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## Submission in respect of the Religious Educational Institutions and Anti-Discrimination Laws: Consultation 2023

### Introduction

1. The Australian Council of Jewish Schools (ACJS) is the peak representative body of Jewish schools in Australia.
2. Each of our schools is an independent school in its own right. Each school is individually registered and responsible for its own structure management and compliance. Our schools are non-systemic.
3. The issues raised in this matter are challenging for the ACJS. On matters for which we have represented our schools in the past, we have had consensus and support from all member schools. On the question of anti-discrimination laws our schools have a wide range of views.
4. Some of our schools advise they would not rely on, nor need, the exemptions outlined, but are otherwise ambivalent. Other member schools strongly oppose the introduction of any exemptions to the Act. A number of our schools require exemptions as the Act is framed, in order to allow them to continue to provide both secular and religious education.
5. None of our schools seek the right to discriminate on the basis of a protected attribute, other than for some schools an ability to preference Jewish students or teachers, which may be caught by the Racial Discrimination Act. Our schools require the ability to preference staff who share or are willing to uphold the religious beliefs and philosophies of the school and at least not undermine the ethos of the school.
6. In respect to religious practice, our schools often refer to the generic term Judaism. Judaism (and Jewish culture, if that be different) has developed, or has always taught policies which would, today, be classified as multiculturalism. The Jewish view is that members of the Jewish community should be productive, respected members of the Australian way of life, integrate into general Australian life, while adhering to Jewish values. That is integration not assimilation.

7. Our schools conduct programs through different structures that integrate the teaching of secular studies with religious and Jewish studies. The primary objective of the activities is often difficult to define. Education, by definition, includes the teaching through both formal and informal methods of core designated curriculum as defined by ACARA, as well as the teaching of moral values, civics, and citizenship as well as religion, religious teaching and cultural identity.
8. Many ACJS Schools will enrol non-Jewish students, although preference is given to students of the Jewish faith (including persons converting to Judaism). Further, the ACJS member schools vary significantly in their approach to religion, culture, and ethos as well as their definition of “who is Jewish”.
9. The ACJS represents 18 Jewish schools throughout Australia and also has, amongst its membership, an organisation that provides Hebrew language and Jewish studies in government schools. Each of our schools also operates an early learning centre. These schools accommodate 10,000 students in the Foundation to year 12 program.
10. Eleven of the schools are in Victoria. They enrol 5,500 students in the Foundation to year 12 program with a further 2,500 students in the school’s early learning centres. Five of the schools are in New South Wales. Those five schools accommodate 3,500 students in the Foundation to year 12 program with a further 550 students enrolled in the respective schools’ early learning centres. There is also one school in each of Western Australia and Queensland.
11. ACJS expresses its gratitude to the Australian Law Reform Commission for the opportunity to make this submission.

#### Submission

12. Given the wide range of views on this matter and the absence of consensus on the issues raised in the consultation paper amongst our schools, including some schools that oppose any exemptions at all, we will not necessarily address specifically or comment on the 4 general propositions or the 14 technical proposals. However, there are aspects of the present legislation and the recommendations for which our schools do require the consideration of exemptions to varying degrees.
13. The issues noted impact the very nature of faith-based schools and the reasons parents chose those schools. The interpretation of the legislation as presently understood, without practical exemptions in some cases, challenges the religious practices and adherence to the faith requirements of those schools, to the point that without the exemptions, those schools would be unable to continue to offer either secular or religious education. Those schools have stated they would be required to close under those circumstances. The exemptions sought are intended as practical, with a view of addressing how the schools can accommodate the intent of the anti-discrimination legislation and simultaneously maintain their religious practices and adherence. These matters are:
  - i. Student-based gender specific activities
  - ii. Preference same gender teachers
  - iii. Enrolment preferencing and criteria
  - iv. Curriculum and religious practices and teachings

#### *Student based gender specific activities.*

14. It is understood, under the present proposals that a school registered as a single sex school can restrict enrolment and the participation of students to those that identify with the gender of the school registration in which the school caters. Such a school caters to a single gender.

15. it is also understood under the present proposals that a school registered as a coeducational school is required to enrol students of all genders and may be subject to a breach of the discrimination law if the school conducts gender specific campuses, streams, classes, or activities.
16. All ACJS member schools are registered coeducational. Some of the schools pursuant to their religious practices and observances, segregate the genders by campus or by class for all activities (sometimes from a prescribed age), be it secular education or Jewish religious instruction. The schools that operate separate campuses for all activities operate in practice as single sex schools. The schools that operate separate classes for all activities, although the campus caters to all genders are also operating in practice as a single sex school.
17. Some of the schools operate with mixed gender classes for the majority of time, but for educational, practical and or religious study or practice reasons, may chose for some classes or some activities to operate as single gender groups.
18. There is no intent by any school to discriminate against the gender for enrolment at a school, unless the year level in which the child wishes to enrol, does not cater to the gender the student identifies, or the level for which the student identifies is otherwise full.
19. ACJS propose that for registered coeducational schools which traditionally and/or for religious reasons have operated in practice as single sex schools by the use of separate campuses, classes and or activities that an exemption to the legislation be provided to allow the schools to continue to operate in that form.

*Preference same gender teacher*

20. In respect to the employment of teachers and or employees that deal directly with students some of our schools for religious practices and observance require a teacher that is of or identifies with a specific gender to deliver instruction to the students that identify with that gender.
21. In such circumstances it is noted each of the schools is registered coeducational and does engage teachers, and employees that deal directly with students, of both sexes. It is not the intention, nor has it been the practice to discriminate or preference one gender against another. However, some of our schools for religious practice and observance reasons require a teacher of the same sex as the students in that class, group or activity. The requirement does not extend to non direct or incidental student contact roles at the school.
22. ACJS proposes that an exemption be considered to allow for the circumstances outlined above.
23. It is understood that this request for exemption for schools that operate in this manner may be out of the scope of the Commission, given the terms of reference. An application on a school-by-school basis to the Human Rights Commission may be required in such circumstances. Nevertheless, we ask the Commission to strongly consider the exemption so that the needs of some of our schools can be met.

*Enrolment preferencing and criteria*

24. There are existing exemptions in various legislation to preference individuals in good faith in order to avoid injury to the religious susceptibilities of the adherents of that religion or creed. It is unclear in the range of sex discrimination acts as referred in the consultation paper if those exemptions remain applicable to educational institutions as they did in the past, and if the exemption allows the school to preference or restrict its enrolment practice to students of a particular faith.

25. Under examples of what it could mean in practice (page 18 of the consultation paper) under proposition “A”, notes “A school could continue to restrict participation in religious ceremonies or prayers to students who were considered to be in conformity with religious doctrines, even as they relate to Sex Discrimination Act grounds.” This proposed exemption relates to specific activities within a school. It does not refer adequately or at all to enrolment in the school.
26. The Jewish affiliated schools vary considerably in respect of their Jewish identity and the aspects of Judaism and the ethos of the school (Refer paragraphs 6, 7 and 8 above). Notwithstanding such variation, it is a fundamental concept of each of our schools that at each school the majority, if not all, the students are of the Jewish faith (as the school defines that term) or converting to Judaism.
27. The definition of what constitutes being of the Jewish faith varies within Judaism. In order to preference enrolment of students each school uses its own definition based on the ethos and religious practices of that school or the theological doctrines of that section of Judaism with which it is aligned.
28. Some of our schools have enrolment criteria that go beyond the definition of being defined as religiously Jewish. For the schools in this category to meet the religious practices, observances and adherence of the sections of the community they serve, they require enrolments not only to be considered religiously Jewish but also to have the students’ parents belong and actively participate in daily services at a specific synagogue or synagogues or be a member of a specific third-party institution. The schools in this category do not advertise to the public through social media or the press. Enrolment is only by word of mouth and the enrolment criteria are clear as to not mislead any applicant.

It is fundamental to Judaism irrespective of the ethos or approach of our schools that each of our schools,

- whether they preference enrolment by Jewish identity alone, however defined by the school in question, or
- by the application of specific additional requirements in addition to being recognised as being Jewish,

that each school maintain the ability to preserve the character of their school by the preferencing and or restricting enrolment of students as per their criteria. We ask the Commission to consider an exemption specifically on this matter.

#### *Curriculum and religious practices and teachings*

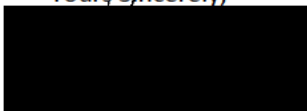
29. Under examples of what it could mean in practice (page 21 of the consultation paper) under proposition “B”, notes a school could require a LGBTQ+ staff member involved in the teaching of religious doctrine or beliefs to teach the school’s position on those religious doctrines or beliefs, as long as they were able to provide objective information about alternative viewpoints if they wished.”
30. This requirement gives blanket authority to the person engaged in delivering the set curriculum to provide alternate views to the school’s position should they wish, at their sole discretion. Potentially, the personal understanding of alternate viewpoints, by a person who is specifically engaged to deliver the schools’ position, could be problematic and could undermine the school if the alternate view was not delivered with full and complete understanding and context. The reference in the consultation paper attempts to qualify what can be provided as alternate views by the teacher, by referring to the term “objectively”. Objectively however is not defined. Additionally, school management has the responsibility to be aware of and approve the curriculum delivered to its students. Allowing a teacher to engage in delivering a curriculum approved by the school, to add to that curriculum an unfettered alternate view, even if objective in nature, could be considered a concern under duty of care to students and other accreditation requirements.

31. The discussion at paragraph 92 of the consultation paper however provides a form of solution which some of our schools would be comfortable with. The discussion at the paragraph allows the school the opportunity to incorporate into its curriculum appropriately and contextualised curriculum material in respect of sexuality, or protected attributes. The paragraph reads in part “....given the importance of the right to manifest religious belief, and the potential for uncertainty, there may be benefit in an explicit provision in the *Sex Discrimination Act* that the content of the curriculum (as opposed to the way it is delivered) is not affected by the *Sex Discrimination Act*. The content of the curriculum will still be subject to requirements of state and territory educational authorities, which may include requirements around how curriculum in relation to sexuality or protected attributes is taught. Schools will also remain bound by their duty of care to students and staff, and other accreditation requirements.”
32. ACJS supports the intent of the consultation paper discussion as outlined at our paragraph 31 (and in the consultation paper at paragraph 92) and notes it addresses the reservation outlined at our paragraph 30, by providing the delivery of alternate views by a professional who can contextualise and reconcile the differing views.

#### Conclusion

33. The submission exemptions sought are intended to ensure every person irrespective of the protected attribute has equal enrolment and equal employment opportunities and are not discriminated in any way and can participate in school life whilst upholding the religious practices, religious teaching, ethos and philosophies of the school.
34. The execution of the above paragraph is and can be a challenge for some of our schools. Notwithstanding, each school strives to meet the objective. In some cases, in order to meet the objective, schools have instituted long standing employment practices whereby a condition of employment, as advised and agreed to prior to engagement, requires its employees not to discuss at work any aspect of their private lives. This includes discussion of personal family religious milestones that align totally with the religious practices and ethos of the school, to what the staff member did over the weekend and to personal preferences.
35. Element 3 of proposition D advises that “Respect for an educational institution’s ethos and codes of conduct or behaviour should not require employees to hide their own sex, sexual orientation, gender identity, marital or relationship status, or pregnancy in connection with work or in private life, or to refrain from supporting another person with these attributes.” This clause, which gives effect to allowing or perhaps promoting discussion openly in a workplace, negates the employment arrangements or codes of conduct which are in place in some schools and may discourage those schools from their current practice of engaging without hesitation employees with personal attributes which perhaps on the surface do not align with the school’s ethos, but which allows the employee full equal opportunity. The clause as proposed can be counter productive to the purposes of anti-discrimination on the basis of a protected attribute in the *Sex Discrimination Act*. ACJS proposes the clause be qualified.
36. ACJS thanks the commission for considering the application. ACJS is happy to elaborate on any aspect of this submission at any time.

Yours Sincerely,



Leonard Main  
Executive Director  
Australian Council of Jewish Schools