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Australia



24 February 2023

Religious Educational Institutions and Anti-Discrimination Laws
Australian Law Reform Commission

PO Box 12953

George Street Post Shop

Queensland 4003

Email: antidiscriminationlaw@alrc.gov.au

Dear Commissioner

Re: Consultation paper on Religious Educational Institutions and Anti-Discrimination Laws

The Executive Council of Australian Jewry (ECAJ), the elected peak national body of the Australian Jewish community, makes the following submission in response to the Australian Law Reform Commission's [*Religious Educational Institutions and Anti-Discrimination Laws: Consultation Paper*](#) (2023). (ALRC CP). We consent to this submission being made public.

We have had the benefit of reading a draft of the submission made by the Australian Council of Jewish Schools (ACJS), which represents 18 Jewish schools throughout Australia and also a community organisation that provides Hebrew language and Jewish studies for Jewish students in government schools. As noted in the ACJS submission, Jewish schools vary significantly in their approach to religion, culture, and ethos as well as their definition of being Jewish. On specific issues arising out of the ALRC CP, different Jewish schools hold different views, as reflected in the ACJS submission.

The purpose of this submission is partly to provide support for the freedom of each Jewish school to continue to operate in accordance with its ethos, as advocated by the ACJS, subject to the prohibition against discriminating against anyone on account of their sexual orientation, biological sex, marital or relationship status or pregnancy, or any other protected attribute under current Federal anti-discrimination law.

Another purpose of this submission is to comment on issues raised by the ALRC CP which potentially have implications for the freedom of operation of religious institutions more generally, particularly in anticipation of the introduction of a Religious Discrimination Bill, which has been foreshadowed by the Federal government.

Executive Summary

In addition to teaching prescribed curricula, religious education institutions provide teaching and other activities which seek to instill religious, ethical, moral and cultural values in students and demonstrate to them what a life lived in accordance with the religious ethos of the institution looks and feels like in practice, both from a personal standpoint and in community with others.

To remain true to their ethos, certain religious education institutions have had, and need to continue to have, the freedom to give preference in enrolment to students who share their ethos; to operate as a same-sex student institution, or maintain separate campuses for different genders¹; to segregate students by gender, with a teacher of the same gender, in circumstances in which this is a good faith requirement of the institution's religious ethos; to give preference in the selection or appointment of staff who share the ethos of the institution; and to take action to prevent any staff member from behaving in a manner, otherwise than in private, that is regarded in good faith as undermining the institution's religious ethos, including in the delivery of the institution's curriculum.

There are proper limits to these freedoms, as there are to all freedoms, particularly so as to exclude discrimination against anyone on account of their sexual orientation, gender identity, marital or relationship status or pregnancy, or any other protected attribute under current Federal anti-discrimination law.

The ALRC CP implicitly acknowledges that the teaching and modelling of religious beliefs does not necessitate practising discrimination against people on account of such attributes. Yet some of the restrictions it proposes on the freedom of operation of religious educational institutions go beyond what is necessary to protect people against such discrimination, and should therefore be reformulated.

Preferencing enrolment of students on the grounds of the student's religion

In providing their services, most charitable Jewish institutions have a stated policy of giving priority to meeting the needs of members of the Jewish community, including their religious and cultural needs, which cannot adequately be met by institutions in the wider community. Consequently, students enrolled at Jewish schools are mostly, and in some cases, exclusively, Jewish. The definition of who is Jewish is determined by Jewish religious law, with the Orthodox and Progressive streams of Judaism having different interpretations.

This policy and practice does not in any way entail discrimination against students or prospective students on any of the grounds prohibited by the *Sex Discrimination Act*, or indeed by any other Federal anti-discrimination law.

Under Proposition A in the ALRC CP, "*a religious school could continue to preference students on the grounds of the student's religion, as long as this did not amount to discrimination on the Sex*

¹ The expression "gender" in this submission means "biological sex".

*Discrimination Act grounds*², but it appears that this would only continue to be the case as long as discrimination against students or prospective students on the grounds of religion or belief is not prohibited under Commonwealth law.

Any future Commonwealth legislation to prohibit discrimination on the ground of religion or belief would therefore need to make express provision to allow religious education institutions to continue to give preference to the enrolment of students on the grounds of the student's religion.

Recommendation 1

Any future Commonwealth legislation to prohibit discrimination on the ground of religion or belief should make express provision to allow religious education institutions to continue to give preference to the enrolment of students on the grounds of the student's religion.

Same sex schools

Proposition A relates to discrimination against students on the grounds of sexual orientation, gender identity, marital or relationships status, or pregnancy. Paragraph 2 relevantly states: "*Religious educational institutions should be permitted to...regulate participation in religious observances or practices, unfettered by sex discrimination laws.*"³ An almost identical recommendation is made in paragraph 2 of Proposition B, which relates to discrimination against staff on the grounds of sex, sexual orientation, gender identity, marital or relationships status, or pregnancy.⁴

A corollary of Proposition A.2 is that the ALRC CP does not propose that any amendment be made to ss. 21(3) of the *Sex Discrimination Act*, and acknowledges that religious (and non-religious) educational institutions which are single-sex institutions would therefore continue to have the freedom to operate in that way, even though this entails discrimination against prospective students on the grounds of sex in relation to enrolment.⁵

We commend this approach. Although almost all Jewish educational institutions do not operate on a single sex basis, there are a small number of exceptions. Some Jewish schools, although registered as co-educational, segregate the genders by campus or by class for all activities, whether related to secular education or Jewish religious instruction. This is done in accordance with their religious beliefs and observances, including beliefs about the need for modesty in matters concerning human sexuality and relationships. In effect they operate separate single sex schools, and through each of their campuses cater to all genders. . We agree with the policy reasons stated in the ALRC CP in support of the recommendation that schools which operate as single-sex schools should be free to continue to do so. For the same policy reasons, this freedom should continue to extend to religious schools which operate more than one gender-segregated campus, provided that through all of their campuses they cater to all genders.

² ALRC CP, para 48, final example given at p.21.

³ ALRC CP p.17, para 45.

⁴ ALRC CP p. 22, para 55.

⁵ ALRC CP p. 29, para 75.

Recommendation 2

The freedom of religious education institutions to operate on a same-sex basis should continue to be extended to any such institution which operates more than one gender-segregated campus, provided that through all of its campuses it caters to all genders.

Sex-segregated classes within non-single-sex religious educational institutions

Another corollary of Proposition A.2 is that “*a school could continue to segregate students by sex for participation in prayers*”.⁶ Similarly, it is a corollary of Proposition B.2 that “*a school could continue to segregate staff by sex for participation in prayers*”.⁷

Sex segregation during religious services is a requirement of Jewish religious law, as interpreted by the entire Orthodox stream of Judaism. It is therefore essential for educational institutions which have an Orthodox Jewish ethos to continue to be free to segregate students and staff by sex during religious services. Without that freedom, such institutions would in effect be precluded from conducting religious services. In our view, this would be an unwarrantable limitation on their right to manifest a religious belief and to operate according to their ethos.

A small number of Jewish education institutions aligned with some sub-streams of Orthodox Judaism which do not operate on a single-sex basis also currently segregate students by sex in a limited number of other circumstances.

Such institutions might, for example, regard classes allocated for the study of religious texts that are sacred to Judaism as an activity that is equivalent to the holding of a religious service, and therefore require students to be segregated by gender, and taught by a teacher of the same gender.

Another example of when this might be required is during sex education classes. In this case the segregation of students by gender with a teacher of the same gender is done for reasons of modesty in matters concerning human sexuality and relationships, in accordance with the institution’s religious ethos.

It would be strongly argued on behalf of the institution that these practices do ***not*** result in any student or staff member being treated less favourably than others on any of the *Sex Discrimination Act* grounds. Nevertheless, the clear implication in the ALRC CP is that segregation of students by gender, with a teacher of the same gender, for participation in anything other than “prayers” should be unlawful. We respectfully disagree. Propositions A and B should be amended so as to permit religious education institutions to segregate students by gender, with a teacher of the same gender, in circumstances in which this is in good faith required by the institution’s religious ethos.

⁶ ALRC CP, p. 20, para 48, fifth example.

⁷ ALRC CP p.23, para 54, third example.

Recommendation 3

Propositions A and B should be amended so as to permit religious education institutions to segregate students by gender, with a teacher of the same gender, in circumstances in which this is in good faith required by the institution's religious ethos.

Preferencing in the selection or appointment of staff on the basis of religious belief and activity

Proposition C of the ALRC CP⁸ would allow religious education institutions, in employing, selecting and promoting staff, to give preference to staff on the basis of the staff member's religious belief or activity, but this would be subject to the fulfilment of three conditions:

- “* participation of the person in the teaching, observance, or practice of the religion is a genuine requirement of the role...[taking into account] the nature and religious ethos of the educational institution;*
- * 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 (such as sex, sexual orientation, gender identity, marital or relationship status, or pregnancy), if applied to a person with the relevant attribute.”*

The ALRC CP puts forward Proposal 8 (amendments to the *Fair Work Act (Cth)*)⁹ and Proposal 10 (recommendations for any future legislation to prohibit discrimination on the basis of religious belief or activity)¹⁰ which are intended to give effect to Proposition C.

We have no difficulty with the second and third conditions in Proposition C. In fact, we would have no objection if the third condition was expanded in scope so as to exclude preferencing that amounts to discrimination under any other Commonwealth anti-discrimination law (other than a future Commonwealth Religious Discrimination law).¹¹

We do, however, object to the first condition in Proposition C. In our view it would constitute too restrictive a limitation on the freedom of religious education institutions to employ and select staff on the basis of the staff member's religious belief or activity, and would go beyond what is necessary to protect staff from being discriminated against on the basis of personal attributes such as race, sex, disability or age. It is a limitation that is neither referred to nor called for by the third limb of the Terms of Reference given to the ALRC.

Religious education institutions in Australia have until now been free to give preference to engaging staff who share the religious ethos of the institution. This freedom has never been limited to staff

⁸ ALRC CP p.22

⁹ ALRC CP p.33

¹⁰ ALRC CP p. 35

¹¹ The ALRC CP itself canvasses this possibility in note 78.

whose roles involve the teaching, observance, or practice of those faiths and beliefs. It has applied to all staff generally.

The exercise of this freedom has not required, and does not require, a religious education institution to discriminate against teachers or other staff, or prospective staff, on the basis of any other personal attribute, including their known or presumed sexual orientation, gender identity, marital or relationship status or pregnancy.

Proposition C would allow a religious education institution to give more favourable treatment on the ground of religion in engaging staff or prospective staff, as long as this treatment does not amount to discrimination on another currently prohibited ground. If this was the formulation proposed for *any* employees of the school we would have no objection. Our objection arises only because the proposal is limited to employees whose “*participation in the teaching, observance or practice of religion is a genuine occupational requirement...[taking into account] the nature and ethos of the institution*”.

The effect of this limitation in our view would be that the law would compel religious education institutions to engage staff who may not share or support the religious ethos of the institution, even if declining to engage them would not involve discrimination against them on the basis of their sexual orientation, gender, gender identity, marital or relationship status or pregnancy, or on the basis of any other attribute protected under current Commonwealth anti-discrimination law.

If discrimination on the basis of a protected attribute is to be excluded from the school’s freedom to preference on the basis of religious belief, then confining that freedom to the engagement of a limited class of employees would in our view go beyond what is necessary and proportionate to protect the fundamental rights of others, and would thus be contrary to international law.¹²

The ALRC CP seeks to justify its approach as follows:

“However, preferencing staff on the grounds of religion disadvantages those who are not of the same religion, and can have particular impacts on those from minority religious communities, so such preferencing must be justified as reasonable, entailing consideration of proportionality. In the context of employment by religious institutions, such preferencing is generally considered

¹² Article 18(3) of the [International Covenant on Civil and Political Rights](#) (ICCPR), 999 *UN Treaty Series* 171 (entered into force 23 March 1976) permits limitations on the manifestation of religious belief and activity only to the extent that it is “*necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others*”. In clarifying what “necessary” means in this context, the [Religious Freedom Review Report](#) in 2018 recommended that: “*Commonwealth, State and Territory governments should have regard to the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights when drafting laws that would limit the right to freedom of religion.*” (Recommendation 2). The [Siracusa Principles](#) (UN Commission on Human Rights, 28 September 1984, E/CN.4/1985/4) stipulate that whenever a limitation to a right, including the right to freedom of thought, conscience and religion, is required by the ICCPR to be “necessary,” the limitation must *inter alia* respond to a pressing public or social need, pursue a legitimate aim and be proportionate to that aim (Principle #10), and the limitation must “*use no more restrictive means than are required for the achievement of the purpose of the limitation*” (Principle #11). As to the meaning of “fundamental rights and freedoms”, Principle #69 of the Siracusa Principles indicates that the expression is intended to have a restricted meaning, and is possibly limited to rights that protect the physical life, bodily integrity and freedom from servitude or arbitrary imprisonment of the individual. Despite Principle 2 in the ALRC CP (p.9) which asserts that all “*human rights are fundamentally important*”, the ALRC CP appears to prioritise other rights over the right to manifest one’s religious beliefs, and those other rights are not those which the Siracusa Principles would recognise as “fundamental rights”.

reasonable where a job has explicitly religious or doctrinal content. In these circumstances, the religious grounds for preferencing can be seen as a 'genuine occupational qualification' for the role."¹³

The rationale for the assertion that preferencing staff on the grounds of religion should only be permitted where a job has explicitly religious or doctrinal content is stated to be that such work is better or preferably done by someone who is of that religion, for reasons that can include modesty, empathy, or authenticity.¹⁴

Yet a vital part of the “work” done by professional educators at a religious education institution, and other staff, is to model the values of the institution and instil them in its students. This is so whether or not their job at the institution includes explicitly religious or doctrinal content. The work is better or preferably done by staff who share the religious beliefs that are at the core of the institution’s ethos, for precisely the same reasons of empathy or authenticity. Such staff will have a personal, and not only a professional, commitment to modelling and instilling the values of the institution in its students. For the same reasons that apply with regard to staff whose duties include teaching religious or doctrinal content, the potential disadvantage to staff or prospective staff who do not share the religious ethos of the institution is neither unreasonable nor disproportionate.¹⁵

Giving preference to the engagement of persons who share the ethos of the religious education institution is consistent with the interpretation of Article 18 of the ICCPR by the UN Human Rights Committee:

*“Finally, the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.”*¹⁶

It is implicit in this passage that differentiation of treatment by the institution between those who share its religious ethos and those who do not, need not necessarily be the most appropriate means of achieving the purpose (the modelling and instilling of religious values). It is sufficient if the criteria for the differentiation are a reasonable and objective way of achieving the purpose.

The dynamics of all education institutions, both inside and outside formal learning environments, involve more than imparting intellectual knowledge. Consciously or unconsciously, students start to develop a sense of their place and purpose in the world, and to choose the values according to which they wish to live their lives.

¹³ ALRC CP p.23 para 57

¹⁴ ALRC CP, note 83, citing Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination Law and Equal Opportunity Law* (The Federation Press, 3rd ed, 2018) 576.

¹⁵ For a fuller discussion of the relevant principles, see the judgment in *Siebenhaar v Germany* (2011) European Court of Human Rights Application no 18136/02, cited and analysed by Adjunct Associate Professor Mark Fowler, ‘[The Position of Religious Schools under International Human Rights Law by Mark Fowler :: SSRN](#)’, (2023), *The Australian Journal of Law and Religion* (forthcoming), pp. 12-16.

¹⁶ Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, [U.N. Doc. HRI/GEN/1/Rev.1 at 26 \(1994\)](#), para 23.

This is why, in addition to teaching the prescribed curriculum, religious education institutions provide religious activities which seek to demonstrate to students what a life lived in accordance with the relevant religion looks and feels like in practice, both from a personal standpoint and in community with others. Having teachers and other staff at a religious education institution who can participate in these activities as part of a faith community, whether these staff are engaged in the teaching, observance, or practice of the religion or not, helps to fulfil the institution’s religious purpose, and to develop an understanding by students that religion is not merely an adjunct to their core activities at the institution and in later life, but an integral part of them. Giving preference to the engagement of persons who share the ethos of the religious education institution is therefore a reasonable and objective way of fulfilling that ethos, as is the case, by analogy, when political parties, including those with a religious ideology, give preference to employing people who share the party’s ideology.

The modelling and instilling of religious values is also among the reasons why many parents choose to send their children to religious schools. The right of parents to do so is enshrined in international law.¹⁷ Despite paying lip service to the importance of all human rights, and rejecting any notion of a hierarchy of rights, the ALRC proposals would place unnecessary and unreasonable restrictions on the freedom of religious schools to give effect to the international human right of parents and guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Even though Jewish schools in Australia do not in practice give preference to engaging Jewish staff,¹⁸ we have supported the freedom of religious education institutions to preference the engagement of staff on the ground of religion, when there is no discrimination on the basis of any other protected attribute, because it is an aspect of religious freedom that is affirmed in international law.¹⁹ We have taken the view that the erosion of any such freedom hitherto enjoyed in Australia, especially one as fundamental as the freedom to manifest one’s religion, is undesirable in principle, even if religious education institutions in our particular community do not in practice exercise that freedom.

We also believe that the first condition proposed by Proposition C in the ALRC CP as to when religious preferencing will be permitted would introduce a test (“*a genuine requirement of the role*”) which is novel. In the event of a dispute, the onus would likely be placed on the religious education institution to prove that the test is satisfied. In our view this would almost certainly give rise to litigation, and would place a harsh and unfair burden on religious education institutions in terms of their time and resources.

Recommendation 4

Delete the first of the three conditions in Proposition C and make consequential amendments to Proposals 8 and 10.

¹⁷ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 *UN Treaty Series* 171 (entered into force 23 March 1976) art 18(4)

¹⁸ One of the reasons for this is that the Jewish community is too small numerically to make such a practice viable.

¹⁹ See Note 12 above.

Codes of conduct

Proposition D of the ALRC CP²⁰ recommends that religious education institutions should continue to be free to impose certain requirements on all staff to respect the religious ethos of the institution where they work. However, Proposition D would limit this freedom in at least two ways.

Firstly, the institution would only be entitled to prevent a staff member from *actively undermining* the institution's ethos.²¹ This limitation is inconsistent with a central purpose of many, if not all, religious education institutions which, as previously noted, is to model the religious values of the institution and instil them in its students. Nothing could be more destructive of this purpose than for a staff member to pay lip service to the values and ethos of the institution while behaving, otherwise than in private,²² in a way that is contrary to them. Yet such conduct might not meet the test of "actively" undermining the ethos of the institution.

A better test in our view would be to entitle the institution to take action to prevent any staff member from behaving in a manner, otherwise than in private, which a reasonable person would regard as undermining the institution's ethos. With this test, the "undermining" would be prohibited even if it were done in subtle way that a court might not consider to be "active", but in any particular case the institution would need to give its reasons for regarding the behaviour as undermining its ethos, and the reasons could not be capricious. This wider, albeit not unlimited, latitude to protect its ethos, would help to mitigate any remaining reservations an institution might have about hiring staff with personal attributes that appear to depart from the institution's ethos.

Recommendation 5

Amend the second sentence of paragraph 1 of Proposition D as follows:

"A religious educational institution should be able to take action to prevent any staff member from actively behaving in a manner, otherwise than in private, that a reasonable person would regard as undermining the institutional ethos of their employer."

Secondly, the ALRC CP recommends that respect for an educational institution's ethos and codes of conduct or behaviour should not require employees "*to hide their sex, sexual orientation, gender identity, marital or relationship status, or pregnancy in connection with work or in private life, or to refrain from supporting another person with these attributes.*"²³

²⁰ p. 25

²¹ ALRC CP, Proposition D, paragraph 1.

²² The expression "otherwise than in private" is used in subsection 18C(1) of the *Racial Discrimination Act 1975* (Cth). Subsection (2) provides: "...an act is taken not to be done in private if it (a) causes words, sounds, images or writing to be communicated to the public; or (b) is done in a public place; or (c) is done in the sight or hearing of people who are in a public place." A public place "includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place" (s.18C(3) of the RDA).

²³ ALRC CP, Proposition D, paragraph 3.

Whilst we agree that no employee should feel compelled to lead a double life, this formulation in our view is too wide. In order to sustain their ethos, many religious education institutions need to continue to be free to enforce rules of conduct on all staff, and also students, which require them to behave, otherwise than in private, with modesty in matters concerning human sexuality and relationships, **regardless** of their sex, sexual orientation, gender identity, marital or relationship status, or pregnancy.

Recommendation 6

Amend paragraph 3 of Proposition D as follows:

“Religious education institutions should continue to be free to enforce rules of conduct on all staff and students which require them to behave, otherwise than in private, with modesty in matters concerning human sexuality and relationships, regardless of their sex, sexual orientation, gender identity, marital or relationship status, or pregnancy. Subject to these rules, respect for an educational institution’s ethos and codes of conduct or behaviour should not require employees to hide their own sex, sexual orientation, gender identity, marital or relationship status, or pregnancy in connection with work or in private life, or to refrain from supporting another person with these attributes.”

Transparency

We agree with the recommendation made by the Hon Justice S C Derrington, when she was President of the Australian Law Reform Commission, that fairness and transparency require that existing and prospective students and their parents and staff of religious institutions should have access to the statement of ethos and purpose and code of conduct of a religious educational institution so that they can be fully informed about these matters before making any enrolment or employment-related decisions.²⁴

Recommendation 7

A religious education institution must have a publicly available written policy, to which it adheres, that sets out its position in relation to the manner in which persons employed or engaged by the institution, and students enrolled at the institution, are expected to conduct themselves consistently with the religious beliefs and practices or religious purposes in the context of the course of their employment.

Curriculum

In respect of Propositions A and B, the ALRC CP recommends that the *Sex Discrimination Act 1984* (Cth) be amended to clarify that, in teaching its doctrine or beliefs, including on human sexuality and relationships, the content of the curriculum of a religious education institution, as distinct from the way

²⁴ [‘Of shields and swords – let the jousting begin!’](#), *Freedom19 Conference*, 4 September 2019, NSW Parliament House, Sydney, p.10.

it is delivered, is not subject to the Act.²⁵ The requirements of state and territory educational authorities, which may include requirements around how curriculum in relation to sexuality or protected attributes is taught, would still apply, as would the institution's duty of care to students and staff, and other accreditation requirements.²⁶

Proposal 7 recognises that the freedom of religious education institutions to teach their doctrines or beliefs about human sexuality and relationships is an important aspect of the right to manifest religious belief. However, it also recognises that haranguing, harassing or berating of a particular student or group of students in the course of delivering this curriculum would be unacceptable.²⁷ We agree with these principles.

In practice, however, a straightforward rendering by an educator of an institution's doctrines or beliefs about sexuality and relationships might amount to behaviour which some students, who are being taught those doctrines or beliefs but do not share them, could see as unwelcome and demeaning, and which a reasonable person, having regard to all the circumstances, would see as offensive, humiliating or intimidating to those students. In the absence of the current exemptions in s.38 of the *Sex Discrimination Act*, such behaviour would be unlawful under ss.28AA(1), especially if one factors in the inherent power imbalance between the educator and students.²⁸ This result would defeat the purpose of Proposal 7.

To avoid such a possibility, we suggest that a further sentence be added to Proposal 7: "*The manner in which the curriculum is delivered is also not subject to the Act, except to the extent that it involves conduct which a reasonable person would consider as haranguing, harassing or berating of a particular student or group of students.*"

Recommendation 8

Add a further sentence to Proposal 7 as follows:

"The manner in which the curriculum is delivered is also not subject to the Act, except to the extent that it involves conduct which a reasonable person would consider as haranguing, harassing or berating of a particular student or group of students."

Another curriculum-related issue follows from Proposal B. According to the ALRC CP, "*a school could require a LGBTQ+ staff member involved in the teaching of religious doctrine or beliefs to teach the school's position on those religious doctrines or beliefs, as long as they were able to provide objective information about alternative viewpoints if they wished*".²⁹ In our view, this consequence

²⁵ Proposal 7 and paragraph 92, p. 32

²⁶ *Ibid.*

²⁷ ALRC CP paragraph 93, p.32, citing Department for Education (UK), *The Equality Act 2010 and Schools: Departmental Advice for School Leaders, School Staff, Governing Bodies and Local Authorities* (May 2014).

²⁸ This is a relevant factor under ss. 28AA(2)(d).

²⁹ Paragraph 54, second-last example, p.21.

would effectively give an educator, who is employed to model and instil the institution's ethos, unreasonably wide scope to undermine that ethos. The question of what would constitute "objective information" in this context is of course open to genuine dispute.

Given that an institution must in any event teach to any government-prescribed curriculum, including on matters concerning human sexuality and relationships, it is our view that it is both unnecessary and undesirable to leave the responsibility of deciding the content of any alternative viewpoints to those held by the institution to the sole discretion of the educator. Parents may not even become aware of what the educator may decide to teach. In our view, these matters are best left to be specified in the relevant prescribed curricula, which are transparent and for which there is public accountability.

Recommendation 9

In teaching about an institution's position relating to religious doctrines or beliefs on matters of human sexuality and relationships, the content of any alternative viewpoint that is presented should be as prescribed by the relevant curriculum.

We thank the Commission for the opportunity to make a submission on this matter of fundamental importance to our community.

Yours sincerely


Peter Wertheim AM
Co-CEO

List of Recommendations

Recommendation 1

Any future Commonwealth legislation to prohibit discrimination on the ground of religion or belief should make express provision to allow religious education institutions to continue to give preference to the enrolment of students on the grounds of the student's religion.

Recommendation 2

The freedom of religious education institutions to operate on a same-sex basis should continue to be extended to any such institution which operates more than one gender-segregated campus, provided that through all of its campuses it caters to all genders.

Recommendation 3

Propositions A and B should be amended so as to permit religious education institutions to segregate students by gender, with a teacher of the same gender, in circumstances in which this is in good faith required by the institution's religious ethos.

Recommendation 4

Delete the first of the three conditions in Proposition C and make consequential amendments to Proposals 8 and 10.

Recommendation 5

Amend the second sentence of paragraph 1 of Proposition D as follows:

“A religious educational institution should be able to take action to prevent any staff member from actively behaving in a manner, otherwise than in private, that a reasonable person would regard as undermining the institutional ethos of their employer.”

Recommendation 6

Amend paragraph 3 of Proposition D as follows:

“Religious education institutions should continue to be free to enforce rules of conduct on all staff and students which require them to behave, otherwise than in private, with modesty in matters concerning human sexuality and relationships, regardless of their sex, sexual orientation, gender identity, marital or relationship status, or pregnancy. Subject to these rules, respect for an educational institution's ethos and codes of conduct or behaviour should not require employees to hide their own sex, sexual orientation, gender identity, marital or relationship status, or pregnancy in connection with work or in private life, or to refrain from supporting another person with these attributes.”

Recommendation 7

A religious education institution must have a publicly available written policy, to which it adheres, that sets out its position in relation to the manner in which persons employed or engaged by the institution, and students enrolled at the institution, are expected to conduct them-

selves consistently with the religious beliefs and practices or religious purposes in the context of the course of their employment.

Recommendation 8

Add a further sentence to Proposal 7 as follows:

“The manner in which the curriculum is delivered is also not subject to the Act, except to the extent that it involves conduct which a reasonable person would consider as haranguing, harassing or berating of a particular student or group of students..”

Recommendation 9

In teaching about an institution’s position relating to religious doctrines or beliefs on matters of human sexuality and relationships, the content of any alternative viewpoint that is presented should be as prescribed by the relevant curriculum.