



16 November 2018

Senator Louise Pratt  
Chair  
Senate Legal and Constitutional Affairs References Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Emailed to [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

Dear Senator Pratt,

### **Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff**

In recent letters to the federal Minister for Education, the Hon Dan Tehan, and to the Shadow Minister, the Hon Tanya Plibersek, AHISA has urged caution in introducing changes to anti-discrimination legislation in relation to schools with a religious affiliation and called for release of the Ruddock Review report as a matter of urgency.

Schools and their communities and the wider public should have the opportunity to read the deliberations of the Ruddock Review expert panel and the rationale for the Review's recommendations. The rights of students, teachers and other staff members in schools with a religious affiliation must be protected; however, the lack of evidence that current legislation has failed to protect the interests of students or staff suggests there is time for implications arising from any proposed changes to legislation to be properly considered and accounted for. These implications include:

#### **Language and terminology**

Given the current fluidity in use of the terms 'sex' and 'gender', careful attention must be paid to terms and their definition. For example, a possible unintended consequence of rushed legislative amendments could be to hinder schools moving from single-sex to co-educational provision. Such a move usually entails application for an exemption under state/territory anti-discrimination laws to allow schools to offer preferential enrolment to students of a particular sex.

#### **Transparency**

The Ruddock Review recommendations, as leaked, appear to rely on a 'transparency' approach as a means to accommodate religious freedom for schools in the enrolment and recruitment of staff. That is, that a school should have publicly available a policy outlining its position in regard



to the religious beliefs it upholds which also details how the policy would be enforced in relation to enrolment and recruitment.

AHISA's submission to the Ruddock Review questioned the strength of transparency as a protection for religious freedom. It is possible that even public statements of faith will be found offensive by some people who, under discrimination laws in at least one Australian state, would be able to mount a case based on their feeling of offence.

Even if a school had posted on its website and included in its information to applicants and new employees a statement of the beliefs and values employees were expected to uphold and demonstrate in their dealings with students and the school community more broadly, it is not clear what the rights of the school would be should a staff member change their sex, sexuality, gender or same-sex marital status in the course of their employment.

AHISA argues in its submission that a transparency approach may be an important first step to achieve balance between competing interests on the issue of religious freedom and freedom from discrimination, but that it will remain weak as a protection for religious freedom because of the application of different interpretations of what constitutes a religion or religious belief in anti-discrimination cases considered by tribunals, commissions and courts.

#### Recruitment and retention of staff

According to the list of recommendations of the Religious Freedom Review as published by *The Sydney Morning Herald*, the Review expert panel makes two recommendations in regard to employment of staff at schools with a religious affiliation:

##### *Recommendation 5*

The Commonwealth should amend the *Sex Discrimination Act 1984* to provide that religious schools can discriminate in relation to the employment of staff, and the engagement of contractors, on the basis of sexual orientation, gender identity or relationship status provided that:

- The discrimination is founded in the precepts of the religion.
- The school has a publicly available policy outlining its position in relation to the matter and explaining how the policy will be enforced.
- The school provides a copy of the policy in writing to employees and contractors and prospective employees and contractors.

##### *Recommendation 6*

Jurisdictions should abolish any exceptions to anti-discrimination laws that provide for discrimination by religious schools in employment on the basis of race, disability, pregnancy or intersex status. Further, jurisdictions should ensure that any exceptions for religious schools do not permit discrimination against an existing employee solely on the basis that the employee has entered into a marriage.



If these recommendations have been reported accurately, it would appear the Review seeks to differentiate between the rights of schools and prospective employees prior to recruitment and the rights of schools and employees once a person has been employed.

We do not know the Review panel's reasons for this differentiation or whether there are further caveats. Without this knowledge, it is impossible to test or debate the assumptions or arguments on which the recommendations are based.

AHISA's submission to the Religious Freedom Review addressed two 'practical religious freedom questions' as proposed by Review Expert Panel member Fr Frank Brennan:

- Should a church school be able to decline to offer married quarters to a teacher in a same sex marriage?
- Would a church boarding school be required to provide married quarters for a boarding master in a same sex marriage?

In our submission we attempted to tease out the implications of these questions. For example, in a scenario where a Head of Boarding position at a school with a religious affiliation entails onsite accommodation, accommodating a same-sex couple under an employment contract could be deemed as condoning or promoting homosexual relations and same-sex marriage to students and their families and therefore be viewed as antithetical to the teachings of the religion with which the school is affiliated. There is, however, currently no legal process by which the school is able to determine whether an applicant is in a same-sex union during the recruitment process or prior to appointment.

It seems possible the Religious Freedom Review is recommending that schools would have no recourse in taking steps to remove the person from their position once they are employed (either by terminating or not renewing their contract or by offering an alternate employment option that did not entail onsite accommodation).

To be safe to learn and work in non-discriminatory environments is important for all Australians. Religious freedom is also an important issue and, as a fundamental human right, should not be diluted or abandoned in Australia without careful thought and respectful public debate. It is therefore imperative for the interests of students and schools, employees and employers that any amendments to employment and anti-discrimination laws are properly considered and thoroughly tested for their impact on the management of all schools – government and non-government, with and without a religious affiliation, single sex and co-educational – prior to their adoption.

Yours faithfully,

**Beth Blackwood**  
Chief Executive Officer