

19 October 2023

Committee Secretary
Parliamentary Joint Committee on Human Rights
PO Box 6100, Parliament House
CANBERRA ACT 2600

Via email: human.rights@aph.gov.au

Dear Ms Coles

Inquiry into Australia's Human Rights Framework

I refer to your email on 5 October 2023 where you requested additional information in response to the following questions on notice from Senator Thorpe following my appearance at the committee's Sydney hearing on Thursday 28 September. See responses to the two questions provided below:

Question on Notice from Senator Thorpe

1. *Your submissions says freedom of religion was not adequately protected, yet other submissions outline say the Commission proposal implicitly prioritises freedom of religion over freedom from discrimination based on sexual orientation, gender and/or intersex status. Could you comment on this?*

Response to Question

AACS strongly rejects the claim that the Commission's proposal prioritises freedom of religion over discrimination based on sexual orientation, gender and/or intersex status.

Christian schools have never sought exceptions on the basis of 'intersex status' and also have no desire to mistreat people based on sexual orientation or gender identity. Conversely, we do not wish to be marginalised by others for our faith and biblical understanding on these matters. In holding a religious belief on the expression of sexual orientation and gender we are simply honouring what we believe is the truth as revealed by God's word. We believe that Christian schools should be able to promote, teach and expect a level of behaviour of staff and students that matches the values and expectations of the faith that the school has been founded upon.

Ideally, we would prefer not to be grudgingly allowed an exemption or exception in discrimination law where it appears to the general community that religious educational institutions are given special treatment and allowed to mistreat people based on their sexual orientation, gender and/or intersex status. We would much prefer to have freedom of religious beliefs and association expressed through positive rights that allows our schools the ability to protect the integrity of their religious culture and ethos through preferencing staff and who can uphold, model and teach the beliefs of the school.

AACS appreciates there are times when the desire for equality between freedom of religion and freedom from discrimination must be carefully balanced. However, the Commission's proposed Human Rights Act priorities freedom from discrimination over freedom of religion,

thereby entrenching the existing gaps in protection for freedom of religion which currently exist in domestic law. It is also worth noting that freedom of religion entails freedom from discrimination on the basis of religion, meaning that careful balancing is required. AACCS believes the current proposal fails to reach the minimum standards required under Australia's international obligations.

Within international law the limitations upon the balancing process provide very significant protection for certain rights such as religious freedom. Article 18 (3) of the International Covenant on Civil and Political Rights (ICCPR) provides that (emphasis added):

*Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are **necessary** to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.*

AACCS are concerned that the AHRC proposal to include a general limitations clause at the standard of 'reasonable' rather than the much higher bar of 'necessary', as provided by the ICCPR, is inconsistent with the AHRC's obligation to implement international human rights protections in domestic Australian law.

Within the context of Christian schools, our members have a policy of employing staff whose beliefs and conduct align to the doctrines, tenets and beliefs of the Christian faith. This could be interpreted by some as unfair discrimination, however, General Comment 18 makes clear that not every differentiation of treatment is discrimination.¹ The Comment notes that: **differentiation aimed at achieving a legitimate purpose under the ICCPR using reasonable and objective criteria will not constitute discrimination.**

Employing staff whose beliefs and conduct are aligned to the beliefs of the school, as outlined in the school's Constitution and Statement of Faith, is a reasonable and legitimate purpose under the ICCPR which should not be constrained by discrimination laws. General Comment 22 provides further guidance on the permissible restrictions on the manifestations of religion or belief (emphasis added):

*Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18. The Committee observes that paragraph 3 of article 18 is to be **strictly interpreted.***²

The importance of freedom of religion is underscored by the Siracusa Principles³ which state at paragraph 58:

No state party shall, even in time of emergency threatening the life of the nation, derogate from the Covenant's guarantees of ... freedom of thought, conscience and religion. These

¹ General Comment No. 18: Non-discrimination, 37th sess (10 November 1989).

² General Comment 22 [8].

³ United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, Annex, UN Doc E/CN.4/1984/4 (1984).

rights are not derogable under any conditions even for the asserted purpose of preserving the life of the nation.

This important principle (derived from art 4.2 of the ICCPR) is further supported by paragraphs 10 and 11 of the Siracusa Principles, which have the effect that:

Article 18.3 of the ICCPR ‘must be strictly interpreted’, any limitations ‘must be the exception and not the rule’, they ‘must be narrowly construed’ and they ‘must be necessary and directly related’ to pursue one of the aims specified in art 18.3.⁴

Together the ICCPR, General Comment 22 and the Siracusa Principles, provide a high level of protection for the freedom to hold and manifest religion or beliefs and are central to the international human rights framework.

The rights of parents should also be supported to reflect the full expression of Article 18(4) of the ICCPR which requires States to respect the liberty of parents to raise their children in conformity with their own beliefs. This right is not subject to any limitation as highlighted by General Comment 22 ‘the liberty of parents and guardians to ensure religious and moral education cannot be restricted’.⁵ The expression of this parental right necessarily requires the facilitation, support and protection of religious schools which adhere to those beliefs.

The development of a federal Human Rights Act must reflect the understanding that not all differentiation is discrimination and that rights must be carefully balanced if parental rights and religious freedom are to be protected, consistent with international law.

Question on Notice from Senator Thorpe

2. *Do you think that the current anti-discrimination framework for conciliation of is effective? Do you think there is a need for direct access to the courts?*

Response to Question

At the outset, we note that the complaint framework under the proposal would only apply to complaints against “Public Authorities” and other businesses that have opted-in (or have been incentivised to opt-in by linking the decision to opt-in to the provision of federal funding). We assume that the intent is for non-government schools to be excluded as “Public Authorities” (although curiously the proposed definition fails to make this clear, when compared to the Queensland legislation referred to as an example in the paper). The suggestion that federal funding could be linked to “opting in” is very concerning. Non-government schools are already subject to Commonwealth and State Discrimination legislation, and we would oppose any broadening or duplication by making non-government schools also subject to a complaints

⁴ Nicholas Aroney & Ben Saunders, 'Freedom of Religion in Australia', in Matthew Groves, Daniel Meagher and Janina Boughey (eds), *The Legal Protection of Rights in Australia* (Hart Publishing, 2019), at n 40. Available at SSRN: <https://ssrn.com/abstract=3360799> or <http://dx.doi.org/10.2139/ssrn.3360799> .

⁵ General Comment 22, [8].

process under the proposed Human Rights Act (and particularly where a Christian School's right to freedom of religion is subordinate to other human rights).

Notwithstanding this comment, Christian schools seek to resolve anti-discrimination complaints (under Commonwealth and State legislation) promptly through early intervention and conciliation to avoid issues becoming further inflamed. AACCS is in favour of retaining the current dispute resolution framework, as it allows the opportunity to resolve issues prior to proceeding to courts. This also reflects the State and Territory regimes.

There may be occasions where it would be beneficial to directly access to courts where there is a weak case that does not meet the tests of discrimination to have the matter struck out or dismissed to avoid lengthy and costly conciliation and subsequent hearing process. However, we believe the Commission should continue to take the role of filtering out frivolous or vexatious claims before they are filed in court.

Thank you for the opportunity to expand upon these matters further.

Yours faithfully

Vanessa Cheng
Executive Officer