

Submission to the Law Reform Commission of WA October, 2021

Law Reform Commission
GPO Box F317
PERTH WA 6841

Dear Members,

Any review of legislation which may impact the way in which Christian Schools operate is of great importance to us. The Australian Association of Christian Schools (AACS) welcomes the opportunity to submit a response to the Discussion Paper.

Introducing AACS

AACS is an advocacy organisation which represents over one hundred schools and thousands of Australian families from a wide variety of backgrounds, cultures and denominations. Our schools are in every state and territory across Australia, ranging from very small to large; urban to regional, rural and remote. In Western Australia, AACS represents 11 schools across 13 campuses, they are:

- Byford John Calvin School,
- Carnarvon Christian School,
- Cornerstone Christian College (Busselton and Dunsborough campuses),
- Foundation Christian College,
- Geraldton Christian College,
- John Calvin School Albany,
- John Calvin School Armadale,
- Kelmscott John Calvin School,
- Rockingham John Calvin School,
- South West John Calvin School,
- Rehoboth Christian College (Kenwick and Wilson campuses).

The Nature of Christian Schools

Our Christian schools were established out of a desire by parents to see their children raised in a teaching and learning environment where they could be nurtured in their faith. Characterised as low-fee, our schools operate autonomously and are accountable to their parent and school communities. Our parents have an expectation of a Christian environment for their children. They make a deliberate choice to place their children in a school that teaches and seeks to live out a value and belief system that is consistent with what is expressed in their home environment.

Christian schools strive to be holistic learning communities in which everyone plays a part and the practised values are as important as the formal teaching of the beliefs of the faith. Faith shapes all areas of the educational experience and is the foundation upon which the character and ethos of our schools is based. Religion is not simply taught as a stand-alone subject but permeates every aspect of the school's life and is embedded within all parts of the teaching and learning program. All participants (parents, teachers, non-teaching staff, leaders and students), structures and practices, work together to provide a faith-based community within which learning takes place.

Religious Freedom

Respect for religious freedom is fundamental to the Australian way of life. This freedom allows individuals and communities to exercise their faith within the framework of Australian law and civic life. It is well recognised and understood that Christian schools, as one expression of schooling choice, play a valuable role within Australian society in providing a faith-based education for families.

Religious freedom is a widely accepted but poorly understood human right within the Australian democratic context.¹ It is supported by the Australian Constitution², Commonwealth, State and Territory statute law³ and affirmed in multiple international covenants to which Australia is a signatory.⁴ Our democratic systems and institutions, and the underlying Australian belief in 'a fair go', have served our nation well over many years. Indeed, the existence of the many faith-based schools across Australia is a powerful testimony to the need for and effectiveness of the current mechanisms for the protection of human rights in this country.

As referred to in the Discussion Paper, the Expert Panel on Religious Freedom chaired by the Hon Philip Ruddock AO, made the following recommendation to Commonwealth, State and Territory Governments regarding amendments to anti-discrimination legislation:

¹ Expert Panel, *Religious Freedom Review: Report of the Expert Panel* (18 May 2018) 13 [1.32]

² *Australian Constitution* s 116

³ *Criminal Code Act 1995* (Cth); *Fair Work Act 2009* (Cth); *Education Act 1990* (NSW); *Anti-Discrimination Act 1991* (Qld); *Anti-Discrimination Act 1998* (Tas); *Constitution Act 1984* (Tas); *Education Act 2016* (Tas); *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Equal Opportunity Act 2010* (Vic); *Racial and Religious Tolerance Act 2001* (Vic); *Equal Opportunity Act 1984* (WA); *School Education Act 1999* (WA); *Criminal Code Act 2002* (ACT); *Discrimination Act 1991* (ACT); *Human Rights Act 2004* (ACT); *Anti-Discrimination Act 1996* (NT); *Education Act 2015* (NT).

⁴ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 18, 26 (ICCPR); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990 generally, and for Australia, 16 January 1991) art 14; *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969 generally, and for Australia, 30 October 1975) art 5(d-vii)

1. (a) consider the use of objects, purposes or other interpretive clauses in such legislation to reflect the equal status in international law of all human rights, including freedom of religion;
2. (b) have regard to the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights when drafting laws that would limit the right to freedom of religion.

We trust that the Commission will consider this and religious freedom more generally when making its own recommendations regarding the future of the *Equal Opportunity Act 1984 (WA)* ('the Act').

The Act

We understand that the Law Reform Commission of Western Australia ('Commission') will provide advice and make recommendations to the Western Australian Government on possible amendments to the Act considering Australian and international best practices regarding equality and discrimination. As the Commission develops its report and finalises its recommendations to Government, AACS asks the Commission to ensure that any proposed amendments to the Act will not infringe on the ability of our schools to continue operating their faith-based, holistic educational model in a way which is consistent with their Christian values and beliefs.

The major issue of concern to our member schools is the retention of the section 73 exceptions for 'religious'⁵ educational institutions. Our members rely on these exceptions to establish employment and enrolment policies and practices to maintain the distinctive Christian character of their schools. Without the protection and peace of mind s 73 provides, our members may be on precarious legal ground as to their current employment and enrolment policies and practices. Situations may arise where employment, contractual and enrolment decisions must be made to maintain the religious character and ethos of the school that may fall foul of the Act without the exceptions contained within s 73 of the Act.

In our schools it is an inherent requirement that all staff have a genuine Christian faith. As Christian doctrine is embedded within all parts of the teaching and learning program, and not simply taught as a stand-alone subject, it follows that all teaching staff must have a well-developed understanding of how to teach their subject through the prism of a Christian faith worldview. As our schools are communities where faith permeates every aspect of the school's life it is also necessary for non-teaching staff to hold and practice the same beliefs as the rest of the school community.

It is imperative that parents, who choose to send their children to these Christian environments in the expectation that their values will not be compromised or undermined, continue to have the freedom to choose an education for their children consistent with their beliefs and values. It is no exaggeration that if the ability of our members to establish and maintain schools with a distinctively Christian character is eroded or taken away, these schools may cease to exist. This only serves to remove choice from Western Australian parents and inhibit the freedom to practice their faith. This is a threat faced by all religious schools and institutions if the exceptions within the Act are removed or narrowed.

⁵ 'Religious' or 'religion' are not terms preferred by our member communities to describe the practice of their faith. However, for the sake of consistency with the Act, these terms are used throughout the submission.

Discussion Paper

Educational institutions established for religious purposes

This submission will attempt to answer some of the questions that the Commission has posed that are most relevant to our members.

Should the exception contained in section 73(1)-(2) of the Act (exception for educational institutions established for religious purposes re employment) be retained or removed?

It is our strong conviction that these provisions should be maintained for the reasons stated above. The distinctive Christian character of our member schools and their unique holistic community-approach to pedagogy and Christian education would be at risk if these provisions were removed.

If the exception contained in section 73(1)-(2) of the Act is retained, should it be narrowed and if so, how?

For the same reasons, these provisions should not be narrowed. It is impossible to foresee what avenues of litigation may arise in the future and these provisions are yet to be tested rigorously by the courts. As stated above, our members rely on the broad scope of these exceptions to establish policies and practices that create a distinctive Christian character. This ensures that the Christian community established within the school is genuine. This is emphasised where the school maintains a more 'closed' enrolment policy, admitting only those whose parent(s) have an active and genuine Christian faith.

If the exception contained in section 73(1)-(2) of the Act is narrowed, should it be narrowed such that it only operates in relation to the employment of specific categories of employees or relates to only some of the Grounds?

Such a narrowing in scope would not work for our members. As mentioned above, their holistic approach to Christian education means that all staff including non-teaching staff must have an active and genuine Christian faith. Our parents consider the authentic Christian character of our schools to be fundamental to their existence. These schools were established by parents for this very reason and there is an expectation that this character underwrites the continued existence of the school.

Should religious educational organisations be required to maintain a publicly available policy outlining their positions in relation to the employment of staff?

Whilst our members would be happy to make such policies public, in fact, many of them already do, there is the potential for negative consequences. In other states such as South Australia, where a similar provision is law⁶, schools have faced adverse publicity by publishing their employment policy, particularly where the policy clear states that the school holds to a traditional belief regarding sexuality

⁶ *Equal Opportunity Act 1984* (SA) s 34(3)(c).

and gender.⁷ One of the schools in question was merely complying with the law and attempting to be open and transparent, only to be castigated for holding to its religious beliefs. Such a provision could impose difficulty on our member schools in WA if added to the Act through increased negative media attention.

Should the exception contained in section 73(3) of the Act (exception for educational institutions established for religious purposes re provision of education) be retained or removed?

We believe this exception should be retained. This exception is critical for our ‘closed’ enrolment schools to maintain their distinctive character. It is important to note, as the *Goldberg*⁸ case demonstrated that this ‘exception’ is already self-limited by the requirement of the school to act in good faith to favour those belonging to the religious community the school represents. In a further limitation, all ‘non-adherents’ must be treated the same. As soon as a school is not acting in good faith to protect its specific religious character, it strays into the territory of discrimination and falls foul of the Act. It is our contention therefore that removal will not achieve greater equality nor avoid harm but may create harm to the religious community the school represents. We humbly submit that removal is unnecessary.

As the Commission identified through ‘some preliminary submissions’,

parents whose values do not align with the doctrines, tenets and beliefs of a religious school are still able to send their children to a non-religious school, while parents who wish to send their children to a religious school rely on the Provision of Education Exception to ensure that they are able to do so.⁹

Other Issues

Whilst the focus of our submission is on the retention of s 73, AACS would also like to address some of the other questions raised in the discussion paper.

Should the protections in the Act be expanded beyond the currently defined gender reassigned persons (for example, persons identifying as another sex)? Should there be exceptions? What other legislation is relevant to this provision?

Any expansion in this protection to include gender identity will be fraught and will only make precarious the legal bounds within which our members operate. Currently the law assumes that sex

and gender are fixed categories and therefore any change to someone’s sex or gender is final. This gives clarity to equal opportunity law by making it easier for institutions and individuals to determine their rights and obligations. If the protections in the Act are expanded to recognise gender identity and the inherent fluidity that comes with this ideology, the law becomes unclear. Difficulties may arise in

⁷ ‘Adelaide school’s policy against hiring homosexual teachers divides community’, *Nine News* (Web Page, 28 October 2021) <<https://www.9news.com.au/videos/national/adelaide-schools-policy-against-hiring-homosexual-teachers-divides-community/cksu6qhh200210hr912qzggqw>>

⁸ *Goldberg v Korsunski Carmel School* (2000) EOC 93-704.

⁹ Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA) (Discussion Paper Project 111, August 2021) (‘Discussion Paper’) 170.

determining the legal threshold for ‘identity’ and how deeply held these identities must be to be recognised at law. If the provisions were expanded to cover gender identity, our members would be concerned at falling foul of such provisions for teaching a traditional biblical view of gender identity in line with biological sex.

There are examples in Queensland of member schools being the subject of anti-discrimination claims for enrolment decisions made where the prospective student identified as a gender different to that with which they were born. The legal problem was that the parents and the student claimed to be of the same ‘religion’ as the school, potentially negating the statutory exception. In this situation, the decision was made in good faith to favour and not harm the religious community the school represents. In another situation, the parents did not hold to the faith the school community represented and it became apparent that their intention was to bring litigation against the school because of their disapproval of the school’s religious beliefs. Whilst the Queensland exception protected the school’s decision, the school still suffered financial and reputational damage. This sort of behaviour would be facilitated by this suggested change in the law. It is our strong view that if such a change must go ahead that religious educational institutions are excepted using similar language to that currently employed in s 73.

Should the protections for religious or political conviction be defined or clarified?

Should the protections for religious or political conviction expressly include religious and political beliefs and activities?

Should the protections for religious or political conviction expressly include religious appearance or dress?

Should the protections for religious or political conviction be extended to relatives or associates of a person protected by the Ground?

Should the protections for religious or political conviction be extended to all areas covered by the Act?

All these questions regarding protections for religious or political conviction will be answered together.

We submit that any definition or clarification should be such that it does not allow for courts of law to become tribunals of religious doctrine. With that in mind, we agree with the Commission’s argument that inclusive definitions may assist. We also submit that a definition of ‘religious conviction’ is one that is genuinely held, rather than adopting any stricter definition. When it comes to the ‘religious convictions’ of our member schools in WA, these would normally be contained in their Statements of Faith, which may be comprehensive or deliberately broad as to accommodate differing interpretations on doctrine. What matters to our members is that their ability to manifest their religious beliefs, as agreed to by the governing body of the school, as an authority by which standards are set in policy areas areas such as employment, pedagogy, curriculum and enrolment, inter alia. Without the appropriate exceptions, our member schools could be forced to employ and enrol individuals whose religious convictions are inconsistent with those of the school community. This would be an existential

threat to our schools and has the potential to permanently change the character and nature of our member schools from representing a specific religious community to becoming indistinguishable from other secular independent schools. Such a change would only impoverish diversity, tolerance and multiculturalism in Western Australia.

Should lawful sexual activity be included as a Ground? If so, what exceptions might apply?

It is our view that exceptions like s 73 would have to be applied to such a Ground if included. The definition of 'lawful sexual activity' is very important here, whilst current definitions interstate are limited to 'sex work', the ordinary meaning of the term is very broad. The ordinary meaning of 'lawful sexual activity' could encompass almost every sexual act and therefore our members would require an exception to this Ground. Our members take seriously the biblical view of sexual mores and ethics and any sexual activity outside of heterosexual marriage is considered harmful, not only to the students, but to the religious community the schools represent. Our members would not wish to see their teaching be the subject of litigation nor would they wish to be faced with the prospect of not being able to dismiss an employee who has engaged in 'lawful sexual activity' where that activity is contrary to the religious beliefs of the school.

Should the area of education be extended to include the evaluation and selection of student applications?

For reasons discussed earlier, we submit that an exception like s 73(3) would need to be in place to allow our 'closed' enrolment schools to continue to provide education solely to the religious communities they serve. As acknowledged in the Discussion Paper, if this Ground were extended to cover student applications and s 73(3) were removed, this could negatively impact the ongoing viability of our 'closed' enrolment schools.¹⁰

Should the area of education be extended to provide for prohibitions of the educational institution to refuse students to carry out their religious practices during school hours?

Such a prohibition would be unworkable in our schools without an exception being made along the lines of those currently found in s 73.

In our 'open' enrolment schools, there are many parents who do not share the faith of the school to which they send their children. As a condition of enrolment, however, these schools have an agreement with parents that the Statement of Faith and the religious practices of the school will be adhered to and supported. The proposed prohibition would undermine such agreements if students could freely oppose and contravene the school's Statement of Faith and its practice under the guise of their own religious practices.

Should the Act place the burden of proof on the alleged discriminator to provide that no discrimination occurred and, if so, in what circumstances?

¹⁰ Ibid.

We would be very concerned if the burden of proof were to be reversed. In our view, it could lead to an increase in vexatious litigation, thereby increasing the risk of reputational damage. As mentioned previously, our members interstate have been subject to such litigation and the damage caused to reputation and the financial effects generally mean that there is a tendency toward settlement. This unfairly favours the vexatious litigant. Our schools do not wish to see any change to current practice.

Should prohibitions on conversion practices be included in the Act?

We would not like to see such a prohibition included in the Act. We do not believe such a prohibition belongs in this Act.

This question comes soon after similar legislation was passed in Victoria. In the *Change or Suppression (Conversion) Practices Prohibition Act 2021 (Vic)* ('Victorian Act'), conversion practices are broadly defined as 'change or suppression' practices.

The Victorian Act legislates adherence to a particular set of ideological beliefs around sexual orientation and gender identity which may conflict with traditional biblical beliefs around gender and sexual morality held by our member schools.

While AACS does not support coercive and harmful practises that force someone to attempt to change their sexual orientation or gender identity, we support of the rights of any Western Australian to have the freedom to seek assistance to live in according to their religious convictions on matters of gender and sexuality.

Under the Victorian Act, the definition of a change or suppression practice captures 'prayer based' activity, which we believe is an unnecessary inclusion that is a direct attack on religious freedom. We certainly would not wish to see any scheme legislated in Western Australia which restricts the ability of religious leaders to offer support, prayer, and resources to same sex attracted and gender dysphoric individuals seeking assistance to adhere to their religious beliefs around gender and sexuality.

AACS urges the Commission to recommend that the Government consider any new prohibition on conversion practices separate to the Equal Opportunity Act. New regulations or legislation in this area should be carefully developed in consultation with the health sector, churches and faith-based schools, to ensure they do not to impose unnecessary constraints on individual freedoms of choice, parental rights and responsibilities.

Yours faithfully,

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