Submission on the ALRC Consultation Paper on Religious Educational Institutions and Discrimination Laws

About Freedom for Faith

Freedom for Faith is a Christian legal think tank that exists to see religious freedom for all faiths protected and promoted in Australia and beyond. It is led by people drawn from a range of denominational churches including the Anglican Church Diocese of Sydney, The Catholic church, the Australian Christian Churches, Australian Baptist Churches, the Presbyterian Church of Australia, and the Seventh-day Adventist Church in Australia. It has strong links with, and works co-operatively with, a range of other faith groups in Australia.

The Australian Law Reform Commission released a Consultation Paper for its current reference on "Religious Educational Institutions and Anti-Discrimination Laws" on 27 January 2023, and invited public submissions by 24 February 2023 .

The paper, while formally acknowledging the importance of religious freedom and parental rights, is a serious disappointment to those involved in religious schools and colleges. It effectively recommends the removal of protections enjoyed by religious educational institutions which have been designed to safeguard the ability of these organisations to operate in accordance with their religious beliefs. The provisions protecting these bodies from being forced to conform to secular views on sexual behaviour and identity (and hence losing their distinctiveness as religious bodies) are to be removed. This is in a context where there is no protection offered for people of faith in a Religious Discrimination Act at the federal level. But the paper offers no convincing reasons for the wholesale demolition of a structure which has served the diversity and plurality of the Australian community for many years. Rather than supporting "Diversity, Equity and Inclusion", the paper's recommendations would require a compulsory uniformity which would undermine the reasons for the existence of faith-based educational institutions. This is all despite there being little if any evidence of students or staff actually being wrongfully discriminated against on the basis of sexuality in faith based schools or colleges.

Background

Why has this document been released? After the failure of the proposed *Religious Discrimination Bill* under the former Coalition government, the current ALP government

undertook to introduce their own version. But they took the view that before general proposals for protection of religious people against unjust discrimination could be introduced, they should get advice on the current protections for religious bodies provided under Commonwealth discrimination laws. The Government appointed New South Wales Supreme Court Judge, the Hon Justice Stephen Rothman AM, as a Part-Time Commissioner for the Inquiry.

Discrimination laws, and the clauses in those laws which recognise religious freedom rights, are currently an important way that religious freedom is protected in Australia (noting the absence of a Religious Discrimination Act at the federal level). The reason for this is that some of the grounds on which discrimination complaints may be made (especially sex, sexual orientation, and gender identity) are directed at decisions that may be made by religious bodies, based on their fundamental faith commitments.

A religious school is set up, and funded, by members of a particular religion to provide education for children in accordance with their beliefs- whether a Christian school, a Muslim school, a Jewish school, or one from another religious tradition. This is in accordance with the important provision in art 18(4) of the ICCPR requiring "respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions."

Many of these communities take very seriously the teachings of their faith that sex is only designed by God for a marriage between a man and a woman, and that a person's biological sex at conception determines whether they are male or female. Those beliefs, and others, are to be taught and lived out in everyday life when students are at school. A member of staff whose words and deeds deny these truths will undermine the ethos and mission of the school. A student club that advocates during school hours against the views of the religious tradition will also do so.

Faith-based schools believe that religious values should be taught and lived out in every aspect of human life. For teaching staff, this means that the tenets and beliefs of faith are modelled in all of life, not just something that is conveyed in religious instruction classes or chapel. Parents frequently choose faith-based schools precisely because of the school's ethos and values. Therefore, having staff whose words or actions contradict these deeply held values or permitting students to behave in a way that repudiates such values is an attack on the very foundation of the school itself. Parents who enrol their children in these schools do so of their own free choice and with full knowledge of the school's ethos and beliefs.

At the moment, some provisions of Commonwealth law operate as "balancing clauses", allowing the balancing of the rights of religious freedom with rights not to be unjustly

discriminated against.[1] Sections 37 and 38 of the *Sex Discrimination Act* 1984 (Cth) ("SDA") allow religious groups generally, and religious educational institutions in particular, to operate in accordance with their faith commitments. There are other provisions allowing religious bodies to implement their beliefs in provision of accommodation- see s 23(3)(b) SDA.
The *Fair Work Act* 2009 (Cth) ("FWA") provides broad protections to employees against discriminatory employment decisions, but contains balancing clauses recognising the rights of religious employers to operate in accordance with their faith in
clauses 351(2)(c) and 772(2)(c).

Consultation Paper recommendations

The paper starts with a generally helpful overview of international obligations in relation to human rights, acknowledging that religion is a matter of great importance to many Australians, and "can be central to a person's identity, sense of self, and purpose" (para 10). They could also have quoted the High Court of Australia's words on the issue:

> Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society. The chief function in the law of a definition of religion is to mark out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint. Such a definition affects the scope and operation of s. 116 of the Constitution and identifies the subject matters which other laws are presumed not to intend to affect. Religion is thus a concept of fundamental importance to the law.[2]

The Commission notes at para 24 that the *International Covenant on Civil and Political Rights* ("ICCPR") art 18 provides strong protection for religious freedom, and that under art 18(3) any limits on the practice of religion can only be justified as prescribed by law "where this is necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others". They accept that such limits (in accordance with other UN documents, such as the *Siracusa Principles*) must be shown to be "necessary" and "proportionate", with a key question being whether, if there are limits imposed for a specific reason, that the limits be as least restrictive as possible.

But after these helpful principles, the paper descends into more controversial areas, and respectfully, mis-states the law.

An example of mis-statement is the statement about the current interaction between Commonwealth and State or Territory discrimination laws. In para 29 at the second dot point on p 13, the paper asserts that, if a State or Territory law on a topic is more restrictive than a Commonwealth law on the same topic, "duty holders must apply with [*sic, presumably* "comply with"] the most restrictive law". The explicit example given is that of an educational

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[1] See Neil J Foster, "Freedom of Religion and Balancing Clauses in Discrimination Legislation" (2016) 5 *Oxford Journal of Law and Religion* 385 – 430.
[2] *Church of the New Faith v Commissioner for Pay-Roll Tax* (1983) 57 ALJR 785 at 787, per Mason ACJ and Brennan J.

institution in Queensland where certain conduct is prohibited under Queensland law, but not Commonwealth law, where it is said that the body must comply with Queensland law.

With respect, this is wrong. No mention at all is made of the way that the Commonwealth Constitution provides for such a situation, where under s 109 a Commonwealth law must be given priority if there is a clash with State law. It is well established that if the Commonwealth provides a right or a defence to a party in relation to a certain matter, that cannot be taken away by an inconsistent State law on the same matter. See this recent academic article that argues that this proposition clearly applies to discrimination laws involving religion.[3] Of course there may be arguments the other way, but it seems odd to find such a bald assertion on the matter without consideration of the literature or these arguments.

In the substantive recommendations made by the paper, at almost every point, balancing clauses currently in force to allow religious schools and colleges to operate in accordance with their faith, are to be abolished. The Commission sets out 4 major "Propositions", and then to support those it adds a number of "Proposals", which amount to specific legislative amendments. They are summarised below, before setting them out in slightly more detail.

Proposition A: Religious schools and colleges can no longer apply conduct rules relating to **student behaviour** in the area of sexual activity or gender identity, except for theological colleges training clergy for formal ordination. Schools and colleges can, however (very carefully) still teach their religiously based views on appropriate sexual behaviour.

Proposition B: Religious schools and colleges can no longer apply conduct or speech rules to their **staff** in the areas of sexual activity or gender identity, except for theological colleges training clergy for formal ordination. But staff can be asked to teach the doctrines of the religion on these issues.

Proposition C: Religious schools and colleges can require **staff** to share the **religious outlook** of the body, or preference such staff in appointments, but only where participation in teaching religion is a "genuine requirement" of the position and the differential treatment is "proportionate". In making these decisions, however, no consideration may be given to staff behaviour, views or identity relating to sexual activity, or orientation, or gender identity.

Proposition D: Staff at a religious school or college can be required **not to "actively undermine"** the ethos of their employer, but no criteria relating to sexual activity or orientation or gender identity can be imposed.

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[3] Neil J Foster, "Religious Freedom, Section 109 of the Constitution, and Anti-discrimination Laws" (2022) 1 *Australian Journal of Law and Religion* 36 – 56.

We will not repeat the text of the Propositions from the paper, as they are of course well known to the Commission. Below we summaries the "Proposals" for legislative amendment related to each Proposition, and our concerns about these Proposals.

Proposition A: Students

The "Proposals" put forward to implement this Proposition (with the Proposal numbers noted) are

- 1: repeal s 38(3) SDA 1984;
- 3: amend s 37(1)(d) SDA 1984 so that the general balancing clause applying to religious bodies does not apply to religious educational institutions;
- 4: amend s 23(3)(d) SDA 1984 so that the accommodation balancing clause does not apply to religious schools and colleges;
- 6: amend the SDA 1984 to ensure that discrimination against students or prospective students based on a "protected attribute" of a family member of the student is unlawful;
- 7: clarify that it is not unlawful under the SDA 1984 for a religious school or college to teach the doctrines of their religion on sex, sexuality and gender identity.

The Commission provides some examples of the operation of their proposals in para 48. For some of the possible examples that are provided there is no evidence that they are occurring (such as expelling an LGBTQ student on account of that status). But other example are of concern as seriously impairing religious freedom, they include:

- *Schools can teach religious doctrine, but the Commission says in doing so, this must be in a way that "respects its duty of care to students."*

  No school would deny that it owes a duty to be careful not to cause physical or psychological harm to students. But this qualification seems to assume that the mere conveying of a religious doctrine *might* cause relevant "harm". In another part of the paper, on p 24 when dealing with staff, the Commission says that requiring a staff member to affirm that "homosexuality is a sin" would automatically be discriminatory against that staff member. If that is what the Commission believes, then it may be argued that teaching this as a doctrine to students could be argued to cause harm. This view may be unpopular in the some parts of the community, but for many religious groups it is a clear teaching about God's purposes for humanity that homosexual activity is wrong (as is sexual activity between a man and a woman outside heterosexual marriage). To exclude such teaching on the basis of a speculative "harm", which is seriously debated, is in our view a clear case of interference with religious teaching. It also amounts to censorship and interference with freedoms of speech, belief, and practise protected by the ICCPR.

- *A school can apply "reasonable uniform requirements" as long as "adjustments could be made to accommodate transgender or gender diverse students".*

  This is an important issue which religious schools wrestle with now, but the thrust of this comment is to suggest that a school would be required to allow a girl who claimed that she was now a boy, to wear a boy's uniform (and vice versa). Many religious schools (and many schools which are not religious) see major problems with allowing a "social transition" where there are likely many other issues involved. Many religious schools would have a strong view that a person's sexual identity is fixed at conception and cannot change. Indeed, this passing comment by the Commission raises a whole range of issues, including the fundamental question which has not yet been resolved by the courts, as to whether a refusal to recognise a social transition by uniform or bathroom policies, does actually amount to discrimination on gender identity grounds. (For an analysis of these issues under the current law, see this recent academic comment from Professor Parkinson.)[4]

- *A school could not refuse to accept as school captain an LGBTQ student.*

  The issue here is whether a student who has decided to announce and celebrate their homosexual sexual orientation, can be held up by the school (as school captains usually are) as an "example" and "role model" to other students, when this is contrary to the religious teachings that underpin all the school's activities. This may also invite unnecessary and unhelpful litigious review of school decisions.

Proposition B: Staff

The relevant legislation Proposals are:

- 2: repeal sub-sections 38(1) and (2) of the SDA 1984;
- 3: Disapply s 37(1)(d) SDA 1984 from religious educational institutions (as previously noted);
- 4: Disapply accommodation provisions in s 23(3)(b), as noted above;
- 5: Amend the *Fair Work Act* 2009 so that religious balancing clauses do not apply to religious schools and colleges;
- 7: allow teaching of doctrines.

Examples are given at para 54. Here are some implications which raise serious concerns about religious freedom:

[4] Patrick Parkinson, "Adolescent Gender Identity and the *Sex Discrimination Act*: The Case for Religious Exemptions" (2022) 1 *Aust Jnl of Law and* Religion 76-93; see also P Parkinson "Gender Identity Discrimination and Religious Freedom" (2023) *Journal of Law and Religion,* 1-28; doi:10.1017/jlr.2022.45.

- *A Roman Catholic University lecturer announces that he is in a same-sex relationship. Even if the University has asked staff to live in accordance with Catholic doctrine, under the changed rules he could not be disciplined or denied promotion.*

  Yet this person will, by his continued recognition in a teaching position while contradicting the teachings of the institution, undermine the message being conveyed to students that Catholic doctrine is important.

- *A religious school can require a gay teacher to "teach the school's doctrine" on sexual issues, but the Commission qualifies this by saying that they must be able to "provide objective information about alternative viewpoints".*

  At this point the Commission thinks the government should be prescribing the curriculum for religious schools. This is a serious over-reach of government into an area where they should be allowing parents to decide what sort of teaching on moral issues they want their children to receive. This proposal fails to understand that faith communities cannot and should not be required to offer "alternate viewpoints" on basic tenets of their faith and belief. No such requirement is required of the LGBTQI community, for example; why is this being imposed on faith communities?

Proposition C: Preferencing Staff and teaching religion

Examples are given at para 60. They are framed in relation to the current law (where, at the Commonwealth level, religious discrimination prohibitions only arise under the FWA 2009), but also in relation to a possible future Commonwealth law forbidding religious discrimination. These examples seriously impact religious freedom:

- *A school can preference staff who will adhere to specific religious forms of dress or diet; but they cannot choose to ask staff to sign a statement affirming religious doctrine on sexual issues, including for example a statement that "homosexuality is a sin"*

  - a teaching of many religions.

- *Staff engaged to teach religious beliefs, if such teaching involved comment on sexual behaviour, must be "permitted to objectively discuss the existence of alternative views about other lifestyles, relationships or sexuality".*

  Again, the Commission is interfering with what is to be taught, and by censoring, interfering with the right to freedom of expression and speech.

Proposition D: Staff to respect religious ethos

Proposition D1 is mostly harmless, but sets a very low standard. The bar of "not actively undermining" the ethos of the school is surely a minimum that would go without saying in any organisation whose ethos included support for a specific worldview.

But D2 and D3 raise more concerns. Under D2, codes of conduct for staff are permitted but "subject to… prohibitions of discrimination on other grounds". What this means can be seen in one of the examples at para 66:

- *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.*

  The view that a teacher is undermining the ethos of a religious institution by ignoring one of its clear tenets is clearly right, but the Commission seems to think this is trivial.

Proposition D3 would lead to a similar result as it refers to not "requiring" employees to "hide" various matters.

Rationale for these changes

Each of the Propositions noted above has material in the paper which aims to justify the removal of these important provisions which have protected the ethos of faith-based schools and colleges for many years. Take para 55, for example, dealing with Proposition B on rules around staff. The Commission correctly says that these changes 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". They even go on to acknowledge 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".

These are all very important points, though somewhat understated. The word "potential" could be removed. There is absolutely no doubt that the proposed reforms **would** substantially interfere with the religious freedom of the institutions and the parents. The Commission later (in the Appendix to the paper, from A.11) correctly notes that religious freedom is always seen in the context of the communal life of religious communities. As they say, quoting a UN report:

> In his 2013 report on the intersection between religious freedom and gender equality, UN Special Rapporteur Bielefeldt explained:
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> "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."[5]

The Commission also correctly refers to the rights of parents in relation to their children's religious education, a right clearly seen in art 18(4) of the ICCPR, and referred to (with a very cursory comment) in paras A.26-A.28 of the Appendix. Christians in Australia are now a minority community according to the latest census information. Balance and proportionality are called for in dealing with the rights of different groups, but this paper lacks either.

With these clear harms breaching rights given under international law, how does the Commission justify its proposed reforms? In para 55 of the main paper it asserts with very little argument that its proposals are "necessary" to protect "both students and staff". Presumably this is because staff who are supportive of, say, LBTQ causes will provide support for students with similar views. They also assert that the reforms are "proportionate" because no other changes will do the job properly.

Acknowledging a significant burden on the institution, we find this questionable comment: "it [the reform] does not burden **the essence of the rights** in the way that allowing discrimination on [SDA] grounds would." (emphasis added). What then, according to the ALRC, is the "essence" of religious freedom? Is their view that religious freedom is *really* only about whether or not one can go to church or the mosque or the temple, and that all the other claims about practicing one's religion in community with others are just peripheral? This would be completely contrary to international law statements such as art 18(1) of the ICCPR, which clearly refers to the right to "practice" religion.

The Appendix, with more detailed comment on these issues, does not really make the case any stronger. Against the substantial burden imposed on the school or college to accept staff who disagree with their ethos on sexual matters, para A.40 indicates that discrimination on SDA grounds "**may** impact on their rights to equality and non-discrimination, employment, health, privacy and freedom of thought, conscience and religion" (emphasis added).

The uncertainty expressed by "may impact" can be contrasted with the clear detrimental effects on religious freedom. Even putting to one side the uncertainty, this looks at first sight like an impressive list. But digging in, it becomes less so. What *are* the rights that staff have to "equality and non-discrimination"? If this simply means "rights not to be dismissed from religious bodies for opposing their ethos", then the point is completely circular. That is the very issue which it is sought to justify. But otherwise, it is an empty category. No-one in the community has a free-standing right to "non-discrimination"! Prohibitions on unjust discrimination are based on specific characteristics in particular circumstances.

[5] Discussion paper, Appendix, A.11, page 41.

Nor indeed do any of us have overarching rights to a job, or to good health, or to privacy. All of these are good things that we hope that citizens can have, but they do not amount to "rights" we can assert against the State or each other, except in certain defined circumstances. What we are discussing here is what those circumstances should be. The argument is not assisted by vague assertions of "rights" that do not exist.

Para A.42, with more clarity, says that it is a bad thing for someone to be "excluded" from an area of "public life". But why has employment by a religious school become an area of "public life"? It is not like admission to a cafe or a bus. Any employment has conditions which must be met before someone is employed. If an institution which is set up to advocate for a specific view of the world- such as, for example, a political party, or an environmental lobby group, or a body set up to further indigenous rights- is allowed to require staff to support its ethos- why not a religious school explicitly established to further a religious view of the world?

The Commission's recommendations, then, will seriously impact the rights of religious schools and colleges, established to educate in accordance with a specific religious view of the world, to operate in accordance with their doctrines, tenets and beliefs. Indeed, as these would be amendments to Commonwealth legislation, it should be clearly kept in mind that s 116 of the Constitution forbids the Commonwealth Parliament from enacting laws for "prohibiting the free exercise of any religion". While of course we are aware that the prohibition on impairing free exercise has so far been fairly narrowly interpreted, legislation which aims 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 be struck down by this provision, as amounting to an "undue" infringement of religious freedom.[6]

[6] See *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, per Latham CJ at 128.

Proposals

a) The staffing question

It is convenient first to deal with the third consideration in the Terms of Reference, which is the right of religious educational institutions to employ or prefer staff who share the faith of the school. This cannot be done in the SDA as it is not a statute to regulate education, or even employment, but rather to address certain specific kinds of discrimination. The Religious Discrimination Bill did address employment in faith-based institutions, and this was supported by the then Opposition, but it sat a little awkwardly in the framework of a statute that has a primary purpose of prohibiting religious discrimination. That structural awkwardness was one of the main criticisms of the Bill.

The obvious place for a provision on employment in religious organisations is in the *Fair Work Act*, which already contains such provisions, for example, in ss. 351 and 772. This has the advantage also of providing a nationally consistent approach, in fulfilment of Australia's international human rights obligations and its commitment to being a multicultural society that respects the rights of its diverse religious minorities. It also ensures that fundamental religious freedoms are not based upon exemptions to otherwise applicable anti-discrimination laws.

To give effect to this, we propose the addition of a new s.351A along the following lines.

351A

(1) The object of this section is to contribute to giving effect to Australia's international obligations under the International Covenant on Civil and Political Rights, including Articles 18, 19, 22 and 27 and other relevant international instruments.

(2) This section applies to an institution, including an educational institution, that is conducted in accordance with religious doctrines, or otherwise established for religious purposes.

(3) It is lawful for an institution to which this section applies, or a person acting on behalf of such an institution, to –

> (a) employ or engage a particular person, or allocate particular duties or responsibilities to that person, on the ground or condition that the person adheres to, acts in accordance with, the religious doctrines or religious purposes of the institution, or agrees to abide by a code of moral conduct;
>
> (b) not employ or engage a particular person, terminate the employment or engagement of a particular person, or not allocate particular duties or responsibilities to a particular person, on the ground that the person does not or no longer adheres to or acts in accordance with the religious doctrines, tenets, beliefs, teachings or religious purposes of the institution or has not agreed to abide by or has breached a code of moral conduct of the institution;

(c) do acts ancillary or incidental to the acts referred to paragraphs (a) and (b), such as advertising for a position that requires the appointee to adhere to or act in accordance with the religious doctrines or religious purposes of the institution or to abide by a code of moral conduct;

provided that the institution has a policy that is available on request, outlining its expectations of employees and others engaged by the institution.

(4) In this section –

(a) an institution includes any association, body, corporation, entity or organisation whether or not incorporated under any Commonwealth, State or Territory law;

(b) religious doctrines include religious beliefs, codes of moral conduct, practices, principles, teachings and tenets;

(c) a religious purpose includes the maintenance of an Indigenous spiritual tradition;

(d) the engagement of a person includes as a contract worker.

(5) Subject to subsection (6), this section has effect notwithstanding any other Commonwealth law.

(6) This section does not affect the operation of:

(a) the Racial Discrimination Act 1975;
(b) the Disability Discrimination Act 1992;
(c) the Age Discrimination Act 2004;
(d) section 5C and 7 of the Sex Discrimination Act 1984;
(e) sections 14, 15 and 16 the Sex Discrimination Act 1984 to the extent that they make it unlawful to discriminate against a person solely on the ground of the person's intersex status, pregnancy or potential pregnancy, breastfeeding or family responsibilities.

(7) This section is not intended to exclude or limit the operation of a law of a State or Territory to the extent that the operation of the law does not diminish the rights conferred by this section and is capable of operating consistently with this section.

There should also be an amendment to s. 772(2) to refer to s. 351A as the basis for a lawful termination in appropriate circumstances.

b) The problem of indirect discrimination

If s.38 goes, consistently with the federal government policy and the Terms of Reference, then unintended consequences may flow from exposing faith-based schools to claims of indirect discrimination without the protection that s. 38 provides. To address this, we propose the

following general provision to clarify what is "reasonable" under indirect discrimination principles. After subsection 7B(2), add:

; and

(d) whether the condition, requirement or practice of a body conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed is imposed, or proposed to be imposed, in good faith in accordance with those doctrines, tenets, beliefs or teachings or for a religious purpose.

c) *The rules, beliefs and values of faith-based schools*

Section 21(2) is very broad in scope, and may be used to challenge the right of schools to be organised in accordance with appropriate rules and codes of conduct, and to teach religious doctrines. The ability to teach religious doctrine and worldview without fear of this being an actionable "detriment" is integral to the purpose and existence of religious schools. To address these issues, we propose that after subsection 21(3) the following is added.

(3A) For the avoidance of doubt, it is no detriment to a student, nor does it amount to less favourable or disadvantageous treatment of a student, for an educational institution to establish rules or codes of moral conduct, or to engage in teaching activity if those rules or codes or that activity are established, or that activity is engaged in:

(a) in good faith in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed; and
(b) by or with the authority of, an educational institution that is conducted in accordance with those doctrines, tenets, beliefs or teachings.

In this section:
teaching activity means any kind of group instruction of students by a person employed or otherwise engaged by an educational institution.

d) *Trans and non-binary students*

Issues have arisen since 2013 that were not contemplated by the Parliament at that time when it made gender identity a protected attribute. What used to be a rare issue of consistent and persistent transgender identification (mostly seen in natal males), has now become a quite common issue in schools. Teenage girls in particular are now identifying in quite large numbers as transgender or non-binary, or alternatively may use some other descriptor that defines their internal sense of identity as different from their natal sex. Not infrequently, such gender identities are quite transitory.

The SDA distinguishes clearly between sex and gender identity, not least by allowing single-sex schools and single sex sports (s. 42). There is no reason at all why gender identity should not remain a protected attribute while allowing schools to continue to be organised, so far as is necessary, on the basis of sex, whether they are single-sex or co-educational. The repeal of

s.38(3) is sufficient to ensure that a child or adolescent who identifies as other than their natal sex should not suffer adverse treatment as a consequence, while allowing schools to function in a way that respects the rights and interests of all children.

To address the emerging problems, at least insofar as they affect faith-based schools, we propose the following amendment, to follow after the proposed subsection 21(3A):

(3B) Nothing in this section affects the right of an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, or otherwise established for a religious purpose, to:

(a) establish, apply or enforce a rule or policy in which sex is a criterion;
(b) organise activities or provide facilities (including accommodation) differentiated on the basis of sex; or
(c) confine those activities, or the use of facilities, to students of one sex,

where the differentiation on the basis of sex is in accordance with those doctrines, tenets, beliefs or teachings or for a religious purpose.

The Government might wish to consider making this provision, without the last rider, applicable to all schools, to remove some of the problems being created, across the educational sector, by s. 21 as amended in 2013.

e) *Amending s. 37*

Section 37 may not be able to stand unamended if s. 38 is removed, consistently with the policy the Government wishes to enact. This is because s.37(1)(d) could remain applicable to all educational institutions established for religious purposes.

In relation to tertiary institutions, s. 37(1)(d) does important work. It is necessary, for example, to protect the right of bible colleges to maintain their staffing practices and codes of conduct. A substantial proportion of bible college students, and students in theological colleges run by the major Churches, are not persons seeking ordination or appointment as priests, ministers of religion or members of a religious order (s.37)(1)(b)).

To address this, we propose the following amendment to s. 37(1)(d):

After “purposes”, insert:

“(other than an educational institution that provides education or training only or mainly for students under the age of 18)”

This makes clear that it applies only to primary and secondary schools, notwithstanding that many high school students have turned 18 in year 12, and a few tertiary students have not yet attained the age of 18 when starting university. The word ‘mainly’ is sufficient to make the meaning and application of the provision clear.

Freedom for Faith also commends for your consideration the proposal contained in the submission of the Anglican Diocese of Sydney, and Assoc. Prof. Mark Fowler, for the following provision relating to students:

> *(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).*

Conclusion

In short, the proposals in the discussion paper remove valid protections for religious educational institutions. Religious schools offer a unique and important educational choice for parents, because of their unique faith ethos and values. Religious organisations sustain and support these schools not because they are profitable, but because they offer a nurturing and caring environment for children and staff.

It is the position of Freedom For Faith that there is some merit in Proposal 7 (reinforcing that it is not unlawful for religious schools to merely teach religious doctrines), the remainder of proposal are a serious and unnecessary incursion into religious freedom, freedom of expression and educational diversity in Australia. Such changes are not warranted or necessary. We urge the Commission to reconsider its position and the suggested amendments to the *Fair Work Act* and the *Sex Discrimination Act* that would strike an appropriate balance between the various rights.