The International Context for Religious Freedom

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In March the Commonwealth Government released the long-awaited report of the Australian Law Reform Commission on religious educational institutions. In a letter to the Prime Minister the nation's preeminent religious leaders asserted that the recommendations 'will extinguish the distinct and authentic character' of 'the overwhelming majority of faith-based schools'. Is this mere hubristic posturing? In this talk I have been asked to briefly overview the consistency of the ALRC's recommendations with Australia's international commitments. I will also overview for you the subsequent comments of the Report's principal drafter, Justice Stephen Rothman.

It is first necessary to outline the ALRC's recommendations. The report proposes the removal of the exemption at section 38 of the *Sex Discrimination Act 1984* to prevent religious schools from discriminating against staff or students under that Act. Corresponding amendments are recommended to the *Fair Work Act*, permitting a school to discriminate against prospective, but not existing, staff on the basis of religion alone.

The result will be that schools will need to, first, not engage in direct discrimination against any teacher or student on the basis of their sex, sexuality, gender identity or marital or relationship status. Second, schools will need to argue that any actions that would otherwise be indirect discrimination on the basis of any of those attributes are 'reasonable' and 'proportionate'.

To comprehend the depth of the religious leaders' concern we must grapple with this distinction. Direct discrimination occurs when conduct is 'directly' grounded upon the complainant's status (for example, his or her gender) and where the complainant is treated less favourably when compared with someone without such a characteristic. Indirect discrimination is a latter

development in the law, recognising that policies and practices which appear neutral or non-discriminatory can have a disproportionate impact on a person on the basis of a protected characteristic. The key test for indirect discrimination is that if the policy or practice is 'reasonable', it will not be unlawful. Direct discrimination can never be 'reasonable'.

This is by no means a sure footing on which to place the international human right that protects 'the liberty of parents to ensure the religious and moral education of their children'. In an article published in the Modern Law Review last year Campbell and Smith correctly state that 'there is considerable disagreement about how the distinction between these two forms of discrimination should be understood.' Fredman has also noted that 'despite in principle having apparently clearly demarcated boundaries, the interaction between direct and indirect discrimination remains … tense and conflictual', positing that courts 'have found it difficult to draw a bright line' between the two. Acknowledging this uncertainty, the Canadian Supreme Court has instead sought to rely upon defences and remedies.

The ALRC's proposal flies in the opposite direction to that trend, forcing religious schools, their staff, students and families to navigate this uncertain legal terrain. To illustrate the ambiguity, consider the rule that a teacher must teach and faithfully model the beliefs of a school. If a teacher teaches or acts in a manner that undermines the beliefs of the school and is disciplined, is that impermissible direct discrimination, or is it permissible 'reasonable' indirect discrimination?

Turning to the consistency of the report with international law, in the movement from the ALRC's initial Consultation Paper of January 2023 to its Final Report a key change is found in the ALRC's reliance on International Labour Organization Convention 111 titled 'Discrimination (Employment and Occupation)'. The ALRC Report claims that '[a]lthough international human rights and international labour standards have developed along somewhat separate tracks, they are very closely connected.'

The ALRC relies heavily on ILO 111 in concluding that international law does not permit religious schools to discriminate under the SDA. Citing ILO 111 the ALRC posits that 'the ILO Committee has stated that provisions (under the law in the Netherlands) allowing discrimination on the ground of religion based on the inherent requirements of the job should not lead to discrimination

based on sexual orientation.'[1] However, the High Commissioner for Human Rights has said that ILO 111 is to be distinguished as 'distinct among international and regional instruments', including on account of its 'limited exceptions' for religious institutions.

A further authority that the ALRC provides in support of its recommendation that religious schools should not be able to discriminate under the SDA is the General Comment of the United Nations Human Rights Committee (UNHRC) on permissible limitations under Article 18 where a limitation is made on the basis of morals.[2] In essence, the ALRC are stating that generally accepted moral standards within the Australian community now require that religious schools be prevented from imposing limitations on a person who has a protected attribute under the SDA. However, the statement of the Office of High Commissioner that the ALRC relies upon is made as a generic unqualified proposition, posited within a general discussion on the rights of persons in secular contexts and without clarification that it applies to employment by religious institutions.

If the unqualified and untextured meaning the ALRC ascribes to both the ILO Committee and the High Commissioner for Human Rights were correct as an application of Australia's obligations in international law, the statements would apply beyond schools to all other religious institutions, including churches, synagogues and mosques. The interpretation would mean that no religious institution in any United Nations member State would be acting in accordance with international

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[1] Australian Law Reform Commission, *Final Report Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws* (ALRC Report 142), December 2023, 282.

[2] Ibid 236, recalling that Article 18(3) permits limitations that are 'prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.' The citation provided by the ALRC is to the Office of the United Nations High Commissioner for Human Rights, *Protecting Minority Rights: A Practice Guide to Developing Comprehensive Anti-Discrimination Legislation* (United Nations and Equal Rights Trust, 2022) 149, which cites Human Rights Committee, General Comment No. 22 (1993), para. 8; and General Comment No. 34 (2011). The quote of the Office of the High Commissioner the ALRC relies upon is: 'It is established law that there is no legitimacy in maintaining rules, policies or practices enacted with reference to religious or affiliated cultural doctrines or sensitivities that discriminate on the basis of sex, sexual orientation, gender identity or other characteristics.' The Office of the High Commissioner provides the following as the basis for its conclusion: 'The Human Rights Committee has noted that "the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations … for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition". Accordingly, "such limitations must be understood in the light of universality of human rights and the principle of nondiscrimination"'.

law where they placed limitations upon an employee in respect of an attribute protected under the SDA for the purpose of ensuring fidelity to their teachings, even in respect of their leadership.

However, as religious leaders recalled in their recent letter to the Prime Minister, in 2019 the prior President of the ALRC Justice Sarah Derrington released a reform model for religious schools that she said would be effective in ensuring Australia complies with the relevant requirements of international law. The model declared that a religious institution '*does not discriminate'* where its acts are 'consistent [with] its religious beliefs and practices or its religious purpose'. This proposal resolves the tension between discrimination and the ability of a school to 'build a community of faith' within both her terms of reference and the terms of reference issued by Mark Dreyfus KC, while avoiding all of the above uncertainties.

The model released by her Honour exhibits fidelity to the international law principle that when a religious institution acts in accordance with its beliefs it is manifesting a legitimate right. It is not relying on an exemption, or second order right. The same principle was also incorporated within the Religious Discrimination Bill 2022. The model also enables religious schools to 'preference' staff, thus avoiding the uncertainties that arise under genuine occupational / inherent requirements tests. What we are thus presented with is directly conflicting proposals from work conducted under the supervision of successive ALRC Commissioners.

In my submission to the ALRC I suggested a clarification to the Derrington model that would prevent courts from assessing the content or the accuracy of an asserted religious belief. I suggested the retention of the existing requirements that a school must demonstrate that an institutional ethos exists and that it is consistent in the application of that ethos. I also recommended that the existing requirement that schools be required to act in 'good faith' be retained, to ensure they clearly articulate their expectations for staff and afford procedural fairness.

In a subsequently issued letter to the Prime Minister the nation's religious leaders stated 'we expect you to uphold your election commitment to maintain the right of religious educational institutions to preference people of their own faith, and not to compromise this to secure the support of The Greens.' And here is the key point. The terms of reference given to the ALRC by Mark Dreyfus KC required that the proposals ensure that religious educational institutions 'must not discriminate against a member of staff …'. However, Federal Labor's election commitment

was not so limited: Labor would 'protect teachers from discrimination …' The commitment on which the government was elected contemplates a greater range of legislative options than those which the ALRC was requested to provide. Any number of options that 'protect' teachers beyond the ALRC's final recommendations can be contemplated, including Justice Derrington's proposal.

Earlier I noted that we are presented with directly conflicting proposals from work conducted under the supervision of successive ALRC Commissioners. On the 12th of April, after the release of the ALRC Report, Justice Rothman gave a speech at the Notre Dame University School of Law Annual Religious Liberty Conference. The reporting of that speech left some aspects of Justice Rothman's position uncertain, so in the remainder of this address I wish to quote directly from His Honour's speech, which he has kindly provided to me, along with the permission to quote him.

Expressing that he was 'grateful for the opportunity to explain my position', his Honour wished to first clarify that the ALRC's recommendations resulted from certain restrictions placed upon him. He clarified that the report

> 'was crafted in circumstances [sic] of three major constraints. First, it was constrained by the terms of reference themselves. … The absence of a religion discrimination act and the absence of a term of reference to propose the contents of a religion discrimination act was the second constraint under which the ALRC report operated. The ALRC, in effect, was confined to preference of employment of persons of the same religion and the requirement to end discrimination on the basis of one of the protected attributes of the Sex Discrimination Act. The third contextual constraint was more implicit and contextual than it was prescribed. The political balance was provided by the terms of reference but the necessary conflict, albeit in a small area, between religious rights, on the one hand, and equality of treatment for reasons which may run inconsistently with religious beliefs is, essentially, a political judgment.'

Having clarified that his Honour's hand was constrained to deliver the recommendations made, Justice Rothman then proceeded to outline the regime for reform that he would have recommended, were he not so constrained. That regime is as follows:

> 'The first proposition should be that the religious institutions should be demanding of the government that religious education institutions, despite the provisions of the Sex Discrimination Act or any other discrimination legislation, or any law, written or

unwritten, Commonwealth or State, should be able to discriminate in favour of, or preference, on the basis of the person's adherence to or belief in the genuinely held religion, beliefs or tenets of the religious education institution.

Such a positive right would have the effect of rendering lawful the conduct of religious education institutions acting under that right and rendering it lawful, notwithstanding the various regimes that may exist in the different States. Further, such a right, expressed in the form just provided, would elide the sometimes-fine distinctions between direct and indirect discrimination. In my view, discrimination in favour of a person on the basis of religion, which incidentally discriminates on the basis of a protected attribute in the Sex Discrimination Act or Race Discrimination Act or other such discrimination legislation, would be indirect discrimination. But the issue is not beyond doubt and an express right of that kind would overcome any such difficulty.

Secondly, I would restrict the religious education institutions' capacity to discriminate by providing that they "may not unreasonably discriminate against or preference a student in the enrolment, suspension or expulsion of the student on the basis of a protected attribute". In so doing, I would bring into play the unreasonableness test that under the ALRC recommendations applies to indirect discrimination to both direct and indirect discrimination.

Thirdly, I would make the same restriction in relation to staff. Thus, I would allow a religious education institution to discriminate or preference on the basis of religion, as previously expressed, but provided they may not "unreasonably discriminate against or preference a staff member, or applicant for employment, or contract worker on the basis of a protected attribute". This needs no further explanation but fits within the same general approach that I have suggested in relation to students.'

In concluding, his Honour was at pains to clarify that he does 'not want anyone to think that anything I have said has the imprimatur of the Federal Government or indeed of any State Government or any Opposition, Federal or State.'

Justice Rothman's views are unequivocal. The conflict between successive ALRC Commissioners that I referred to before has been resolved. The judicial expert appointed to conduct the review of the current exemptions for religious schools by the current government,

having consulted the relevant bodies and surveyed the relevant law, has concluded that religious schools should be given a 'positive right' to preference staff which would be available in respect of attributes under the *Sex Discrimination Act* and in respect of both staff and students. To that extent the conflict between successive Commissioners is addressed; Justice Rothman's predecessor Justice Derrington reached the same conclusion in the draft reform model she released in 2019.

Justice Rothman also recommended that a Religious Discrimination Commissioner should be empowered, upon application by schools, to issue certificates stating that their conduct was 'reasonable'. The proposed broad 'reasonableness' test and accompanying Commissioner power presents the chief point of difference I have with Justice Rothman's model, which I informed his Honour of. It would amount to a transferral of the decision as to whether a school can maintain its religious ethos from Parliament to the Australian Human Rights Commission, and on review, the judiciary. In conferring this wide penumbral discretion of 'reasonableness' upon the Commissioner and the bench, Parliament would be washing its hands of its obligations to ensure compliance with Australia's international obligation to protect the parental right.

Australia's strong and exponentially growing independent private schooling sector is the envy of many Western nations. As former United Nations Special Rapporteur Heiner Bielfeldt has said 'private schools constitute a part of the institutionalized diversity within a modern pluralistic society'. The nation's religious leaders are correct when they say that the recommendations made in the ALRC's formal report, if effected, would efface that diversity. My continuing hope is that, with the benefit of Justice Rothman and Justice Derrington's considered reflections, wiser heads will yet prevail.