

RELIGIOUS EDUCATIONAL INSTITUTIONS AND ANTI-DISCRIMINATION LAWS



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Consultation Paper: Religious Educational Institutions and Anti-Discrimination Laws – January 2023 CSA Overview and Analysis



The Australian Law Reform Commission (ALRC) has released a Consultation Paper in relation to its Inquiry into Religious Educational Institutions and Anti-Discrimination Laws. This Inquiry is constrained in its scope by the [Terms of Reference](#) set out by the Attorney-General, Hon Mark Dreyfus. In summary, the Terms of Reference require the ALRC to make proposals supporting the policy that:

‘... an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed:

- *must not discriminate against a student on the basis of sexual orientation, gender identity, marital or relationship status or pregnancy;*
- *must not discriminate against a member of staff on the basis of sex, sexual orientation, gender identity, marital or relationship status or pregnancy;*
- *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.’*

While reflecting only the preliminary view of the ALRC, the proposals in the Consultation Paper should be considered as relatively firmly established. It will be difficult to change the views of the ALRC and the final recommendations are expected to be broadly in line with the proposals.

Reforms Relating to Students

The approach taken by the ALRC is to outline four ‘propositions’ and then propose legislative amendments to enact those propositions.

Proposition A - Discrimination against students on the grounds of sexual orientation, gender identity, marital or relationships status, or pregnancy

1. Religious educational institutions should not be allowed to discriminate against students (current or prospective) on the grounds of their sexual orientation, gender identity, marital or relationship status, or pregnancy, or on the grounds that a family member or carer has one of those attributes.

RELIGIOUS EDUCATIONAL INSTITUTIONS AND ANTI-DISCRIMINATION LAWS



Australian Government
Australian Law Reform Commission

Proposition A - Discrimination against students on the grounds of sexual orientation, gender identity, marital or relationships status, or pregnancy

2. Religious educational institutions should be permitted to train religious ministers and members of religious orders, and regulate participation in religious observances or practices, unfettered by sex discrimination laws. Where applicable, religious educational institutions should also continue to benefit from the exception available to charities in relation to the provision of accommodation.
3. Religious educational institutions should be permitted to teach religious doctrines or beliefs on sex or sexual orientation in a way that accords with their duty of care to students and requirements of the curriculum.

The ALRC gives examples of how they see this proposition working, addressing a number of scenarios and concerns raised by Christian school groups and others in the consultations to date (emphasis added):

‘the ALRC expects that the effect of Proposition A would be, for instance:

- *a school could no longer refuse to enrol a student who is LGBTQ+;*
- *LGBTQ+ students would not be able to be expelled from a school on the grounds of their LGBTQ+ status;*
- *a school could not refuse to enrol a student because her **parents were in a same-sex relationship**;*
- *a school could continue to **teach its religious beliefs** or doctrine on matters of sexuality and relationships (while continuing to be subject to existing legal requirements to do so **in a way that respects its duty of care to students, and accreditation and curriculum requirements**);*
- *a school could continue to segregate students by sex for participation in prayers;*
- *a school would need to take reasonable and proportionate measures to **facilitate the continuing education of a student who became pregnant**;*
- *a school could continue to impose reasonable **uniform requirements** as long as **adjustments could be made to accommodate transgender or gender diverse students**;*
- *a school could continue to restrict participation in religious ceremonies or prayers to students who were considered to be in conformity with religious doctrines, even as they relate to Sex Discrimination Act grounds;*

RELIGIOUS EDUCATIONAL INSTITUTIONS AND ANTI-DISCRIMINATION LAWS



Australian Government
Australian Law Reform Commission

- *a theological college could continue to discriminate on the grounds of sexual orientation or gender identity in relation to students studying to be religious ministers;*
- *a university college with charitable status could continue to provide accommodation solely for students of one relationship or marital status (as long as it did not distinguish on the grounds of sexual orientation, gender identity or intersex status);*
- *a school could no longer refuse to accept as school captain a LGBTQ+ student elected or appointed in accordance with its applicable process;*
- *a failure to address homophobic or transphobic bullying in a school would be unlawful;*
- *the running of competitive sports by high schools or universities would be unaffected as it is covered by a separate exception; and*
- *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 Discrimination Act grounds.'*

These examples would apply across all Christian schools, whether they have to date adopted a 'covenantal' or 'closed' enrolment policy or a 'missional' or 'open' approach. The examples include some which are clearly inapplicable to the practice of Christian schools, and others that infer a view of the practices of religious educational institutions that is, frankly, offensive and reflecting the falsehoods claimed by activists.

The final example is reflective of some of the 'double-speak' involved in this area of policy –

'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 Discrimination Act grounds.'

The unstated, and unresolved, issue is whether the applicable 'religion' can legitimately include beliefs around gender and sexuality, some of the examples in relation to staff suggest that this may not be the case. If so, this example would not have any practical value, a hollow claim made without any substantive basis.

RELIGIOUS EDUCATIONAL INSTITUTIONS AND ANTI-DISCRIMINATION LAWS



Australian Government
Australian Law Reform Commission

Reforms Relating to Staff

The second proposition relates to staff.

Proposition B - Discrimination against staff on the grounds of sex, sexual orientation, gender identity, marital or relationships status, or pregnancy

1. Religious educational institutions should not be allowed to discriminate against any staff (current or prospective) on the grounds of sex, sexual orientation, gender identity, marital or relationship status, or pregnancy.
2. Religious educational institutions should be able to select staff involved in the training of religious ministers and members of religious orders, and regulate participation in religious observances or practices, unfettered by sex discrimination laws. Where applicable, religious educational institutions should also continue to benefit from the exception available to charities in relation to the provision of accommodation.
3. Religious educational institutions should be able to require staff involved in the teaching of religious doctrine or belief to teach religious doctrine or belief on sex or sexuality as set out by that institution and in accordance with their duty of care to students and staff, and requirements of the curriculum.

Once again, the ALRC gives examples of how they see this proposition working (emphasis added):

‘the ALRC expects that the effect of Proposition A would be, for instance:

- *a school could no longer refuse to **hire a teacher on the grounds that they are LGBTQ+**;*
- *a university could not refuse to consider a lecturer’s application for promotion because they were gay and in a same-sex relationship;*
- *a school could continue to segregate staff by sex for participation in prayers;*
- *a boarding school with charitable status could continue to provide accommodation solely for staff members of one relationship or marital status (as long as it did not make a distinction within those categories);*
- *a school could not refuse to consider a person’s application for **promotion to a leadership position** because she was divorced and in a new relationship;*
- *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*

RELIGIOUS EDUCATIONAL INSTITUTIONS AND ANTI-DISCRIMINATION LAWS



Australian Government
Australian Law Reform Commission

beliefs, as long as they were able to provide objective information about alternative viewpoints if they wished; and

- *a theological college could continue to select staff on the basis of sex or sexual orientation where the staff member was to be involved in the training of ministers.'*

These examples raise further questions, such as whether a staff member who was LGBTQ+, or indeed was heterosexual and held beliefs on sexuality and gender which were inconsistent with the beliefs of the school, could be refused a position with a school? Is the ALRC requiring schools to employ staff regardless of their views on such issues? This might be inferred since other examples suggest forcing schools to allow 'objective information about alternative viewpoints' to be taught to students?

The ALRC then goes on with further propositions in relation to staff.

Proposition C - Preferencing staff involved in the teaching, observance, or practice of religion on religious grounds

1. In relation to selection, appointment, and promotion, religious educational institutions should be able to preference staff based on the staff member's religious belief or activity, where this is justified because:
 - participation of the person in the teaching, observance, or practice of the religion is a genuine requirement of the role;
 - the differential treatment is proportionate to the objective of upholding the religious ethos of the institution; and
 - the criteria for preferencing in relation to religion or belief would not amount to discrimination on another prohibited ground (such as sex, sexual orientation, gender identity, marital or relationship status, or pregnancy), if applied to a person with the relevant attribute.
2. The nature and religious ethos of the educational institution should be taken into account in determining whether participation of the person in the teaching, observance, or practice of the religion is a genuine requirement of the role.

This proposition is intended to be the 'good news' for religious educational institutions. Unfortunately, it is not.

This proposal only allows:

- (a) Preferencing only on the basis of religious belief or activity, and

RELIGIOUS EDUCATIONAL INSTITUTIONS AND ANTI-DISCRIMINATION LAWS



Australian Government
Australian Law Reform Commission

- (b) This is only in relation to the 'selection, appointment, and promotion' of staff, so it would not allow termination of staff, and
- (c) The school must demonstrate that 'participation of the person in the teaching, observance, or practice of the religion is a genuine requirement of the role', and
- (d) The school must demonstrate that the differential treatment is 'proportionate to the objective of upholding the religious ethos of the institution', and
- (e) The basis for preferencing cannot involve another protected ground under the SDA.

Point (e) above is expanded upon in paragraph 59 which indicates (emphasis added) –

'... a key aspect of this proposition is that preferencing on the grounds of religion cannot be used to justify discrimination in relation to attributes protected under the Sex Discrimination Act. For example, a religious educational institution could not refuse to consider a person as a 'practising' member of its religion because the person was LGBTQ+ or in a same-sex relationship, where the person adhered to other religious criteria that the institution reasonably applied.'

In effect, the ALRC is proposing that religious educational institutions cannot seek conformity with religious doctrines regarding any of the attributes protected by the SDA –

- sex,
- gender identity,
- intersex status,
- sexual orientation,
- marital or relationship status,
- family responsibilities,
- because they are pregnant or might become pregnant or
- because they are breastfeeding.

Orthodox, historical Christian belief has been determined to be unlawful to require conformity with for staff in Christian schools.

The examples further reinforce this (emphasis added) –

- *'in selecting teachers of religion, a school could preference members of the religion who adhered to particular dietary restrictions or forms of dress, where this was proportionate in all the circumstances;*
- *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***

RELIGIOUS EDUCATIONAL INSTITUTIONS AND ANTI-DISCRIMINATION LAWS



Australian Government
Australian Law Reform Commission

that homosexuality is a sin (because this would be discriminatory against an LGBTQ+ applicant);

- *a school where all teaching staff were required to lead home-rooms for students where acts of religious observance or practice were expected to be carried out could preference applicants on religious grounds, such as whether they supported the religious ethos of the school (and any particular requirement would need to be assessed for proportionality to the aim of maintaining the religious ethos of the particular school);*
- *a requirement for appointment or promotion that a staff member **attend a particular temple, synagogue, mosque or church** (for example) would need to be assessed on a case by case basis, by reference to the nature of the role and whether the requirement was proportionate to maintaining the religious ethos of the school; and*
- *it would be reasonable and proportionate for a school to **prefer an applicant for the position of religious education teacher** who was willing to teach the school's particular beliefs around sexuality, as long as **the teacher was permitted to objectively discuss the existence of alternative views about other lifestyles, relationships, or sexuality in a manner appropriate to the context.**'*

The last example deserves to be read carefully, you can (subject to the earlier restrictions) preference a staff member who will teach the school's beliefs around sexuality – but **only if they can present other alternative views**. The ALRC is proposing to force religious schools to teach other moral and sexual codes.

Even without the inclusion of (e) in that list of requirements, the proposal is the **most restrictive in the country – and has national implications**. Schools within states and territories with broader existing protections for religious freedom would be constrained by Commonwealth law.

This proposition is further watered down by the form that the associated legislative proposals take. The only legislative changes associated with the proposition would merely:

- Allow modern awards or enterprise agreements to include a term that provided for such preferencing (with little likelihood of modern awards being amended in this way), and
- Any future religious discrimination legislation allow treatment along these lines.

No protections would be provided against claims of discrimination under any of the attributes protected by the SDA.

RELIGIOUS EDUCATIONAL INSTITUTIONS AND ANTI-DISCRIMINATION LAWS



Australian Government
Australian Law Reform Commission

Proposition D - Ongoing requirements on all staff to respect the religious ethos of the educational institution

1. Religious educational institutions should be able to expect all staff to respect their institutional ethos. A religious educational institution should be able to take action to prevent any staff member from actively undermining the institutional ethos of their employer.
2. Religious educational institutions should be able to impose reasonable and proportionate codes of staff conduct and behaviour relating to respect for the institution's ethos, subject to ordinary principles of employment law and prohibitions of discrimination on other grounds.
3. 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.

This final 'proposition' provides the lowest possible standard to which schools can hold staff, that they 'respect' the 'institutional ethos'. It would only permit a religious educational institution to take action to prevent staff from 'actively undermining the institutional ethos' of the school. **Staff would not have to live the faith, nor even hold the faith, as long as they didn't actively undermine the faith.**

This is a pathway forcing Christian schools to employ nominal adherents and reflect a hypocritical approach to faith formation.

The ALRC has once again made their position clear through examples, noting that under this proposition:

'a school could not terminate the employment of a lesbian teacher on the grounds that she was actively undermining the religious ethos of the institution merely by entering into a marriage with a woman'

and that under any future religious anti-discrimination legislation that:

'a religious school could not take action against a staff member for supporting an LGBTQ+ student, or attending a Pride rally, on the grounds that it undermined the religious ethos of the school'.

Their intention under this proposition is that any future religious discrimination bill would operate so that:

- *'a school could impose reasonable and proportionate requirements for all staff in a code of conduct that staff **cannot publicly denigrate or ridicule the religion of the institution** (as practised in that institution); and*

RELIGIOUS EDUCATIONAL INSTITUTIONS AND ANTI-DISCRIMINATION LAWS



Australian Government
Australian Law Reform Commission

- *a school could impose reasonable and proportionate requirements for all staff in a code of conduct that **appropriate respect be given by staff to religious observances and practices within the school.***

Once again, the lowest possible bar for expectations has been protected.

Like Proposition C, the legislative mechanism proposed to embed these protections is weak, a facilitative provision to allow terms along these lines to be included in modern awards and enterprise agreements.

Other Proposed Reforms

In addition to these broad propositions the ALRC outlined specific 'Technical Consultation Proposals' with specific legislative amendments included. Most of these flow from the propositions discussed above, such as **the removal of section 38 of the SDA**. There are, however, others which also have significant potential impact upon Christian schools:

- **Proposal 11** would see religious educational institutions included within the oversight of the Australian Human Rights Commission (AHRC) and subject to their ability to conduct inquiries on their own initiative, without any complaint, if they claim there is 'systemic unlawful discrimination'.
- **Proposal 12** which would see the guidelines for temporary exemptions to the SDA narrowed to reflect the legislative changes proposed by the ALRC.
- **Proposal 13** allowing the AHRC to develop 'guidance' on the operation of the SDA for religious educational institutions, materials not subject to any Parliamentary oversight and which inevitably set expectations and benchmarks for practice.
- **Proposal 14** which recommends further reform, including a Commonwealth Human Rights Act.

Conclusion

The Terms of Reference require the ALRC to develop proposals for protections against discrimination of students and staff while ensuring that religious educational institutions 'can continue to build a community of faith ...'.

The Consultation Paper comprehensively fails to provide any reasonable mechanism to allow a genuine, authentic Christian learning community to be established that encompasses orthodox, historical beliefs regarding gender and sexuality.

The propositions put forward by the ALRC impose on Christian schools a set of beliefs regarding sexuality and gender and in doing so fundamentally undermine the authority and legitimacy of Christian schools as faith communities able to interpret fundamental religious texts.

If enacted, the ALRC's recommendations substitute their beliefs on gender and sexuality for those of a Christian school.