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Institute of Public Affairs

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The Hon Mark Dreyfus KC MP
PO Box 6022
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Dear Attorney-General,

ALRC recommendations will allow activism to ravage faith-based schools

I am writing to share Institute of Public Affairs (IPA) research into, and analysis of, the recommendations contained within the Australian Law Reform Commission's (ALRC) recently released report, *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws.*

IPA research has found that the ALRC's recommendations have three major flaws. Firstly, they will provide the means for political activism to ravage faith-based schools. Secondly, the cost to implement necessary risk mitigation measures to protect faith-based schools will be borne by the schools themselves and, in turn, by families through higher school fees. And thirdly, the Australian Human Rights Commission (AHRC) will be given control over what a faith-based school can do and say, including how the school imparts religious values and doctrine.

The ALRC's proposals will enable activism to ravage faith-based schools.

The ALRC report recommends the repeal of section 38 of the *Sex Discrimination Act 1984*, as well as further reforms to the *Fair Work Act 2009* to narrow exceptions upon which religious schools currently rely in relation to staffing and student enrolment, which are considered necessary to preserve their religious character.

Repealing section 38 would remove the exemption afforded to faith-based schools from the requirements of sections 14 (discrimination in relation to employment) and 21 (discrimination in relation to education), which allow them to impose conditions on staff and students (and prospective staff and students) consistent with the religious ethos and doctrine of a faith-based school.

Contrary to claims made by proponents of the changes, this will not operate as a shield against harmful actions by schools. Indeed, the ALRC itself identified in its report that the problem it is seeking to address is negligible: for example, the Queensland Human Rights Commission reported that discrimination complaints against religious educational institutions made up just

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0.02 per cent of the overall complaints received, equating to just 23 complaints since 2009.[1] Equal Opportunity Tasmania similarly noted that it received few complaints of discrimination against religious educational institutions.[2] Rather, the changes would deliver a sword to a minority of students, parents, and ideologically-motivated organisations which seek to engage in activism, and would take advantage of the lack of legal protections for religious schools to advance a political and ideological campaign to undermine faith-based education.

Rather than stop discrimination, the proposals would facilitate discrimination against people of faith by opening a door for political activism to run unchecked in faith-based schools. They would also introduce significant legal risk for faith-based schools in the event that they attempt to discipline a student or staff member for behaving in a way that is inconsistent with the values of the school, who may then allege that they are being discriminated against on the basis of a protected attribute.

Example 1

An example of how the legislative changes would function will help illustrate this point. Consider a transgender teacher who is employed by a faith-based school to teach science. This teacher actively seeks to teach students "LGBTQ+ inclusive" biology lessons. The school learns of the lessons after receiving complaints from concerned parents that the perspectives being taught are contrary to the school's stated religious values. The school subsequently attempts to impose on the teacher conditions requiring them to refrain from teaching those perspectives, but the teacher refuses and asserts that the condition, and any disciplinary action for failing to abide by the condition, is unlawful discrimination on the basis of the teacher's sexual or gender identity. Currently, the school would be able to rely on section 38 of the Sex Discrimination Act as an exemption. In the absence of section 38, as proposed by the ALRC, the school would potentially be found to have engaged in unlawful discrimination under section 14 of the *Sex Discrimination Act 1984.*

Example 2

In another example, consider a religious school that separates students according to their sex for sports activities and events. A student who was born a male but who identifies as a female approaches the school and requests that he be allowed to play in the girls sporting competition. The school refuses, citing their faith-based beliefs about the immutable relationship between biological sex and gender. The boy's parents then threaten to pursue a discrimination complaint under section 21 of the *Sex Discrimination Act 1984*, arguing that the school subjected her to a detriment because of her gender identity. Under the ALRC proposal, the repeal of the section 38 religious exemptions would mean the schools could no longer make a decision that was made 'in good faith in order to avoid injury to the religious susceptibilities of an adherent of that religion or creed', and the school would have to choose between acceding to the student's demands or risking litigation for potentially contravening the law.

[1] Australian Law Reform Commission, *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws* (ALRC Report 142, 2023) 75.
[2] Ibid.

The necessary risk mitigation measures required to protect faith-based schools will inevitably increase fees.

The religious schools themselves will have to bear the cost of protecting themselves against the risk of student or staff activism. This will take the form of increased costs to cover heightened insurance premiums, or the costs associated with employing or contracting legal professionals to manage risk. The increased costs to schools will, in turn, likely be passed on to families by way of higher annual school fees.

By repealing the exemption for faith-based schools under the *Sex Discrimination Act*, every student and staff member at the school represents a potential lawsuit should the school continue to act, and expect staff and students to act, in a way that is consistent with the religious ethos of the school. Given the average number of students enrolled at an independent school in Australia is 562 students, while the average number of staff employed in a non-government school was 30 staff members, this means an average independent school has to manage 600 different litigation risks associated with federal discrimination law alone.[3] If one lawsuit proceeds to trial, the legal costs alone in defending a single discrimination complaint may be in the area of $300,000 if the school is required to pay the applicant's fees as well.[4] Under another proposed bill, the Australian Human Rights Commission Amendment (Costs Protection) Bill, staff members who sue schools over discrimination claims would not have to pay the school's legal fees if they are unsuccessful.[5] This upends the traditional rule that in litigation, it is the loser who pays. This rule is an important incentive against frivolous litigation, as it imposes a considerable financial risk. Under the bill, the risk is removed, meaning activist litigants are also risk-free litigants.

If the cost of managing this risk was borne by parents, it would see an increase of at least $500 in school fees per student. Given the typical average annual tuition fees at a Catholic school are in the order of $3,000, this would amount to a 15 per cent increase in school fees in the event of litigation. This calculation of the increased school fees however assumes that the school mitigates against the risk of just one lawsuit. In reality, the school could face multiple discrimination complaints at a time, as recent history has shown. In 2022, students and staff at Citipointe Christian College lodged five discrimination complaints with the Queensland Human Rights Commission over the school's issuing of enrolment contracts, which contained a statement of faith detailing the school's beliefs about human sexuality.[6]

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[3] This figure includes independent Catholic schools: Independent Schools Australia. *Independent Schools Snapshot: 2022 Edition*, available from https://isa.edu.au/wp-content/uploads/2022/04/ISA090322_SNAPSHOT_2022_DD04.pdf.

[4] This figure is drawn from a recent successful discrimination lawsuit, *Gutierrez v MUR Shipping Australia Pty Limited* [2023] FCA 399. Alysia Blackham, 'It can be hard to challenge workplace discrimination but the government's new bill should make it easier,' *The Conversation* (29 November 2023): https://theconversation.com/it-can-be-hard-to-challenge-workplace-discrimination-but-the-governments-new-bill-should-make-it-easier-218359.

[5] Rhiannon Down, 'Employers left holding the legal bill under sex harassment reforms,' *The Australian* (26 December 2023): https://www.theaustralian.com.au/nation/politics/employers-left-holding-the-legal-bill-under-sex-harassment-reforms/news-story/6383914eec48d9b3469e43ecd2d932ae.

[6] Ben Smee, 'Citipointe college referred to Human Rights Commission over withdrawn student enrolment contracts,' *The Guardian* 26 May 2022: https://www.theguardian.com/australia-news/2022/may/26/citipointe-college-referred-to-human-rights-commission-over-withdrawn-student-enrolment-contracts.

The Australian Human Rights Commission will be given powers to control how faith-based schools can impart religious values and doctrine.

Recommendation 10 states that government bodies, including the Australian Human Rights Commission, the Attorney-General's Department, the Fair Work Commission, the Fair Work Ombudsman, and non-government stakeholders should develop detailed guidance to assist educational institution administrators, including faith-based schools, to understand and comply with the *Sex Discrimination Act 1984* and anti-discrimination provisions in the *Fair Work Act 2009*. This would have the effect of several government bodies being given control over what a faith-based school can do and say, particularly in regard to how the school imparts religious values and doctrine.[7]

This would result in government agencies pre-emptively 'guiding' schools on how they should impart religious values and doctrine to students. The *Religious Educational Institutions and Anti-Discrimination Laws: Consultation Paper (2023)* provides examples as to what this may entail:

> a school could require a LGBTQ+ staff member involved in the teaching of religious doctrine or beliefs to teach the school's position on those religious doctrines or beliefs, as long as they were able to provide objective information about alternative viewpoints if they wished;[8] [emphasis added]

And

> it would be reasonable and proportionate for a school to preference an applicant for the position of religious education teacher who was willing to teach the school's particular beliefs around sexuality, as long as the teacher was permitted to objectively discuss the existence of alternative views about other lifestyles, relationships, or sexuality in a manner appropriate to the context.[9] [emphasis added]

The IPA's analysis of the ALRC report finds that its proposals are fundamentally flawed and should be rejected. The report is a solution in search of a problem and, in so doing, the proposals would expose faith-based schools to litigation risk by activists. In undermining the ability of faith-based schools to protect their religious character, they are an unacceptable assault on religious liberties.

Given these findings, the IPA recommends the federal government reject the proposals contained in the ALRC Report.

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[7] Morgan Begg, *IPA Response to Australian Law Reform Commission* Religious Educational Institutions and Anti-Discrimination laws: Consultation Paper (2023) (Institute of Public Affairs, 24 February 2023) 3.
[8] Australian Law Reform Commission, *Religious Educational Institutions and Anti-Discrimination Law: Consultation Paper* (2023) 21.
[9] Consultation Paper (2023) 24.