2 October 2019

The Hon Christian Porter MP
Attorney-General of Australia
PO Box 6022
House of Representatives
Parliament House
Canberra ACT 2600

Emailed to FoRConsultation@ag.gov.au

Dear Attorney General,

 Religious Discrimination Bill 2019 – exposure draft

AHISA commends the Morrison Government for taking action to support the continued freedom of expression of religious belief in Australia. At a time when the boundaries of this freedom are being contested, we value the release of an exposure draft of the Religious Discrimination Bill 2019 (‘the exposure Bill’) so that religious and other community groups have an opportunity to contribute to the shaping of the Bill.

AHISA has several concerns relating to the exposure Bill, which we outline below. The combined effect of these concerns points to two critical issues which may be expressed in brief as uncertainty and contestability:

• Should the exposure Bill be enacted in its current form, ambiguity in terminology and interaction of the exposure Bill with other legislation would leave schools uncertain as to the extent of their freedom either to express and/or maintain their religious ethos or to guard against statements of belief which may cause offence to their communities.

• Arising from such uncertainty is the potential for the freedom of schools with a religious affiliation to be tested in the courts and decided by case law – often a lengthy and expensive process.

Terminology

Differences in terminology between the exposure bill and other federal anti-discrimination legislation raise legitimate questions as to whether there are differences in intent and scope for the application of these laws.

In reference to religious bodies, the Sex Discrimination Act 1984 uses the phrase, ‘an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion’ (see for example Section 37(1)(d) and Section 38). The underlined phrase, ‘or is necessary to avoid injury to the
ABOUT AHISA

AHISA Ltd is a professional association for Heads of independent schools.

The primary object of AHISA is to optimise the opportunity for the education and welfare of Australia’s young people through the maintenance of collegiality and high standards of professional practice and conduct amongst its members.

AHISA’s 440 members lead schools that collectively account for over 443,000 students, representing 11.5 per cent of total Australian school enrolments and 20 per cent of Australia’s total Year 12 enrolments. One in every five Australian Year 12 students gains at least part of their education at an AHISA member’s school.

AHISA’s members lead a collective workforce of over 40,000 teaching staff and some 27,000 support staff.

The socio-economic profile of AHISA members’ schools is diverse. Over 20 per cent of members lead schools serving low- to very low-SES communities. The geographic spread of members’ schools is also diverse, with schools located in major city, inner regional, outer regional, remote and very remote areas. School size varies from less than 200 students to over 3,000 students, with the majority of members’ schools falling within the range 600 to 1400 students.

Some 82 per cent of AHISA members’ schools have a direct affiliation with a Christian denomination or other faith group, including Jewish and Islamic faith traditions, or are inter-denominational.

AHISA believes that a high quality schooling system in Australia depends on:

- Parents having the freedom to exercise their rights and responsibilities in regard to the education of their children
- Students and their families having the freedom to choose among diverse schooling options
- Schools having the autonomy to exercise educational leadership as they respond to the emerging needs of their communities in a rapidly changing society.

religious susceptibilities of adherents of that religion’, does not appear in the exposure Bill. An example of the terminology adopted by the exposure Bill appears in Section 10(1), which states:

A religious body does not discriminate against a person under this Act by engaging, in good faith, in conduct that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion in relation to which the religious body is conducted.

Inclusion of the term underlined, ‘may reasonably be regarded’, adds to the potential dissonance between the exposure Bill and other legislation. The question arises, regarded as reasonable by whom? Potentially, the new wording may unintentionally expand protections to the unique views of a particular individual, rather than to those of a particular religion.

While the explanatory notes to the exposure Bill state that it is important for religious bodies ‘to be able to freely manifest their religious beliefs’ and to ‘maintain their religious ethos’, the
exposure Bill itself does not adopt this terminology, leaving uncertainty as to what courts might decide as being reasonable practice by a religious institution.

**RECOMMENDATION 1**

AHISA recommends greater consistency in terminology across federal anti-discrimination laws to avoid uncertainty around potential differences in intent of the laws and their application, and therefore uncertainty as to the freedom of religious bodies to maintain and express their religious ethos.

The status of schools as religious educational institutions

A further complication arises in Part 2, Section 8(3) of the exposure Bill, which introduces the concept of an ‘employer conduct rule’.

The exposure Bill seeks to make it indirect discrimination for an employer to introduce an ‘employer conduct rule’ which is not reasonable. In doing so, it proposes to restrict an employer’s right to regulate the conduct of its employees outside of the workplace.

Any ambiguity around the concept of what is, and what is not ‘reasonable’ creates uncertainty (although perhaps not more than is currently the case under other anti-discrimination laws). There are, however, two other aspects of the ‘employer conduct rule’ provisions which create particular complexity in a school context.

First, the exposure Bill presumes as ‘unreasonable’ (Part 2, Section 8) a conduct rule imposed by an employer with an annual revenue of over $50 million which ‘would have the effect of restricting or preventing an employee of the employer from making a statement of belief at a time other than when the employee is performing work on behalf of the employer’. If the rule is to be judged ‘reasonable’, the employer must show that such a rule is necessary to avoid ‘unjustifiable financial hardship to the employer’.

AHISA is concerned that this rule, if legislated, could have a negative if unintended impact on larger educational institutions, including independent schools.

The revenue of independent schools in Australia reflects private contribution in the form of fees and donations and per student federal and state/territory government funding. Fees typically cover a debt component for the financing of capital development as well as recurrent costs associated with program delivery, such as salary costs of teaching and other staff. The larger a school’s enrolment, the higher its revenue will inevitably be.

The fees of independent schools and therefore their revenue will also reflect whether or not the school offers boarding provision and, if it does, the number of boarding students attending the school. It would not be unusual for an independent boarding school to reach an annual turnover of $50 million even at an enrolment level of only 1,750 students. Larger day schools, especially those with multiple campuses, could also reach an annual turnover of $50 million, depending on the level of fees charged. (Some six per cent of AHISA’s members lead schools of 1,800 students or over.)

It should be noted that the level of fees charged by an independent school is largely dependent on the level of government funding it receives. The bulk of government funding for independent
schools is provided by the federal government in the form of per student general recurrent grants allocated according to a school community’s ‘capacity to contribute’. The greater a school community’s capacity to contribute, the lower the level of government funding, and vice versa.

Whatever their size or revenue, independent schools do not perceive employee conduct – whether occurring inside or outside of the school – in terms of ‘financial hardship’. Rather, schools will be concerned whether particular conduct has the potential to:

- Undermine the ethos of the school;
- Offend the sensitivities of families of students attending the school;
- Impair the ability of the school to successfully transfer the traditions and spiritual inheritance allied with the school’s religious affiliation; or
- Affect the health and wellbeing, or learning and personal development of any of the school’s students.

Such impacts cannot be measured in terms of ‘unjustifiable financial hardship’.

If such considerations are recognised as legitimate grounds for an ‘employer conduct rule’ under anti-discrimination laws for schools (which have a broader set of stakeholders than other organisations) with an annual turnover under $50 million, there is no reasonable justification for applying a presumption on larger schools.

The exposure Bill’s presumption would in effect limit the religious freedoms of large religious educational institutions, and place them in a position where they would only be able to defend practices aimed at maintaining their religious character, and the sensitivities of their school community, solely on the basis of ‘unjustifiable financial hardship’.

As educational institutions ‘conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion’, schools with a religious affiliation should be exempted from such arbitrary conditions as described in Section 8(3), no matter what their size or annual revenue.

Large schools of a non-denominational nature would also be heavily restricted in their ability to prohibit staff from expressing statements of belief outside of school which may offend those within the school community (who may have specifically chosen a non-denominational school in an effort to keep their children away from such views). All non-government schools should be exempted from the presumption in Part 2, Section 8 of the exposure Bill.

**RECOMMENDATION 2**

AHISA recommends that the exposure Bill be amended to exempt all non-government schools from the presumption in Part 2, Section 8 of the exposure Bill, irrespective of the school’s size or turnover.

A second concern is that the concept of a ‘statement of belief’ again expands coverage to not simply beliefs which are ‘in accordance with the doctrines, tenets, beliefs or teaching of a particular religion’ (as is currently the language in similar anti-discrimination laws), but also to beliefs ‘that may reasonably be regarded as being so’.
The proposed protection available to those expressing their personal views may be considerably broader (and therefore highly uncertain) when compared to the concept of a ‘religious belief’ currently contained other anti-discrimination laws. This creates uncertainty about the extent to which an employer may legitimately take issue with a statement made by a staff member or student which is not actually in accordance with the doctrines, tenets, beliefs or teachings of that individual’s religion, but which ‘may reasonably be regarded as being so’.

RECOMMENDATION 3

AHISA recommends that the definition of ‘statement of belief’ in Part 1, Section 5 of the exposure Bill be amended to apply only to a belief that ‘is in accordance with the doctrines, tenets, beliefs or teachings’ of the religion of the person expressing the statement.

The preamble to the 2008 Melbourne Declaration on Educational Goals for Young Australians recognises that all schools ‘play a vital role in promoting the intellectual, physical, social, emotional, moral, spiritual and aesthetic development and wellbeing of young Australians’.

Schools with a religious affiliation directly address the spiritual development and wellbeing of their students within the major faith traditions and are playing an increasingly important role in transmitting the beliefs and tenets of those traditions to young Australians.

With due respect for the rights of individuals, it should be the goal of anti-discrimination laws to uphold the freedoms of religious schools in Australia, not dilute them further. As it stands, the exposure Bill leaves schools unsure about their enrolment and employment practices, and increases their vulnerability to legal challenge.

Yours faithfully,

(Ms) Beth Blackwood

AHISA Chief Executive Officer