



# Anglican Church Diocese of Sydney

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Australian Law Reform Commission

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## Submission on the Consultation Paper on Religious Educational Institutions and Anti-Discrimination Laws

### 1. Who are we?

This submission is on behalf of Anglican Church Diocese of Sydney (the Diocese). The Diocese is one of twenty three dioceses that comprise the Anglican Church of Australia. The Diocese is an unincorporated voluntary association comprising 267 parishes and various bodies constituted or incorporated under the *Anglican Church of Australia Trust Property Act 1917* (NSW) and the *Anglican Church of Australia (Bodies Corporate) Act 1938* (NSW). These bodies include 40 Anglican schools, Anglicare Sydney (a large social welfare institution, which includes aged care), Anglican Youthworks and Anglican Aid (which focuses on overseas aid and development). The Diocese, through its various component bodies and congregational life, makes a rich contribution to the social capital of our State, through programs involving social welfare, education, health and aged care, overseas aid, youth work and not least the proclamation of the Christian message of hope for all people.

2. Although religious educational institutions are the primary focus of the ALRC proposals, the recommendation that these proposals be extended to all other faith-based institutions means these proposals could impact each of our religious institutions that seek to employ staff who support the Christian ethos.
3. Our Anglican schools operate across the socio-economic spectrum. Our schools are located in the Greater Sydney Basin, the Illawarra and Central Western NSW. Each school is a vibrant local community, bringing together thousands of parents, students, teachers and other staff. Our schools make a distinctive and significant contribution to our nation's social capital. Each school provides an educational context and pastoral care that is distinctively Christian, which is why many of our parents choose our schools. Our schools, along with other faith-based schools, make an enormous contribution to the national educational landscape, because they relieve the state of a considerable cost, and provide for parental choice for those

who seek an education for their children which is consistent with their moral and religious convictions.

4. The Diocese also operates a theological college (Moore Theological College) and a specialist youth ministry training college (Youthworks College), which prepare men and women for Christian ministry in the diocese and beyond. The ALRC proposals raise distinct concerns for these colleges, which are addressed in a separate submission from Moore Theological College.
5. We welcome the opportunity to make this submission and we give consent for this submission to be published. Our contact details are as follows.

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#### 6. **Executive Summary**

We are deeply disappointed with the proposals outlined in the Consultation Paper, and can demonstrate them to be legally and socially flawed for the following reasons.

- A. They fail to address the terms of reference
- B. They misstate international law
- C. They undermine and consequently fail to acquit Australia's Human Rights treaty commitments.
- D. They fail to understand the nature of religious educational institutions.

In place of these legally compromised proposals, we commend a version of the model proposed by the former ALRC President, Her Honour Justice Derrington in 2019, which is set out at the end of this paper.

#### 7. **These proposals fail to address the Terms of Reference**

Our most fundamental objection to the proposals is that they fail to address the third limb of the Terms of Reference, which was

“... to ensure that an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed ... can continue to build a community of faith by giving preference, in good

faith, to persons of the same religion as the educational institution in the selection of staff.”

8. Instead, the ARLC proposes reversing the current position in Commonwealth Law, introducing limits that will mean that a religious educational institution **cannot** give preference, in good faith, to persons of the same religion as the educational institution, except for a very narrowly defined range of teaching positions.
9. The third limb of the Terms of Reference is a clear expression of the pre-election commitment of an Albanese Labor Government to “protect teachers from discrimination at work, while maintaining the right of religious schools to preference people of their faith in the selection of staff”.
10. In assessing the extent to which the ALRC proposals diverge from the terms of reference, it is helpful to differentiate between two different employment scenarios. This first scenario is where religious belief or activity is **not** a formal requirement of the role – eg. a maths teacher being employed to teach maths. Currently, most religious educational institutions are free to preference in employment in ‘general’ teaching roles those who share the same faith as the school. That is, an Anglican school considering two appropriately qualified maths teachers is free to choose the Christian maths teacher over the non-Christian maths teacher. Instead of “continuing” or “maintaining” this principle, the ALRC proposal inverts it. The ALRC proposes that a school can **only** preference on the basis of religious belief or activity if that is a ‘genuine occupational requirement’ of the teaching role. This means that our Anglican schools will never be able to preference in ‘general’ teaching roles – perhaps 95% or more of all teaching roles – because religious belief or activity is not a formal requirement of these roles.
11. Anglican Schools in the Diocese of Sydney have a variety of practices in relation to preferencing in employment. The majority of schools have a mix of Christian and non-Christian staff, but will preference teachers who believe and embody the Christian faith in order to establish, maintain and promote the Christian ethos of the organisation. The application of the ALRC proposals would lead to the absurd outcome that an Anglican school could have no Christian teachers except the religious studies teacher, the chaplain and the principal, but that somehow this would be sufficient to “build a community of faith” or “maintain the religious ethos” of the school.
12. The ARLC proposals in relation to ‘general’ teaching roles are an overreach of the Terms of Reference. These situations do not – by definition – involve any tension between the second and third limbs of the terms of reference, and therefore there is no warrant to impose any restrictions on religious freedoms on employment in order to “balance” competing rights. A plain reading of the terms of reference would surely lead to the conclusion that the Government’s policy position is that a school should be **permitted** to continue to preference in general employment those staff

who support the Christian ethos. Instead, the ALRC recommends that this be **prohibited**.

13. Paragraph 9 of the Consultation Paper states that “the ALRC has been asked to formulate a legislative approach to implement the Government’s policy position” and that “it is not the ALRC’s role in this Inquiry to question the policy framework the Government has set in the Terms of Reference”. It is therefore curious that the ALRC has created an online survey which asks the question “Do you see the creation of a 'community of faith' within a religious educational institution as important?”. This question goes directly to a central element of the third limb of the terms of reference, and therefore ought to be a given for the purpose of this inquiry. The survey amounts to a ‘vox pop’ as to whether the rights of parents to educate their children in accordance with their moral and religious convictions should continue to be respected within Australia. Based on what has been proposed by the ALRC, it is hard to resist the conclusion that the ALRC does not support the Government’s policy position on “building a community of faith by giving preference ... in employment”, or at least that it has been unable to find a way to implement this.
14. The second scenario is where particular religious beliefs or activities **are** expressly required by employment contract or code of conduct. This second scenario is the primary focus of the inquiry, because of the potential that, for example, a teacher who identifies as LGBTI may hold and express religious beliefs inconsistent with that of the school.
15. In this scenario, the ARLC proposes that a religious educational institution will only be able to preference staff based on the staff member’s religious belief or activity where
  - a. participation of the person in the teaching, observance, or practice of the religion is a genuine requirement of the role;
  - b. the differential treatment is proportionate to the objective of upholding the religious ethos of the institution; and
  - c. the criteria for preferencing in relation to religion or belief would not amount to discrimination on another prohibited ground
16. According to the examples given by the ARLC paper,
  - a. a school could not require, as a condition of appointment, any staff member or prospective staff member to sign a statement of belief by which they had to affirm that homosexuality is a sin (because this would be discriminatory against an LGBTQ+ applicant) [para 60].
  - b. a school could only 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 [para 54].

17. The ALRC asserts that the first leg of Proposition B and the third leg of Proposition C, both of which require that ‘the criteria for preferencing in relation to religion or belief would not amount to discrimination on another prohibited ground’ is ‘generally consistent with amendments to the law recently passed in the Northern Territory ... and in force in Victoria’.<sup>1</sup> This assertion is in error. The ALRC proposal is much stricter. Under both the Northern Territory and Victorian regimes, where preferencing is lawful because of an inherent requirement (e.g., that the religious studies teacher hold certain religious beliefs), then the employer can require this, notwithstanding any protected attribute displayed by the employee. For example, section 83A of the Victorian *Equal Opportunity Act 2010* extends to all forms of discrimination under the Act by the use of the words ‘A person may discriminate’ without limiting the applicable grounds. This point is made in the Minister’s second reading speech.<sup>2</sup>
18. In summary then, for Scenario 1 (i.e., general teaching roles) religious schools will be required to employ teachers who may not share or support the religious beliefs of the organisation, and whose employment can only be terminated where they “actively undermine” the religious ethos of the school, and for Scenario 2 (e.g., religious studies teacher), religious schools will be required to employ someone provided they are prepared to **teach** the school’s position on those religious doctrines or beliefs, but cannot require them to declare that they actually believe what they are teaching, and furthermore if they do not, must allow them to teach an alternative viewpoint that contradicts the school’s position on those religious doctrines or beliefs.
19. The ALRC acknowledges that its proposals have “the potential to interfere with institutional autonomy connected to the right of individuals to manifest religion or belief in community with others, parents’ freedoms in relation to their children’s religious education, and freedoms of expression and association”, and that “staff may act as important role models in faith formation”, so that the “interference with institutional autonomy is likely to be greater than in relation to exceptions concerning students” (para 55). The word “potential” in this paragraph is redundant – there is no doubt that the proposed reforms would substantially interfere with the religious freedom of a religious educational institution and its parents.
20. Why has the ALRC arrived at proposals which fail to address the terms of reference and also substantially interfere with the religious freedom of a religious educational institution and its parents? It is not, as claimed, because this is required by

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<sup>1</sup> In respect of Proposition B this claim is made at para 53; in respect of Proposition C at para 60.

<sup>2</sup>

“Many religions have specific beliefs about aspects of sex, sexuality, and gender. For example, some religions believe marriage should only be between people of the opposite sex. If a particular religious belief about a protected attribute is an inherent requirement of the role, and a person has an inconsistent religious belief, it may be lawful for the religious organisation to discriminate against that person”, Victoria, Parliamentary Debates, Legislative Assembly 28 October 2021, Natalie Hutchins, Minister, 4375.

Australia's international human rights law obligations.

### The ALRC Proposals Misstate International Law

21. The ALRC justifies the restrictions it recommends to the religious freedom of faith-based schools on the basis of Australia's international human rights law obligations. The Consultation paper says that it "adopts frameworks provided by international human rights law" (para 12), and that "in light of Australia's international legal obligations, the ALRC has reached the following preliminary views about how those policy objectives can be achieved consistently with Australia's international obligations" (para 43). Each proposition is justified on the basis that it is "consistent with Australia's international human rights obligations" (see paras 49, 55, 67, 72).
22. What is unacknowledged in this argument, however, is that the International Covenant on Civil and Political Rights (ICCPR) and other related international instruments to which Australia has become a signatory are broad instruments, which permit a degree of latitude as to how different State Parties may choose to balance competing universal rights. When the ALRC paper argues that its propositions are "consistent with Australia's international human rights obligation", it fails to acknowledge that alternative propositions to the opposite effect would also be "consistent" with the same. This has been obscured by a subtle shift in language, from "consistent with" to "required". For example, in paragraph 55, the Consultation Paper claims that its proposals are both "necessary" and "proportionate", and that there is "no less restrictive measure to achieve the protection of rights *required*" (emphasis added).
23. If the ARLC Consultation Paper is claiming, as it appears to be, that there is no alternative with less restrictive force that would satisfy Australia's obligation to comply with its international human rights commitments, then such a claim is patently false.
24. In 2018 the Expert Panel on Religious Freedom, comprised of the Hon Philip Ruddock (chair), Emeritus Professor Rosalind Croucher AM, the Hon Dr Annabelle Bennett AO SC, Father Frank Brennan SJ AO and Professor Dr Nicholas Aroney comprehensively analysed the same international human rights law as canvassed by the ALRC. In doing so they proposed very different measures, with much less restrictive force on religious educational institutions, than those which have been put forward by the ALRC.
25. Similarly, in 2019 Justice Sarah Derrington (then President of the ALRC) proposed amendments to the *Sex Discrimination Act 1984* in response to a referral to the ALRC in very similar terms to the current referral. The proposals were predicated on the principle that "Australian law should properly reflect the content of the international

covenants and conventions to which Australia has agreed to be bound”.<sup>3</sup> The Derrington proposals are substantively different to the current ALRC proposals. We will return to her Honour’s proposals in the final section of this paper, where we will commend a version of her recommendations as a better and more appropriate response to the current terms of reference.

26. Furthermore, the ALRC’s analysis of the international human rights law is selective and distorted.
27. The Consultation Paper glosses over *Siebenhaar v Germany*, a decision involving a kindergarten run by a protestant congregation. The European Court found the dismissal of a kindergarten teacher was not a violation of any of her rights, in circumstances where her employment contract required staff loyalty to institutional ethos, by virtue of the “mission of proclaiming the Gospel in word and deed [requiring e]mployees and employers [to] place their professional skills in the service of this goal and form a community of service independent of their position or their professional functions.” The European Court found “That the termination of employment in question was based on conduct by the applicant outside the professional sphere can have no weight in this case. The [European] Court noted that the particular nature of the professional requirements imposed on the applicant were due to the fact that they were established by an employer with an ethos based on religion or belief.”<sup>4</sup> This example is directly on point for the purposes of this inquiry.
28. The ALRC Consultation Paper selectively quotes from a 2013 report by UN Special rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt. The section “cherry-picked” by the ALRC in para A.11 (shown in bold below) is in fact part of a wider argument that substantively undercuts and contradicts the Propositions argued for by the ALRC.

Freedom of religion or belief also covers the right of persons and groups of persons to establish religious institutions that function in conformity with their religious self-understanding. **This is not just an external aspect of marginal significance. Religious communities, in particular minority communities, need an appropriate institutional infrastructure, without which their long-term survival options as a community might be in serious peril, a situation which at the same time would amount to a violation of freedom of religion or belief of individual members.**

Moreover, for many (not all) religious or belief communities, institutional questions, such as the appointment of religious leaders or the rules governing monastic life, directly or indirectly derive from the tenets of their faith.

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<sup>3</sup> <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-s-derrington/s-derrington-j-20190904>

<sup>4</sup> *Siebenhaar* [46].

Hence, questions of how to institutionalize religious community life can have a significance that goes far beyond mere organizational or managerial aspects. Freedom of religion or belief therefore entails respect for the autonomy of religious institutions...

It cannot be the business of the State to shape or reshape religious traditions, nor can the State claim any binding authority in the interpretation of religious sources or in the definition of the tenets of faith. Freedom of religion or belief is a right of human beings, after all, not a right of the State. As mentioned above, questions of how to institutionalize community life may significantly affect the religious self-understanding of a community. From this it follows that the State must generally respect the autonomy of religious institutions, also in policies of promoting equality between men and women....

...freedom of religion or belief includes the right to establish new religious communities and institutions. The issue of equality between men and women has in fact led to splits in quite a number of religious communities, and meanwhile, in virtually all religious traditions, reform branches exist in which women may have better opportunities to achieve positions of religious authority. Again, it cannot be the business of the State directly or indirectly to initiate such internal developments, which must always be left to believers themselves, since they remain the relevant rights holders in this regard. What the State can and should do, however, is to provide an open framework in which religious pluralism, including pluralism in institutions, can unfold freely. An open framework facilitating the free expression of pluralism may also improve the opportunities for new gender-sensitive developments within different religious traditions, initiated by believers themselves.<sup>5</sup>

29. Significantly, the ALRC has failed to acknowledge the pivotal comment from a Special Rapporteur on Freedom of Religion or Belief upon private schools under the ICCPR. Correctly acknowledging that 'private denominational schools' provide a 'way for parents to ensure a religious and moral education of their children in conformity with their own convictions' pursuant to Article 18(4) of the ICCPR, the Special Rapporteur stated:

The situation of religious instruction in private schools warrants a distinct assessment. The reason is that private schools, depending on their particular rationale and curriculum, might accommodate the more specific educational interests or needs of parents and children, including in questions of religion or belief. Indeed, many private schools have a specific denominational profile which can make them particularly attractive to adherents of the respective denomination, but frequently also for parents and children of other religious or belief orientation. In this sense, private schools constitute a part of the

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<sup>5</sup> A/68/290 (2013), paragraphs 57,59-61.

institutionalized diversity within a modern pluralistic society. States are not obliged under international human rights law to fund schools which are established on a religious basis, however, if the State chooses to provide public funding to religious schools, it should make this funding available without any discrimination.<sup>6</sup>

30. The ALRC Consultation paper relies heavily on the views of the Former Special Rapporteur Ahmed Shaheed. However, these views are not the settled position of international law, and stand in sharp tension with the views of both his predecessor (cited in the previous paragraph) and the current Special Rapporteur, who in a book co-authored with the Former Special Rapporteur Heiner Bielefeldt, commenting on the position of women in religious institutions that do not accept female leadership, wrote:

to demand that States should directly enforce women’s right of equality within religious institutions would lead to highly problematic consequences. It would give the State a genuine authority over the definition of theological issues, thereby creating enormous new risks for freedom of religion or belief, particularly in countries governed by authoritarian or totalitarian Governments. It can neither be the business of the State to shape or reshape religious traditions, nor should the State claim any theological authority in the interpretation of religious sources or in the definition of the tenets of faith. Going along that road and giving the State the authority to decide on certain theological issues could result in heavy-handed State interferences and concomitant abuses, to the detriment of autonomous religious life. Freedom of religion or belief is a right of human beings, after all, not a right of the State. From this it follows that the State must generally respect the autonomy of religious institutions, also when it seeks to promote equality between men and women.<sup>7</sup>

31. The ALRC Consultation Paper overreaches in its claim that international law establishes that differential treatment on the basis of religious belief can never “extend to differential treatment or detriment on Sex Discrimination Act grounds”. The ALRC makes this assertion in reliance on a UN Guide that comments that it “is established law that there is no legitimacy in maintaining rules, policies or practices enacted with reference to religious or affiliated cultural doctrines or sensitivities that discriminate on the basis of sex, sexual orientation, gender identity or other

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<sup>6</sup> Heiner Bielefeldt, *Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/HRC/16/53 (15 December 2010) [54]-[55].

<sup>7</sup> Bielefeldt, Heiner, Nazila Ghanea-Hercock and Michael Wiener, *Freedom of Religion or Belief: an International Law Commentary* (Oxford University Press, 2016) 380-1.

characteristics”.<sup>8</sup> However, that comment was in relation to “[d]iscrimination...in situations in which religion is a pretext.” Moreover, the authority relied upon by the UN Guide was General Comment 22 on freedom of religion, which merely notes, in the context of the limitation grounds of morals that “the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations...for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition”. The point being made by General Comment 22 is the much more limited point that “[r]estrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.”

32. In another example of “cherry picking” of sources, it is both notable and surprising that the ALRC excludes the USA from its international comparisons, particularly given that one of the key reference works used in the Consultation Paper (at footnotes 5, 6, 7, 8, 9, 11 and 12) is Megan Pearson, *Proportionality, Equality Laws, and Religion: Conflicts in England, Canada, and the USA* (Routledge, 2017). As the book’s subheading indicates, Pearson’s comparisons include the USA, so it is unusual that the Consultation Paper would not draw on international comparisons that include the USA when they are available from an author already cited seven times. The ALRC’s decision to not include the USA in its international comparisons is particularly concerning given the many social and cultural similarities between the USA and Australia, and that nation’s history of providing extensive consideration to issues of religious freedom.

### **The ALRC proposals undermine Australia’s existing ICCPR Commitments**

33. The ALRC proposals remove measures on which Australia presently relies to acquit its ICCPR obligations to protect religious freedom, without putting anything in their place. At present, the means by which Australia has balanced rights in Article 18 (freedom of thought, conscience and belief, including the right of parents to ensure the religious and moral education of their children in conformity with their own convictions) with Article 26 (the right to non-discrimination) is by exemption clauses in anti-discrimination law.
34. For example, when the *Sex Discrimination Act 1984* was amended in 2013 to add sexual orientation, gender identity and intersex status as protected attributes, the Attorney-General, the Hon Mark Dreyfuss, said in the Explanatory Memorandum to the amending Bill:

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<sup>8</sup> Consultation Paper, pp. 27 and 40, citing Office of the United Nations High Commissioner for Human Rights, *Protecting Minority Rights: A Practice Guide to Developing Comprehensive Anti-Discrimination Legislation* (United Nations and Equal Rights Trust, 2022, p. 149).

The importance of the right to freedom of religion is recognised in sections 37 and 38 of the SDA. These sections provide exemptions for religious bodies and education institutions from the operation of the prohibition of discrimination provisions of the SDA in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

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The Bill will extend the exemption at section 38 of the SDA, so that otherwise discriminatory conduct on the basis of sexual orientation and gender identity will not be prohibited for educational institutions established for religious purpose. Consequently, the Bill will not alter the right to freedom of thought, conscience, and religion or belief in respect of the new grounds of sexual orientation and gender identity.<sup>9</sup>

35. The then Shadow Attorney-General, the Hon Senator George Brandis, said in his Second Reading Speech;

The right of people to fair treatment, a precious value, must take its place alongside other precious values, and one of those precious values is freedom of religion...in balancing those competing and sometimes inconsistent values...the right of freedom of religious practice and the right of freedom of religious worship must always be respected. And if we are to respect the right of religions which conduct social institutions, whether they be schools or churches or aged-care facilities or hospitals, to conduct those institutions in accordance with the tenets of their faith should always be respected. That is a very fundamental value.

You cannot have freedom of religion if you also have legislation which requires, which imposes by statutory obligation, an obligation upon a church or religious institution to conduct its affairs at variance with the tenets of its teachings.<sup>10</sup>

36. It is evident from this that both sides of Government accepted at the time that religious institutions should be able to conduct those institutions in accordance with the doctrines and tenets of their faith, and that the means by which freedom of religion would be protected was through the exemptions in sections 37 and 38. In the case of religious educational institutions, section 38 permits a school to act consistently with its religious beliefs, on the proviso that it does so in 'good faith'. In the words of former Special Rapporteur, this framework has protected religious schools as 'a part of the institutionalized diversity within a modern pluralistic society.'<sup>11</sup> It has served Australian pluralism well and there is no evidence that the

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<sup>9</sup> Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth).

<sup>10</sup> Commonwealth, *Parliamentary Debates*, Senate, 18 June 2013, 3272 (Brandis QC).

<sup>11</sup> Heiner Bielefeldt, *Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/HRC/16/53 (15 December 2010) [54]-[55].

‘good faith’ standard has failed in ensuring religious schools act appropriately

37. As an aside, it should be noted that we regard exemption clauses as an extremely poor mechanism to embed and protect the right to freedom of thought, conscience and belief in Australian law. Furthermore, we do not support the breadths of the exemptions in clauses 37 and 38, because they permit schools to do things they have never done, and do not want the right to do.
38. However, notwithstanding our view that exemption clauses are not ideal, it must be recognised that they are the mechanism (and the only mechanism) that the Labor Government chose in 1984 (and continued to rely on in 2013) to acquit its international obligation to protect freedom of religion. And, as the unredacted quote from Heiner Bielefeldt’s 2013 report makes clear “[f]reedom of religion or belief also covers the right of persons and groups of persons to establish religious institutions that function in conformity with their religious self-understanding” (see para 25 above).<sup>12</sup>
39. The ALRC proposal to removal the exemption clauses and replace them with Propositions A to D (especially in so far as Propositions B to D mean that a school should have no ability to maintain their ethos wherever a protected attribute arises under the *Sex Discrimination Act 1984*) would arguably leave Australia in breach of its obligations under the ICCPR Article 18. Article 18 guarantees to everyone “the right to freedom of thought, conscience and religion”. The freedom to *have* a belief is absolute, and the freedom to *manifest* a belief, including manifesting it in community with others, “may only be subject to those limitations which are prescribed by law and necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others” (18.3). The importance of this provision is emphasised by the fact that, while article 4 of the ICCPR allows derogation from many Convention rights during times of “public emergency”, Article 18 is one of the few provisions to which this right of derogation does not apply (see 4.2). In other words, the only permissible exceptions to religious freedom are the narrowly defined ones in Article 18.3. The State needs to demonstrate the necessity to interfere with the ability of persons to manifest religion in community, through selecting the persons that they employ in the maintenance or propagation of their beliefs. Moreover, it is for those communities to determine the means by which they most effectively maintain and propagate their beliefs, including the means by which they create institutions that bear a religious ethos consistent with their beliefs. As the former Special Rapporteur Bielefeldt has said,
- It cannot be the business of the State to shape or reshape religious traditions, nor can the State claim any binding authority in the interpretation of religious sources or in the definition of the tenets of faith. Freedom of religion or

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<sup>12</sup> And see also paragraph 8 of the CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), 30 July 1993, CCPR/C/21/Rev.1/Add.4, (General comment 22), which refers specifically to “the freedom to establish seminaries or religious schools”.

belief is a right of human beings, after all, not a right of the State. As mentioned above, questions of how to institutionalize community life may significantly affect the religious self-understanding of a community. From this it follows that the State must generally respect the autonomy of religious institutions, also in policies of promoting equality between men and women.<sup>13</sup>

40. The Siracusa Principles address the circumstances in which derogations of certain rights may be justified and establish principles of interpretation in relation to specific limitation clauses. The ALRC Consultation Paper pays lip service to the Siracusa Principles, but then proceeds to substantially undermine the freedom to manifest a religious belief in association with others (e.g., to form schools and social welfare agencies and conduct those institutions in accordance with the tenets of their faith). It also fails to respect the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions.
41. The ALRC acknowledgement that its proposals have “the potential to interfere with ... parents’ freedoms in relation to their children’s religious education” is important. However, the analysis provided in paragraphs A.26-A.28 lacks a rigorous analysis of the parental right to ensure the moral and religious education of their children set out in ICCPR Article 18(4). There is no analysis as to what positive right is entailed by this clause. The commentary is limited to stating what the clause does not entail. Moreover, there is no attempt to demonstrate that it is necessary to override the right. This is even more remarkable given the United Nations Human Rights Committee has said in its General Comment on Article 18 that: ‘the liberty of parents and guardians to ensure religious and moral education cannot be restricted.’<sup>14</sup> The onus is on the ALRC to explain how its proposals satisfy this understanding. It has not done so.
42. There is even an argument that what is being proposed by the ALRC could be struck down by virtue of Section 116 of the Constitution which prohibits the Commonwealth Parliament from enacting laws for “prohibiting the free exercise of any religion”. Notwithstanding the fact that prohibition on impairing free exercise has so far been fairly narrowly interpreted, it is arguable that legislation aiming to remove religious freedom rights which have been exercised by schools and colleges for many years seems just the sort of thing which may indeed go so far as to infringe this provision, and therefore be liable to be struck down as amounting to an “undue” infringement of religious freedom.

### **The ALRC Proposals Fundamentally Misunderstand the Nature of Religious Schools**

43. The purpose of religious schools is not only to impart intellectual knowledge, but also to instil religious values. In addition to teaching the prescribed curriculum, they

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<sup>13</sup> 68/290 [57]-[61] (emphasis added).

<sup>14</sup> Human Rights Committee, General Comment No 22: Article 18, 48th sess, (20 July 1993) [8].

provide religious activities that seek to demonstrate to students what a life lived in accordance with the relevant religion looks and feels like in practice. Having teachers and other staff at the school who can participate in these activities as a faith community, whether these staff are engaged in religious teaching or not, helps to realise the school's religious purpose. It also allows students to develop an understanding that religion is not merely an adjunct to the school's core activities, but an integral part of them. These are among the reasons why many parents choose to send their children to religious schools.

44. In relation to students, our Anglican schools have an open enrolment policy where all are welcome to attend, understanding that they will also participate in religious instruction. We don't expel or mistreat students for holding values in conflict with the Christian faith. Anglican schools provide appropriate and caring pastoral support and adjustments to allow all students to feel welcome and safe within the school community.
45. In relation to teachers and other staff, our Anglican schools generally do not require teachers and other staff to sign a statement of belief. Schools often choose to preference in employment so that there are sufficient Christian staff to model the Christian faith to students. We do not dismiss employees for being LGBTQ+. Typically, the staff code of conduct will require employees to support the Christian ethos of the school, or words to that effect. Certain key roles (e.g., chaplain) are recognised as ministry roles that require an authorisation from the Archbishop, which entails a commitment to abide by *Faithfulness in Service*, the National Anglican Code of Conduct for Clergy and Church Workers.<sup>15</sup>
46. Our Anglican schools are **religious** educational institutions. Faith-based education is not simply secular education with faith as one among many fields of study, or with a thin veneer of "religion" tacked on the side. Religious belief infuses the entire curriculum. Our schools provide high quality education within a Christian worldview shaped by the Bible, by the Christian message and by the values that flow from this. Parents choose Anglican schools because of their distinct "ethos", and that ethos is inseparable from the religious and moral values that our schools seek to model and instil in their students. Where possible, the persons who comprise the leadership directing the community, and those who are offered as role models for the students within the school community, are persons with an active Christian faith. The promulgating of Propositions B to D as realistic models for reform in the ALRC proposals suggests a failure to understand the nature of schools as "communities of faith".
47. The ALRC's rationale for requiring schools to continue to employ staff who do not believe and practice the religion of the institution is that "exclusion from any area of public life on Sex Discrimination Act grounds is a serious interference with a person's

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<sup>15</sup> <https://safeministry.org.au/faithfulness-in-service-code-of-conduct/>

dignity, particularly where it relates to exclusion from something as personal and fundamental as a ***faith community***<sup>16</sup> (emphasis added). There is an unwarranted assumption in this statement – that a “faith community” is part of “public life”. It would appear that the ALRC proposals fail to take account of the notion that if communities defined by a religious ethos are required to include persons who do not share the beliefs from which that ethos proceeds, they cease to be communities of that belief. Someone seeking employment in a religious school is making a deliberate and informed choice about being employed within a particular faith community - this is not public life.

48. ALRC Propositions C and D are based on the untenable assumptions that a school could maintain its religious ethos provided its teachers do not “actively undermine” the religious ethos, and that the religious faith could be instilled by religious studies teachers who are prepared to **teach** the school’s position on those religious doctrines or beliefs, even though they do not actually believe what they are teaching. Furthermore, the example provided by the ALRC in connection with Proposition C suggests that if a religious studies teacher does not believe what they teach, they must be allowed to also teach an alternative viewpoint that contradicts the school’s position on those religious doctrines or beliefs. This would institutionalise hypocrisy, which is antithetical to the core values of our schools.
49. There is a significant body of research on organisational performance which demonstrates the importance of employees having a strong positive values and ethos alignment with the organisation.<sup>17</sup> With respect to workplaces, Dr Louise Parkes has stated that: “The strength of a culture is when values and purpose are internalised by individual employees and reflected in their work as well as their identity as workers for that organisation”.<sup>18</sup> For this reason it has become commonplace for many organisations to prioritise values alignment in recruitment. Against this, Propositions C and D will potentially require schools to employ as teachers, people who are not aligned with the ethos of the school, but who merely agree not to undermine the ethos and may even then publicly contradict certain of the school’s religious doctrines or beliefs.
50. The ALRC Consultation Paper argues that it is necessary for LGBTQ+ students to have LGBTQ+ teachers as role models – “without revealing personal details, LGBTQ+ staff can play an important role in supporting LGBTQ+ students and ameliorating some of the mental health risks they disproportionately face” (para A.42). And yet it inconsistently rejected the argument (put to the ALRC by ourselves and others) that faith-based schools need teachers of the same religion as role models “in order to create a ‘community of faith’ or to maintain a ‘critical mass’ of co-religionists” (para 57). Its rejection is based on the spurious ground for the purposes of this inquiry that

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<sup>16</sup> Para A.42.

<sup>17</sup> For example: research by Dr Louise Parkes, Principal Consultant and Head of Research at *The Voice Project* at Macquarie University.

<sup>18</sup> Dr Louise Parkes, *Illuminations* (e-magazine of the Australian Psychological Society, June 2008). P.5.

“preferencing staff on the grounds of religion disadvantages those who are not of the same religion” (para 57). This has the appearance of an unwarranted double standard which preferences one worldview over another.

51. The rationale that “preferencing staff on the grounds of religion disadvantages those who are not of the same religion” discloses a failure to appreciate (or a misstatement of) international jurisprudence in relation to religious institutional autonomy. Where the religious belief of the individual is in conflict with the doctrines, tenets or beliefs of the religious institution, “freedom of religion” for the individual does not mean that the individual can require the institution to change its doctrine to accommodate them. Rather, it means that they are free to leave the institution and join another with compatible beliefs.
52. In light of the foregoing, we submit that any legislative amendments recognise the following principles.
  - (a) Religious educational institutions are a key means by which the Federal Government acquires its treaty obligations to enable parents to ensure the moral and religious education of their children. Religious educational institutions are communities of faith that exist for a religious purpose as well as an educational purpose. It undermines a faith community to require it to employ staff who do not share or support its religious ethos.
  - (b) Students and teachers are in different situations, and the legislation should recognise this. In most schools, students are not required to share or support the faith of the school, whereas teachers are. Teachers are role models to students, and not vice versa. However, as noted below, there are certain circumstances in which schools require an ability to impose limitations that, due to the expansive technical definition of ‘discriminate’ at law, could be rendered unlawful absent express clarification.
  - (c) Those seeking employment in a religious school should be in the position to make a deliberate and informed choice, knowing what being part of that faith community entails.
  - (d) It should be left to each individual school to determine for which roles it will require a faith commitment from staff, and the form that this commitment will take. Requiring courts to determine whether religious belief or activity is a “genuine occupational requirement” of a particular teaching role is not appropriate. It should be lawful for a school to have a code of conduct that requires certain behaviour conforming to the teachings of its religion, should a school choose to do so.
  - (e) Staff should only be bound by the explicit commitments they made when they were employed or appointed to a role or to which they have consented by subsequent agreement, such as a faith commitment or a commitment to abide by a code of conduct.

- (f) It should not be lawful to terminate staff on the basis of a protected attribute under the Sex Discrimination Act. However, where a staff member initially makes a faith commitment, and subsequently comes to hold an incompatible belief, or engages in behaviour which breaches commitments to a code of conduct, it should be lawful for the school to terminate employment or reassign to other duties. This reflects the understanding that the determinative reason for any such action taken is not any attribute arising under the *Sex Discrimination Act*. Rather, the reason for any such action taken is the inconsistent religious belief or activity of the person in question. This would require clarification that such an outcome follows regardless of whether any protected attribute under that Act might be technically relevant because of section 8 of the Act, which permits regard to multiple reasons. This is the result attained by the drafting proposed by Justice Sarah Derrington, as is outlined in the following section.

## A BETTER PROPOSAL

53. In place of the 4 propositions and 14 technical proposals set out in the ARLC Consultation paper, we recommend that the ALRC work from the model developed by former ALRC President Sarah Derrington, a version of which is set out below.
54. This proposal has been reproduced with permission from the submission by Adjunct Associate Professor Mark Fowler, whose submission provides a full analysis and rationale, which is unnecessary to repeat here.
55. **Employment of Staff**  
In respect of employment, Justice Derrington proposed replacing Section 38(1) and (2) with the following drafting. Clarificatory amendments proposed by Adjunct Associate Professor Fowler are shown in markup.<sup>19</sup>

“a religious educational institution that is conducted in accordance with the doctrines, tenets or beliefs of a particular religion or creed or a person acting on behalf of such a religious educational institution does not discriminate against another person by conduct within the meaning of the Act ~~when acting on behalf of a religious institution~~ in relation to the employment of (or refusal to employ) a person, including conduct relating to the allocation of particular duties or responsibilities. Religious educational institutions would have the freedom to prefer to hire (or not) if:

- a) the conduct is consistent (or not) with the genuinely held religious beliefs and practices of the institution;

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<sup>19</sup> Fowler’s amendments achieve 4 aims.

- a) Ensure both religious educational institution and the person acting on its behalf are covered.  
b) Require religious beliefs to be “genuinely held”. The application of this evidentiary test to institutions within existing legal judgements is further explained in Fowler’s submission.  
c) Make explicit the “good faith” test proposed by Justice Derrington.  
d) Clarify that “preferencing in selection” covers both new staff and the promotion of existing staff.

- b) the conduct has the effect of preferring (or refusing to employ) a candidate for employment or an employee on the grounds that the candidate or employee adheres (or does not) to the genuinely held religious beliefs and practices of the institution, or conducts himself or herself in accordance with the genuinely held religious beliefs and practices or religious purposes of the institution; and
- c) the institution engages in the conduct in good faith. In determining whether the institution has acted in good faith, regard may be had to whether it has made a publicly available to employees or prospective employees a 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 are expected to conduct themselves consistently with the genuinely held religious beliefs and practices or religious purposes in the context of the course of their employment.”<sup>20</sup>

56. Justice Derrington has explained the outworking of her proposed drafting;

*Its intent would be to have the effect that no person can be discriminated against in relation to their employment on the basis of any protected attribute alone. Rather, the onus would be on the institution to establish that any decision to prefer a candidate for employment, or to refuse employment, is consistent [with] its religious beliefs and practices or its religious purpose as set out in a policy to which the institution adheres (it cannot selectively enforce the policy).*

In order for the religious educational institution to engage in such conduct it must act in ‘good faith’. Accordingly, a court may consider whether the ability to terminate a person’s employment flowed from *the employee’s breach of a written agreement to conduct him or herself in accordance with the particular ethos of the institution.*<sup>21</sup>

#### 57. Students

As noted above, our Anglican schools, like most religious educational institutions, have an open enrolment policy. Student admission is not based on the faith of the student or their parents, and ongoing enrolment is not conditional on living in accordance with the religious beliefs and practices or religious purposes of the school. Our key concern is that the removal of s.38(3) not impair our ability to teach the beliefs of the Christian faith and to require students to engage with the religious life of the school (e.g., attend chapel), and that the school not be forced to endorse or promote beliefs that are inconsistent with its religious convictions. The ALRC’s Technical Proposal 7 seeks to address some of these concerns, but it is deficient for the following reasons.

- a) The drafting is narrower in scope than the UK Equality Act test on which it purports to be based. An exemption for “the *content* of the curriculum” is more

<sup>20</sup> Sarah Derrington, ‘Of Shields and Swords – Let the Jousting Begin!’ Speech, Freedom19 Conference, 4 September 2019, <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-s-derrington/s-derrington-j-20190904>.

<sup>21</sup> Ibid (emphasis added).

restrictive that “*anything done in connection with the content of the curriculum.*” (s 89(2) *Equality Act 2010* [UK]).

- b) In Australia, the term “curriculum” has a different connotation to the UK, because of the development of an Australian curriculum by ACARA, currently at Version 9. The National Curriculum does not cover the doctrines, tenets and beliefs of specific religious groups, and therefore an exemption for “the content of the curriculum” could be interpreted in such a way that this provision is of little effect.
- c) It may not cover instruction that occurs in the context of religious worship (e.g., a sermon in chapel) if this does not form part of the ‘curriculum’.

These issues could be addressed by a clause in the following terms:

“A person does not discriminate against a person where they engage in teaching activity if that activity is in good faith in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed.

In this section:

*teaching activity* means any kind of instruction of a student by a person employed or otherwise engaged by an educational institution that is conducted in accordance with doctrines, tenets, beliefs or teachings of a particular religion or creed.”

58. However, although a suitably redrafted version of Technical Proposal 7 might be sufficient for the purposes of our Anglican schools for the issues raised above, we recognise that some religious educational institutions, particularly those for a religion other than Christianity, do need to preference in enrolment based on the faith of students or their parents. For example, we note from the submission of the Executive Council of Australia Jewry that most charitable Jewish institutions have a stated policy of giving priority to meeting the needs of members of the Jewish community, and that consequently, students enrolled at Jewish schools are mostly, and in some cases, exclusively, Jewish. Furthermore, a small number of Jewish education institutions within sub-streams of Orthodox Judaism segregate students by sex/gender who, they consider it essential, be taught by a teacher of the same sex/gender. It is for the benefit of such schools that we recommend that there continues to be a mechanism within the *Sex Discrimination Act 1984* that allows schools to operate consistently with the genuine requirement of the institution’s religious ethos.

59. Justice Derrington’s proposal with respect to students addressed some of these concerns. Justice Derrington has proposed that section 38(3) be replaced with the following drafting.

*“a person does not discriminate against another person by conduct within the meaning of the Act when acting on behalf of an educational institution in relation to the admission (or non-admission) of a student to an educational institution if:*

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

*Such a section would respond to (and largely adopt) Recommendation 7 of the Religious Freedom Review. Its intended effect would be that no student could be discriminated against at the time of admission to an institution on the basis of any protected attribute alone. Rather, the onus would be on the institution to establish that any decision to prefer or refuse a student is consistent with its religious beliefs and practices or its religious purpose as set out in a policy to which the institution adheres (it cannot selectively enforce the policy). It would also be consistent with the principle of integrity and transparency to protect the inherent dignity of those who might otherwise be surprised or confronted by a religious institution's adherence to particular religious beliefs and practices.<sup>22</sup>*

60. However, as noted by Associate Professor Fowler, Justice Derrington's 'proposal will not address actions by existing students that undermine the ethos of a religious educational institution. By limiting its operation to the admission of students, Derrington J's proposal is also inconsistent with the recommendations of the Expert Panel [on Religious Freedom].'<sup>23</sup> As we noted above, our schools seek reforms so that there is no impairment to our ability to require students to engage with the religious life of the school (e.g., attend chapel), and which will prevent our schools from being forced to endorse or promote beliefs that are inconsistent with our religious beliefs.
61. For this reason, we commend the proposal of Associate Professor Fowler to combine the key elements of Derrington J's proposal with
- a. the regime currently enacted at Schedule 12, pt 2, s 5 of the Equality Act 2010 (UK) concerning students and religious educational institutions; and
  - b. the current definition of a religious educational institution under the Sex Discrimination Act 1984 and the additional requirement that such institutions

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<sup>22</sup> Derrington (n 3) (emphasis added).

<sup>23</sup> Expert Panel on Religious Freedom, *Religious Freedom Review*, 18 May 2018 [1.275].

act in 'good faith'.

62. This leads to the following proposed drafting

- (1) An educational institution that is conducted in accordance with doctrines, tenets, beliefs or teachings of a particular religion or creed or a person acting on behalf of such an institution does not discriminate against a student by conduct within the meaning of the Act where such conduct is:
- a. consistent with the genuinely held religious beliefs and practices of the institution or its religious purpose; and
  - b. undertaken in good faith to preserve the institution's religious ethos.
- (2) Without limitation, conduct under subparagraph (1) includes anything done in connection with:
- (a) the curriculum of a school;
  - (b) the adoption and maintenance of observances or practices that are consistent with or model the school's religious ethos (whether or not forming part of the curriculum);
  - (c) acts of worship or other religious observances or practices organised by or on behalf of a school or in which a school participates (whether or not forming part of the curriculum).

We thank the ALRC for the opportunity to make this submission.

**The Right Reverend Dr Michael Stead**  
Chair, Religious Freedom Reference Group  
Anglican Church Diocese of Sydney

23 February 2023