sex, sexual orientation, gender identity, marital or relationship status or pregnancy if this is done “in accordance with the “doctrines” of a religion in order to avoid “injury to the religious susceptibilities of adherents of that religion.” This section applies only in terms of appointment of staff and their dismissal.

Sections 38(1) and (2) are outdated. They are not maintainable in an Australian society that is committed to equality, diversity and inclusion and fostering these values in all children and adolescents. They are also profoundly harmful, enabling situations where employees may have to conceal their identity or aspects of it at work for fear of not getting a job or being dismissed. In addition to violating fundamental principles of international human rights law (freedom of expression, equality)⁹, this can also lead to work, health, and safety risks, with the potential of profound psychological harm to employees who have to hide their protected attributes at work in order to avoid discrimination. Religious educational institutions should not be allowed to discriminate against any staff (current or prospective) on any grounds, including sex, sexual orientation, gender identity, marital or relationship status, or pregnancy.

We support the recommendation of the Paper on this issue, which recommends the removal of sections 38(1) and (2) of the SDA.

⁶ Article 29(1)(b)

⁷ Article 29(1)(c).

⁸ Article 29(1)(d).

⁹ For example, see International Covenant on Civil and Political Rights, articles 19, 26.

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Recommendation 3: section 38(1) and (2) of the Sex Discrimination Act 1984 (Cth) should be repealed. Federal discrimination laws must ensure that teachers and other staff cannot be discriminated against by religious educational institutions on the basis of any protected attribute, including their sexual orientation, gender identity, marital or relationship status or pregnancy.

4. Issues with proposal for preferential treatment of prospective staff on religious grounds

The Consultation Paper proposes that federal law is reformed to enable religious educational institutions to continue to give preference to prospective staff on religious grounds. Specifically, the Paper says that religious educational institutions should be able to preference staff based on the staff member's religious belief where:

- Participation of the person in the teaching, observance or practice of the religion is a genuine requirement of the role.
- The differential treatment is proportionate to the objective of upholding the religious ethos of the institution; and
- The criteria for preferencing in relation to religion or belief would not amount to discrimination on another prohibited ground.¹⁰

We are concerned about a number of issues with the proposal. First, we are concerned about the legal justification for preferencing workers based on their faith. Religious educational institutions should be able to select people of the same faith as their institution in hiring decisions when this is an inherent requirement of a role. This is an established notion in discrimination laws. However, we do not see any justification for any preferencing system beyond this. There are no other comparable exceptions for other protected attributes for prospective jobs. For example, federal discrimination laws do not enable employers to preference job applicants based on disability (unless they are relying on an inherent requirement exception or doing so as a special measure).

Second, an issue arises as to how prospective employees will be able to determine that the preferential treatment was on the basis of faith, and not another protected attribute. This issue is noted in the Consultation Paper, which says the preferencing should not amount to discrimination on another prohibited ground.¹¹ This is a complex issue in the context of discrimination laws generally already, but this kind of reform may create further issues in relation to protecting job applicants from unlawful discrimination.

¹⁰ Consultation Paper, p. 22

¹¹ Ibid.

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Finally, the concept of ‘proportionate preferential treatment’ is unclear and potentially confusing. For example, a question arises as to what ‘proportionate preferential treatment’ involves where there are two candidates with very different qualifications and experiences, and the person most qualified and experienced is not of the same faith as the religious educational institution. For instance, would it be proportionate to reject a candidate with a PhD in education over a candidate with no postgraduate qualifications because the candidate with no postgraduate qualifications was of the same faith as the religion of the educational institution? Rohan’s story raises this issue.

Rohan’s story

Rohan was a temporary teacher at a Catholic school. He was not religious and did not attend mass. Other staff made negative comments about this. Rohan missed out on a permanent teaching opportunity. He believes this was due to religious discrimination, as the teacher who got the job was Catholic. The school was also enforcing policies, such as the dress code, very strictly against Rohan, while not enforcing the policies at all against other employees. Rohan was far more qualified and had more teaching experience than the teacher that got the permanent teaching opportunity.

**Name changed to protect confidentiality.*

While we are unconvinced of the legal rationale to enable preferential treatment to job applicants based on their faith (separate to the inherent requirements exception/special measures processes), if the government seeks to adopt this approach in law, there must be clear legislative restrictions on this. If the federal government wishes to extend the preferencing exception for roles in educational institutions where a particular faith is not an inherent requirement, there must be legislative clarity on what “preferencing in good faith” would mean.

For example, there should be a legislative provision that creates a clear proportionality test, requiring consideration to be had to the qualifications, training, experience, and situation of prospective job applicants. We note that the Australian Discrimination Law Experts Group has raised this issue in their submission to this Inquiry. They argue that any preferencing of job applicants based on their faith must be in accordance with “objective measurements to ensure the test is not vulnerable to misuse”, such as a “reasonable and proportionate” test.¹² This test could include a comprehensive list of factors to

¹² Submission of the Australian Discrimination Law Experts Group in Response to the Australian Law Reform Commission’s Inquiry into Religious Educational Institutions and Anti-Discrimination Laws (17 February 2023) pp. 24-25.

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consider.¹³ It could also take into account the impact of not hiring a person based on their faith position, such as where there may be limited employment opportunities in regional and remote areas.¹⁴

Recommendation 4: At present, the SDA should only enable religious educational institutions to preference people of the same faith in hiring decisions when this is an inherent requirement of a role.

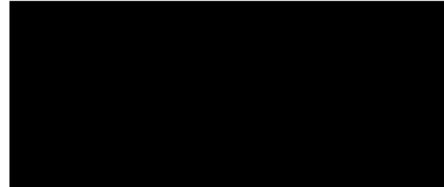
If you have any questions about this submission, please contact Emma Golledge at legal@unsw.edu.au.

Yours faithfully

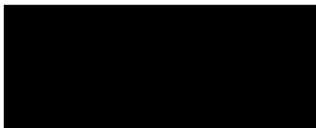
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¹³ Ibid.

¹⁴ Ibid 25.