Submission to the Australian Law Reform Commission's Inquiry

'Religious Educational Institutions and Anti-Discrimination Laws'

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Introduction

1. This document is made as a submission to the Australian Law Reform Commission's (ALRC) Inquiry into 'Religious Educational Institutions and Anti-Discrimination Laws' (the Inquiry).[1] It responds to the ALRC Consultation Paper issued on 27 January 2023.[2] It first considers potential reforms to the regime for the employment of staff within religious educational institutions. It then turns to consider reforms in respect of their treatment of students. As the ALRC relies heavily on international law in offering the four 'propositions' and 14 'technical proposals' outlined in the Consultation Paper, Appendix A provides a critical analysis of the ALRC's treatment of that law.

The ALRC Terms of Reference

2. The key three pivotal considerations within the terms of reference for the Inquiry are contained within the request for recommendations on reforms that would 'ensure that an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed:
    1. must not discriminate against a student on the basis of sexual orientation, gender identity, marital or relationship status or pregnancy;
    2. must not discriminate against a member of staff on the basis of sex, sexual orientation, gender identity, marital or relationship status or pregnancy;
    3. can continue to build a community of faith by giving preference, in good faith, to persons of the same religion as the educational institution in the selection of staff.'
3. In the following discussion, these three considerations are referred to as limbs 1, 2 and 3. There is a critical tension between limbs 1 and 2, which proceed on the assumption that religious educational institutions are discriminating on a range of protected attributes, and limb 3, which permits such institutions to select staff so to 'build a community of faith'. In response to the terms of reference the ALRC has proposed four

[1] https://www.alrc.gov.au/inquiry/anti-discrimination-laws/terms-of-reference/
[2] Australian Law Reform Commission *Consultation Paper, Religious Educational Institutions and Anti-Discrimination Laws* (27 January 2023).

'propositions' and 14 'technical proposals'. For ease of reference, Appendix B provides the four propositions.

President Derrington's Prior Proposal

4. The above terms of reference replace the terms of reference of a prior referral first made by then Attorney General Christian Porter on 10 April 2019. The prior referral extended to both religious institutions and religious educational institutions.
5. The prior referral requested recommendations for reforms that 'should be made in order to limit or remove altogether (if practicable) religious exemptions to prohibitions on discrimination, while also guaranteeing the right of religious institutions to conduct their affairs in a way consistent with their religious ethos'.[3] To the extent that the prior referral requested the removal of exemptions while 'guaranteeing the right of religious institutions to conduct their affairs in a way consistent with their religious ethos' it also reflected the tension between a prohibition on discrimination and the ability to 'build a community of faith' contained within the three limbs of the current referral. This commonality between the two references is critical to the ongoing relevance of the publicly available work of the ALRC on the prior referral.
6. On 04 September 2019, during the currency of the prior referral, the (still current) President of the Australian Law Reform Commission, Justice Sarah Derrington, gave a speech in which she outlined her 'preliminary thoughts on amendments to the *Sex Discrimination Act*'.[4] Those thoughts were offered not as concluded recommendations for Government, but as a proposal that would eventually be put out for formal public consultation subsequent to the passage of the *Religious Discrimination Bill*.
7. Acquitting the prior terms of reference, Derrington J's speech provided, what effectively amounted to, drafting provisions to be inserted into the *Sex Discrimination Act 1984* (Cth) to 'remove altogether (if practicable) religious exemptions to prohibitions on discrimination, while also guaranteeing the right of religious institutions to conduct their affairs in a way consistent with their religious ethos'. Although the drafting proposed by her Honour addressed both religious institutions and religious educational institutions, it is the drafting in respect of the latter that remains relevant to the current inquiry. This is because it attempts to reconcile the tension expressed within both terms

[3] Available at https://www.alrc.gov.au/wp-content/uploads/2019/04/Religious-Exemptions-Original-Terms-of-Reference-1.pdf The terms of reference were subsequently amended on 29 August 2019. The amended terms are available here: https://www.alrc.gov.au/inquiry/review-into-the-framework-of-religious-exemptions-in-anti-discrimination-legislation/terms-of-reference/.
[4] Sarah Derrington, 'Of Shields and Swords – Let the Jousting Begin!' Speech, Freedom19 Conference, 4 September 2019, https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-s-derrington/s-derrington-j-20190904.

of reference, between a prohibition on discrimination and the ability to 'build a community of faith'.

Staff within Religious Educational Institutions

8. Justice Derrington proposed the following outline of a provision that would pertain to the employment of staff within religious educational institutions (as noted above, the regime was also to be proposed to all religious institutions, not just religious educational institutions):

> This section could provide, similarly, that a person *does not discriminate* against another person by *conduct within the meaning of the Act* when acting on behalf of a religious institution in relation to the employment (or refusal to employ) a person, including conduct relating to the allocation of particular duties or responsibilities. Religious institutions would have the freedom to *prefer to hire* (or not) if:
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> - the conduct is *consistent (or not)* with the religious beliefs and practices of the institution;
> - the conduct has the effect of preferring (or refusing to employ) a candidate for employment on the grounds that the candidate *adheres (or does not)* to the religious beliefs and practices of the institution, *or conducts himself or herself in accordance with* the religious beliefs and practices or religious purposes of the institution; and
> - the institution has a publicly available written policy, to which it adheres, that sets out its position in relation to the manner in which persons employed or engaged by the institution are expected to *conduct themselves consistently* with the religious beliefs and practices or religious purposes in the context of the course of their employment.
>
> Such a section would respond to (and adopt) Recommendations 5 of the Religious Freedom Review. *Its intent would be to have the effect that no person can be discriminated against in relation to their employment on the basis of any protected attribute alone*. Rather, the onus would be on the institution to establish that any decision to *prefer a candidate for employment*, or to refuse employment, *is consistent [with] its religious beliefs and practices or its religious purpose* as set out in a policy to which the institution adheres (it cannot selectively enforce the policy).

> Such a section would have the effect that the existing provisions of the Act (Part II, Div 1) would continue to operate so as to make it unlawful for a person to discriminate in relation to a person's employment during the period of the person's employment (s 14(2)). There would be no ability to terminate a contract of employment purely on the basis that an employee subsequently exhibits an attribute that is said not to accord with the religious beliefs or practices of the institution. Rather, there would be an ability to terminate a person's employment only *where the employee has breached a written agreement to conduct him or herself in accordance with the particular ethos of the institution*.
>
> Such a section would be intended to replace section 38, which could be repealed. Appropriate drafting should also then enable the religious exemptions within the Fair Work Act 2009 to be repealed.[5]

9. It will be observed that within this framework Derrington J makes a distinction between prospective and existing staff. A religious institution may only rely on the exception 'where the [existing] employee has breached a written agreement to conduct him or herself in accordance with the particular ethos of the institution'. It appears that this proposal presumes a certain interaction with section 8 of the *Sex Discrimination Act 1984* (SDA) (further outlined at paragraph 27 below), to the effect that the action of the school is to be considered not to be 'on the ground of' any particular attribute displayed by the employee, but rather taken in response to (or 'on the ground of') the breach of contract engaged in by the employee. Modifications are proposed to Derrington J's proposal below in order to resolve any uncertainty as to the application of section 8 by equating the framework for existing employees with that which is to be applied to prospective employees. It should also be noted that Derrington J's claim that '[a]ppropriate drafting should also then enable the religious exemptions within the Fair Work Act 2009 to be repealed' needs further consideration because the exemptions within that Act relate to a range of protected attributes outside of those covered by the SDA. For consistency, the provisions pertaining to the conduct of religious educational institutions under the Fair Work Act should be aligned with the ultimate framework adopted in the SDA.

[5] Ibid (emphasis added).

Justice Derrington's Proposal Resolves Equality and Religious Freedom According to International Law

10. Justice Derrington's framework turns on the critical distinction between the proposition 'that no person can be discriminated against in relation to their employment on the basis of any protected attribute alone' and the ability of a religious institution to act 'consistent [with] its religious beliefs and practices or its religious purpose'. Justice Derrington's proposal is that if the latter is proven, the former is met: a religious institution '*does not discriminate'* where its acts are 'consistent [with] its religious beliefs and practices or its religious purpose'. To that extent Justice Derrington's proposal can be seen to directly resolve the tension within the three limbs of the current terms of reference.
11. It can thus be said that Justice Derrington's regime holds the key to aligning limbs 1 and 2 (which require that a religious educational institution 'must not discriminate' on a range of protected attributes) with limb 3 (by which they 'can continue to build a community of faith by giving preference, in good faith, to persons of the same religion as the educational institution in the selection of staff'). It also aligns with the balance between the right to freedom from discrimination and religious freedom within international law, which I have outlined at paragraphs 26 to 35 of the attached article.
12. Justice Derrington's proposal is also consistent with the drafting of Part 2 of the *Religious Discrimination Bill,* which included provisions that clarified, for example, that 'this section sets out circumstances in which a religious body's conduct *is not discrimination* under this Act.' That legislation correctly reflected the balance between the right to non-discrimination and religious freedom within international law (outlined at paragraphs 26 to 35 of the attached article). The ALRC's terms of reference request that

> The ALRC should also have regard to the Government's commitment to introduce legislation to (among other things) prohibit discrimination on the basis of religious belief or activity, subject to a number of appropriate exemptions. In doing so, the ALRC should consider whether some or all of the reforms recommended as a result of this inquiry could be included in that legislation.

13. It may be reasonable to assume that the Government will commence the drafting of a separate Commonwealth protection against religious discrimination by taking the existing draft of the *Religious Discrimination Bill 2021* as its initial template. Drawing these threads together, if it is Federal Labor's intention to continue the proposal that

conduct by a religious institution 'is not discrimination' under the *Religious Discrimination Bill,* that regime should also be reflected within the ALRC's drafting offered in substitution for section 38 of the *Sex Discrimination Act.*

14. Justice Derrington's proposal declares that a religious institution '*does not discriminate'* where its acts are 'consistent [with] its religious beliefs and practices or its religious purpose'. Drafting modelled on such a framework that declares that a religious institution 'does not discriminate' when it 'build[s] a community of faith by giving preference, in good faith, to persons of the same religion as the educational institution in the selection of staff' would acquit the existing terms of reference and align the *Religious Discrimination Act* with the *Sex Discrimination Act's* treatment of religious educational institutions.

The Provision Requires the Religious Educational Institution to Demonstrate its Actions are Consistent with its Religious Beliefs

15. Beyond its offer of a resolution of the interests at the core of the existing reference, Derrington J's provision proposes that the behaviour of the religious educational institution must be '**consistent with**' religious beliefs. This is to be preferred to tests that impose standards of 'conformity' or 'avoidance of injury to religious susceptibilities', which have been restrictively interpreted. These two tests, as stated within the then *Equal Opportunity Act 1995* (Vic), were extensively considered by the Victorian Court of Appeal in *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd (Cobaw).*[6] That matter concerned a faith-based camping ground that declined a booking request on the basis of its religious objection to the activities proposed to be undertaken by the applicant. The majority judgements exemplify the application of a strict interpretation of these two tests that artificially constrains religious assertions of belief.
16. The interpretation applied to the phrase 'conforms with the doctrines of the religion' by Maxwell P was that 'the doctrine requires, obliges or dictates that the person act in a particular way when confronted by the circumstances which resulted in their acting in the way they did'[7] and 'as requiring it to be shown that conformity with the relevant doctrine(s) of the religion gave the person no alternative but to act (or refrain from acting) in the particular way.'[8]

[6] *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* 308 ALR 615 ('*Cobaw*') Maxwell P.
[7] Ibid [286] (Maxwell P).
[8] Ibid [286].

17. In respect of the 'reasonably necessary' test, at the time of the actions considered in *Cobaw* the test did not include the word 'reasonably', requiring instead that the actions 'are necessary to avoid injury to the religious sensitivities of adherents of the religious body's religion'. The inclusion of the word 'reasonably' introduced an objective element to the determination of what is 'necessary to avoid injury', displacing subjective assessment. In respect of the 'necessary' test the Victorian Court of Appeal held that the following statement of the judge at first instance was correct:

> in order for it to be necessary to engage in discriminatory conduct to avoid injury to the religious sensitivities of members of a religion, the injury which would be caused if the discriminatory conduct were not permitted must be *significant, and unavoidable*. The persons engaging in the discriminatory conduct must have been *required or compelled by the doctrines of their religion or their religious beliefs to act in the way they did, or had no option other than to act in the way they did to avoid injuring, or causing real harm to the religious sensitivities of people of the religion*. The religious sensitivities of people of the religion would be injured if *matters intimately or closely connected with, or of real significance to the doctrines, beliefs or practices of the adherents of the religion are not respected*, or are treated with disrespect.[9]

As an aside, the jurisprudence is replete with judicial warnings to avoiding regard to whether actions are 'intimately' connected with a religion.[10] President Maxwell, with whom Neave JA agreed, also stated:

> it would need to be shown that for the body to be required to act in a non-discriminatory fashion — by not doing the act in question — would be an affront to the reasonable expectation of adherents that the body be able to conduct itself in accordance with the doctrines to which they subscribed and the beliefs which they held.[11]

The inclusion of the word 'reasonably' in the Victorian legislation indicates that the above formulations of the 'necessary to avoid injury' test must now be objectively evident to a court.

18. The interpretations of the 'conformity' and 'necessary to avoid injury' requirements applied in *Cobaw* impose strict tests that require a religious body to demonstrate, effectively, that no other course of action was open to it. The interpretations have very

[9] Ibid [299] (emphasis added).
[10] See Fowler, Mark 'Judicial Apprehension of Religious Belief under the Commonwealth Religious Discrimination Bill', in Michael Quinlan and A. Keith Thompson (eds) *Inclusion, Exclusion and Religious Freedom in Contemporary Australia*, (Shepherd Street Press, 2021) 95-6.
[11] *Cobaw* (n 5) [301].

significant consequences. Possibly the most wide-ranging (and entirely logical) consequence of those interpretations is that drawn by Maxwell P himself: because a religious body is not compelled to offer its services to the wider market, no question of 'conformity with doctrines' or 'necessity to avoid injury' can arise where it offers those services. As Maxwell P noted: 'CYC has chosen voluntarily to enter the market for accommodation services'.[12] On Maxwell P's reasoning the 'voluntary' nature of the religious institution's act in offering services to the public obviates any question of 'conformity with doctrines' or 'necessity to avoid religious injury' that would arise for its subsequent actions. That interpretation would render any 'voluntary' act of a religious body in providing, for example, education or other charitable services, or public services under Government funding, as automatically precluded from exemptions within anti-discrimination law. In the context of the ALRC's Inquiry, the application of Maxwell P's interpretation would have the result that religious educational institutions would be unable to retain their religious ethos in respect of both their employment practices and the activities they undertake. Justice Derrington's proposal addresses such concerns by adopting a test that requires that the institution act in a manner that is 'consistent with' its asserted religious beliefs. At the conclusion of this document, I make comment on the means by which such an institution may evidence its beliefs.

Other Welcome Facets of Justice Derrington's Proposal

19. Other key elements of Derrington J's framework that are worthy of support include the following:
    a) By proceeding from the proposal that 'a person **does not discriminate** against another person' Derrington J avoids relegating the question of religious freedom to the 'reasonableness' test for indirect discrimination (under section 7B of the *Sex Discrimination Act 1984* (Cth) (SDA)) or the 'on the ground of' test within the provisions pertaining to direct discrimination (see sections 5 to 7A). As the relevant act is not 'discrimination', the questions of the 'reasonableness' of the act, or that which comprised the relevant 'ground' for the act, simply do not arise.
    b) The provision does not name any particular protected attribute. Instead, it operates in respect of '**conduct within the meaning of the Act**'. As her Honour stated elsewhere in her speech, the proposal proceeded on the basis that 'there is no *a priori* determination of which attributes should be included in an exemption for religious bodies'.[13]

[12] Ibid [269]. See also Neave JA at [431].
[13] Derrington (n 3).

c) The provision states the question of an employee's '**adherence**' and whether their '**conduct [is] in accordance with**' the religious beliefs as two separate limbs, both of which could be separately relevant to an employee's suitability. My understanding is that many religious schools seek to employ persons who personally share the relevant faith. Such is considered critical to their ability to model faith to the coming generation. Justice Derrington's proposal permits the continuation of such models by eschewing a singular focus on the actions of the staff member and whether they 'accord' with the beliefs.

d) The provision recognises that conduct that is inconsistent with religious beliefs may be relevant to the determination of an employee's suitability. In this Derrington J departs from the fraught model now introduced in Victoria under the *Equal Opportunity Act 2010*, which is outlined at paragraphs 36 to 42 of the enclosed article. As argued in that article, in that regard the Victorian model is inconsistent with the applicable international human rights law.

e) Justice Derrington's framework expressly encompasses the notion that a religious educational institution may **preference** staff. Correctly drafted this will assist in avoiding negative inferences being drawn by the temporary employment of persons who do not share the faith of the religious educational institution (paragraph 45 of the enclosed article outlines the difficulties that arise under regimes that preclude such preferencing). Part 2 of the *Religious Discrimination Bill* contained a model that enabled 'preferencing'. Again, in the interest of streamlining the ALRC's proposal with the drafting of the *Religious Discrimination Bill,* following Derrington J's proposal, the ALRC's drafting could specifically recognise the ability to preference staff.

f) Justice Derrington's framework applies to not only applicants for employment, but also **existing staff**. Limb 3 of the new terms of reference seeks a regime that allows religious educational institutions to give 'preference, in good faith, to persons of the same religion as the educational institution *in the selection of staff*'. The reference to the 'selection of staff' could suggest that the regime sought is only to be applied at the point of employment, and not during the term of employment. Over time such a test could lead to a serious white-anting of the religious ethos of an institution. Justice Derrington's proposal answers this concern, to the extent that it applies to both applicants and existing staff. (It should be noted, that the phrase '*the selection of staff*' in the current terms of reference could also reasonably be applied to the appointment of existing staff for additional responsibilities or benefits.)

g) In offering a resolution between the *prima facie* contesting notions that a religious educational institution 'must not discriminate' but can exercise an ability to 'build a community of faith' Derrington J avoids the complexities of the recently legislated amendments to the Victorian *Equal Opportunity Act 2010.* Although purporting to offer a reconciliation of the same principles, those Victorian amendments set up a regime that seeks to disqualify consideration of non-religious activity on the part of an employee (rendering that regime inconsistent with international law, as outlined at paragraphs 36 to 42 of the enclosed article).

20. The following elements of Derrington J's proposal are potentially problematic and require further amendment or consideration, along the following lines:

h) The provision needs to make clear that it not only applies to a person 'acting on behalf of a religious institution', but also to the religious institution itself.

i) The notion that the provision would only apply to an existing employee 'where the employee has breached a written agreement to conduct him or herself in accordance with the particular ethos of the institution' goes beyond the recommendations of the Expert Panel, which only required that a copy of a 'publicly available policy' be provided to 'employees and contractors and prospective employees and contractors'.[14] Similarly the *Religious Discrimination Bill 2021* required that 'the conduct must be in accordance with a publicly available policy'. However, as we have seen, those schools that have sought to comply with the Expert Panel's recommendations have been subject to substantial negative media scrutiny. An alternative to such tests may be to retain the requirement that a religious educational institution must act in 'good faith', as is required under the terms of reference and also current section 38(1) of the SDA, but to also stipulate that, in order to demonstrate that it had acted in 'good faith', a religious educational institution is required to make its religious requirements known within the applicable employment documentation. This would be sufficient to balance an educational religious institution's ability to maintain its ethos with the important concern for equitable disclosure to employees.

It can be said that current law already drives religious institutions to make their expectations contractually clear in order to successfully rely on statutory exemptions in a court of law. Indeed, this reflects the expectations stated by the Victorian Court of Appeal in *Cobaw* in respect of supplies to the public by faith-

[14] Expert Panel on Religious Freedom, *Religious Freedom Review*, 18 May 2018, recommendation 5, 2.

based institutions. Whether a religious institution's requirements have been made clear as a matter of contract will also be a relevant consideration when seeking to rely upon the current 'good faith' test under section 38(1) of the *Sex Discrimination Act 1984* (Cth). The above proposal clarifies that such disclosure is a necessary component of the 'good faith' test (operating in addition to the other facets of that test). Consideration will need to be given to the precise terms of this proposal to ensure that sufficient latitude is provided to avoid effectively removing the freedoms accorded to religious educational institutions at international law consequent on poor or sloppy drafting of employment contracts. What can be said in defence of the proposal, however, is that where a religious institution makes its requirements known to staff, it is acting equitably, consistent with the argument that its actions do not amount to technical 'discrimination'.

Multiple Reasons under Section 8 of the SDA

21. It is also noted that by avoiding the naming of any particular attribute on which a religious institution must not discriminate and by stating that a religious institution 'does not discriminate' when it acts to maintain its religious ethos, Derrington J's proposal avoids the complicated questions that arise under section 8 of the SDA where multiple 'reasons' may be said to underpin the one act. Section 8 provides:

> A reference in subsection 5(1), 5A(1), 5B(1), 5C(1), 6(1), 7(1) or 7AA(1), section 7A or subsection 28AA(1) to the doing of an act by reason of a particular matter includes a reference to the doing of such an act by reason of 2 or more matters that include the particular matter, whether or not the particular matter is the dominant or substantial reason for the doing of the act.

The section acknowledges that multiple reasons may underpin the one discriminatory act, including non-discriminatory reasons. It provides that the presence of non-discriminatory reasons (even 'dominant or substantial' non-discriminatory reasons) will not disqualify a decision-maker's reference to discriminatory reasons (even where those discriminatory reasons are non-dominant or non-substantial reasons). Drafting that permits a religious educational institution to act for the *reason* of 'building a community of faith' but which also provides that religious educational institution 'must not discriminate' on the basis of certain protected attributes could result in the religious institution not being able to act. This is because, even though the 'dominant or substantial' reason for the action may have been for the non-discriminatory reason of

'building a community of faith', section 8 will operate so to render the secondary discriminatory reason as untouched by the exemption. By avoiding the naming of any particular attribute on which a religious institution must not discriminate and by stating that a religious institution 'does not discriminate' Derrington J's proposal avoids this outcome.

22. The concern is accentuated by a close consideration of the precise phrasing of limb 3 of the terms of reference. In omitting to state any other protected attribute apart from the consideration of a person's 'religion', limb 3 of the terms of reference leaves open the prospect of a regime similar to that which is now law in Victoria, and which is recommended for adoption in Queensland and Western Australia, namely that an institution may only discriminate on the ground of a person's inconsistent religious belief or religious activity. In Victoria this has opened the door to great uncertainty for religious institutions, requiring that they consider the extent to which an employee's activity that is inconsistent with the religious institution's belief (but not itself a form of 'religious activity') can be informative of the employee's own belief (see paragraphs 39 to 42 of the enclosed article).

23. Depending on how the ALRC's legislative proposal is drafted, drawing a distinction between permissible discrimination on the basis of religious belief and activity and non-permissible discrimination in respect of any other protected attribute could require a determination of the relevant 'reasons' under section 8 where there are multiple relevant protected attributes. If a Court finds that there are multiple reasons, and if the exemption operates only in respect of religious belief, the institution would not have an exemption in respect of any other protected attribute that was a 'reason' by operation of section 8. This would mean that the religious institution could not act to 'build a community of faith'.

24. It is important to observe that this is the effect of Propositions B and C put by the ALRC. The ALRC proposes at proposition B that '[r]eligious educational institutions should not be allowed to discriminate against any staff (current or prospective) on the grounds of sex, sexual orientation, gender identity, marital or relationship status, or pregnancy'. At proposition C the ALRC proposes that '[i]n relation to selection, appointment, and promotion, religious educational institutions should be able to preference staff based on the staff member's religious belief or activity, where this is justified because … the criteria for preferencing in relation to religion or belief would not amount to discrimination on another prohibited ground (such as sex, sexual orientation, gender

identity, marital or relationship status, or pregnancy), if applied to a person with the relevant attribute'. In both respects the ALRC draws upon the complicated test for determining the 'ground' of an allegedly discriminatory act within anti-discrimination law. The implications of that test for Propositions B and C may not be readily apparent to the non-legally trained.

25. The ALRC are relying on the 'on the ground of' test, which looks to the 'real reason' for the action. As noted above, section 8 of the SDA recognises that there can be multiple reasons for the one act. Thus, even though an act may be done 'on the basis' of the inconsistent religious beliefs of the person in question, if a court holds that a separate attribute is also a reason (it need not even be a substantial reason) by operation of section 8, the separate prohibition from discrimination (at subsections 5(1), 5A(1), 5B(1), 5C(1), 6(1), 7(1) or 7AA(1), section 7A or subsection 28AA(1), as may apply) will be breached. This means that Propositions B and C would remove all discretion wherever a person is otherwise protected under the SDA, even where their role is to teach religion.

Justice Derrington's Proposal Modified

26. Justice Derrington's proposal could be modified to retain the above enumerated strengths while addressing the above listed concerns in the following manner:

> "A religious educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, or a person acting on behalf of such a religious educational institution, does not discriminate against another person by conduct within the meaning of the Act ~~when acting on behalf of a religious institution~~ in relation to the employment of (or refusal to employ) a person, including conduct relating to the allocation of particular duties or responsibilities. Religious educational institutions would have the freedom to prefer to hire (or not) if:
>
> a) the conduct is consistent (or not) with the genuinely held religious beliefs and practices of the institution;
>
> b) the conduct has the effect of preferring (or refusing to employ) a candidate for employment or an employee on the grounds that the candidate or employee adheres (or does not) to the genuinely held religious beliefs and practices of the institution, or conducts himself or herself in accordance with the genuinely held religious beliefs and practices or religious purposes of the institution; and

c) the institution engages in the conduct in good faith. In determining whether the institution has acted in good faith, regard may be had to whether it has made ~~a publicly~~ available to employees or prospective employees a written policy, to which it adheres, that sets out its position in relation to the manner in which persons employed or engaged by the institution are expected to conduct themselves consistently with the genuinely held religious beliefs and practices or religious purposes in the context of the course of their employment."[15]

Such a section would substantively respond to ~~(and adopt)~~ Recommendations 5 of the Religious Freedom Review. *Its intent would be to have the effect that no person can be discriminated against in relation to their employment on the basis of any protected attribute alone*. Rather, the onus would be on the institution to establish that any decision to *prefer a candidate for employment*, or to refuse employment, or to refuse to continue the engagement of an existing employee *is consistent [with] its religious beliefs and practices or its religious purpose* as set out in a policy to which the institution adheres (it cannot selectively enforce the policy).

~~Such a section would have the effect that the existing provisions of the Act (Part II, Div 1) would continue to operate so as to make it unlawful for a person to discriminate in relation to a person's employment during the period of the person's employment (s 14(2)). There would be no ability to terminate a contract of employment purely on the basis that an employee subsequently exhibits an attribute that is said not to accord with the religious beliefs or practices of the institution. Rather, t~~In order for the religious educational institution to engage in such conduct it must act in 'good faith'. Accordingly, a court may consider whether ~~here would be an~~the ability to terminate a person's employment ~~only~~ flowed from ~~*where*~~ *the employee~~'s has~~ breach ~~of ed~~ a written agreement to conduct him or herself in accordance with the particular ethos of the institution*.

Such a section would be intended to replace section 38, which could be repealed. Appropriate drafting should also then enable the religious exemptions within the Fair Work Act 2009 to be repealed.[16]

27. Whereas Derrington J's proposal placed the emphasis on establishing that the action was taken 'on the basis of' the breach of contract in the case of existing employees

[15] Sarah Derrington, 'Of Shields and Swords – Let the Jousting Begin!' Speech, Freedom19 Conference, 4 September 2019, https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-s-derrington/s-derrington-j-20190904.
[16] Ibid (emphasis added).

(see paragraph 9 above), the proposed drafting removes any doubt as to the operation of section 8 of the SDA by stating that the regime that has regard to the consistency of conduct and the adherence of individuals applies to both prospective and existing employees.

'Good faith'

28. It is necessary to clarify the intended scope of the term 'good faith' within the proposed exception. This is because, as French J (as he then was) stated in *Bropho v Human Rights and Equal Opportunity Commission & another (Bropho),* '[t]he particular construction will be adapted to the particular statute or rule of law in which the words are used.'[17] It should be clarified that the requirement that a religious educational body act in 'good faith' is not intended to import the separate and distinct requirement of 'reasonableness', as understood at law. A 'reasonableness' requirement could subject the content of religious beliefs to a merits-based assessment by a secular court. Instead, 'good faith' is intended to import a subjective requirement of honesty and of not knowingly pursuing an improper purpose when acting consistently with a religious belief. It also requires actions to be assessed according to their fidelity to the norms the wider provision prescribes. In *Bropho*, French J summarised these twinned principles as follows:

> In a statutory setting a requirement to act in good faith, absent any contrary intention express or implied, will require honest action and fidelity to whatever norm, or rule or obligation the statute prescribes as attracting the requirement of good faith observance….[18]

In the context of the proposed religious educational bodies exception, the 'norms' that are applicable include the freedom of religious persons to associate in community with one another and the rights of parents to ensure the religious and moral education of their children, consistent with Australia's obligations to respect freedom of religion and freedom of association.

Evidencing the Relevant Beliefs

29. A further modification to Derrington J's wording as outlined above proposes that regard be had to the 'genuinely held' beliefs associated with the institution. In her speech Derrington J said:

[17] (2004) 204 ALR 761 [87] (French J).
[18] At 93.

> Assuming it is accepted, as it appears to be on both sides of government, that there is a legitimate balancing exercise to be undertaken between the right to equality and the right to freedom of religion, it seems fraught for secular law to provide in legislation, from time to time, which doctrines, tenets and beliefs or teachings of a particular creed are deemed an acceptable basis on which to discriminate and which are not – subject always to the overriding limitations on the right to freedom of religion that are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others.[19]

30. A 'genuineness' or 'sincerity' test reflects the settled position developed by the highest courts in Australia, England, Canada and the United States as a means to prevent judicial determination of doctrinal disputes.[20] As I outlined at paragraphs 24 to 37 of my submission to the Senate Inquiry on the *Religious Discrimination Bill 2021* (attached), that test can be applied to the evidencing of not only the beliefs of individuals, but also religious institutions. Whether a particular position is genuinely held could be assessed through reference to the institution's written statements of belief (although care would need to be taken to avoid prejudicing smaller institutions that do not have the resources to develop extensively articulated statements of belief), the conduct of the institution and the sincere testimony of its leaders. In substance this reflects the evidentiary approach that was applied by the New South Wales Court of Appeal in *OV & OW v Members of the Board of the Wesley Mission Council*.[21] Such a test should be applied when determining whether conduct was undertaken in order to 'preserve the religious ethos' of a school, as is proposed in respect of students at paragraph 33(b) below. This would also be consistent with the approach outlined above whereby a religious educational institution would be required to make its religious requirements known within the applicable documentation provided to families in order to demonstrate that it had acted in 'good faith'.

Students within Religious Educational Institutions

31. Her Honour proposed the following regime for consultation in respect of students within religious educational institutions:

> Educational institutions

[19] Derrington (n 3).
[20] See further Fowler (n 9).
[21] *OV & OW v Members of the Board of the Wesley Mission Council* (2010) 79 NSWLR 606 ('*Wesley Mission*').

This section could apply to educational institutions which are also religious institutions. Similarly, it could provide that a person does not discriminate against another person by conduct within the meaning of the Act when acting on behalf of an educational institution in relation to the admission (or non-admission) of a student to an educational institution if:

- the conduct is *consistent with* religious beliefs and practices of the institution;
- the conduct has the effect of preferring (or refusing to admit) a student on the grounds that the student (or his or her parents) are adherents of the religious beliefs and practices of the institution, and where necessary, the student is recognised by the institution as having the relevant religious status; or conducts themselves in accordance with the religious beliefs and practices or religious purposes of the institution; and
- the institution has a publicly available written policy, to which it adheres, that sets out its position in relation to its religious beliefs and practices or religious purposes in the context of the environment of the educational institution.

Such a section would respond to (and largely adopt) Recommendation 7 of the Religious Freedom Review. Its intended effect would be that *no student could be discriminated against at the time of admission to an institution on the basis of any protected attribute alone*. Rather, *the onus would be on the institution to establish that any decision to prefer or refuse a student is consistent with its religious beliefs and practices or its religious purpose as set out in a policy to which the institution adheres* (it cannot selectively enforce the policy). It would also be consistent with the principle of integrity and transparency to protect the inherent dignity of those who might otherwise be surprised or confronted by a religious institution's adherence to particular religious beliefs and practices.

Such a section would have the effect that the existing provisions of the Act (s 21) would continue to operate so as to make it unlawful for a person to discriminate in relation to a student on any ground during the student's term of enrolment or in relation to exclusion or expulsion from the institution. This is consistent with the findings of the Religious Freedom Review.[22]

[22] Derrington (n 3) (emphasis added).

32. Key elements of Derrington J's framework to observe include the following:
    a) Again, the proposal provides that an educational institution is **not discriminating** when its actions are '**consistent with its religious beliefs and practices or its religious purpose**'**.** This accords with international law, as noted above, and in the attached article (paragraphs 26 to 35). As also outlined above, the adoption of that proposal would acquit the obligations of the current ALRC referral.
    b) Again, by proceeding from the proposal that 'a person **does not discriminate** against another person' Derrington J avoids relegating the question of religious freedom to the 'reasonableness' test for indirect discrimination under section 7B. The question of the 'reasonableness' of the action does not arise as the act is not 'discrimination'. For the same reason the question of whether the action was taken 'on the ground of' a protected attribute does not arise under the tests for direct discrimination under sections 5 to 7A.
    c) The provision does not name any particular protected attribute. Instead, it operates in respect of '**conduct within the meaning of the Act**'. This also addresses the concern that arises where multiple reasons are identifiable for an action under section 8, as discussed at paragraphs 21 to 25 above.
    d) The provision states that the behaviour of the religious educational institution must be '**consistent with**' religious beliefs. As outlined above at paragraphs 15 to 18 above, this is to be preferred to tests that impose standards of 'conformity' or 'avoidance of injury to religious susceptibilities', which have been strictly interpreted.[23]
    e) The provision states the question of a prospective student's '**adherence**' and whether their '**conduct [is] in accordance with**' the religious beliefs as two separate limbs, both of which could be separately relevant to a prospective student's suitability.
    f) Justice Derrington's framework expressly encompasses the notion that a religious educational institution may **preference** students. Justice Derrington's proposal reflects the exception that applies to religious educational institutions under Schedule 12, pt 2, s 5 of the *Equality Act 2010* (UK). That provision also permits religious educational institutions to give 'preference to persons of a particular religion or belief' in the selection of students.
    g) The provision recognises that conduct that is inconsistent with religious beliefs may be relevant to the determination of a prospective student's suitability.

[23] See for example *Cobaw* (n 5).

33. However, the following elements are problematic and require further amendment, along the following lines:

a) As noted above in respect of employees, those schools that have sought to comply with the Expert Panel's recommendation that schools adopt publicly available policies have been subject to substantial negative media scrutiny. An alternative to such tests may be to retain the requirement that a religious educational institution must act in 'good faith', as is required under current section 38(3), but to also stipulate that, in order to demonstrate that it had acted in 'good faith', a religious educational institution is required to make its religious requirements known within the applicable documentation provided to families. This would be sufficient to balance an educational religious institution's ability to maintain its ethos with the important concern for equitable disclosure.

b) In applying to the point of enrolment only, Derrington J's proposal will not address actions by existing students that undermine the ethos of a religious educational institution. By limiting its operation to the admission of students, Derrington J's proposal is also inconsistent with the recommendations of the Expert Panel.[24] The following provides examples of actions which could be held to be discriminatory in response to a complaint made in the absence of an exemption within discrimination law:

    a. An Anglican school which provides spiritual instruction or pastoral care from a priest does not make equivalent provision for pupils from other religious faiths.
    b. A Jewish school organises visits for pupils to sites of particular interest to its own faith, such as a synagogue or historical museum, but does not arrange trips to sites of significance to the faiths of other pupils.
    c. A child of a different faith claims that they were being treated less favourably because objects symbolic of a school's faith, such as the Koran, were given a special status in the school.
    d. A child of a different faith claims that they are being treated less favourably because a Christmas nativity is displayed or nativity performance is undertaken within a Catholic school, whereas equivalent festivities observed within their own religion are not.

[24] Expert Panel on Religious Freedom (n 13) [1.275].

e. A school requires that all enrolled students attend religious instruction classes, or a regular chapel service.
f. A school tells a group of existing students that they cannot operate a club that exists to advocate for the school to eschew its religious beliefs concerning marriage.
g. A student that is not heterosexual complains that the teaching of a schools' traditional view of marriage is discriminatory.
h. A school adopts a policy that students must use the facilities that correspond to their biological sex.

In examples (a) to (f) the protected attribute will be religious belief or activity. The examples are then to be determined according to the exception regime within the proposed *Religious Discrimination Bill.* The following analysis is relevant to the ALRC's recommendations on the regime concerning students under that legislation, noting that the terms of reference state that 'the ALRC should consider whether some or all of the reforms recommended as a result of this inquiry could be included in that legislation'. Examples (f) to (g) concern certain of the protected attributes listed at limb 1 of the terms of reference (and potentially also the religious belief or activity of a student). Consistent with the recommendations of the Expert Panel, religious educational institutions should retain the existing ability to refuse those complaints which if successful would undermine or impact detrimentally upon their distinct religious ethos (such as those outlined above). To fail to provide for such would undermine their ability to offer an education that gives effect to 'the liberty of parents … to ensure the religious and moral education of their children in conformity with their own convictions'. Such an outcome would be in contravention of Article 18(4) of the *International Covenant on Civil and Political Rights 1966* (for further detail on this right see the enclosed article at paragraphs 19 to 25).

One way to address this concern would be to extend Derrington J's proposal to existing students under both the *Religious Discrimination Bill* and the SDA. For greater clarity, the key elements of Derrington J's proposal that are applicable to both existing and prospective students could be combined with the regime currently enacted at Schedule 12, pt 2, s 5 of the *Equality Act 2010* (UK) concerning students and religious educational institutions. This would (in addition to Derrington J's core tests) require a school to demonstrate that its actions (clarified to be 'non-discriminatory') were taken 'to preserve the institution's religious ethos'. Under that Act, it is lawful to give 'preference to [students] of a particular religion or belief' where such is undertaken 'to preserve the institution's religious ethos'. Consistent

with Derrington J's proposal that such actions are 'not discrimination', it should be observed that under this additional requirement such a school would not be acting on the basis of any particular attribute. Instead, it would be acting in order to 'preserve [its] religious ethos'. Drawing upon Schedule 12, pt 2, s 5 of the *Equality Act 2010* (UK), Derrington J's proposal could then be combined with the current definition of a religious educational institution under the SDA and the additional requirement that such institutions act in 'good faith' in the following manner:

> (1) An educational institution that is conducted in accordance with doctrines, tenets, beliefs or teachings of a particular religion or creed or a person acting on behalf of such an institution does not discriminate against a student by conduct within the meaning of the Act where such conduct is:
>
> > (a) consistent with the genuinely held religious beliefs and practices of the institution or its religious purpose; and
> >
> > (b) undertaken in good faith to preserve the institution's religious ethos.
>
> (2) Without limitation, conduct under subparagraph (1) includes anything done in connection with:
>
> > (a) the curriculum of a school;
> >
> > (b) the adoption and maintenance of observances or practices that are consistent with or model the school's religious ethos (whether or not forming part of the curriculum);
> >
> > (c) acts of worship or other religious observances or practices organised by or on behalf of a school or in which a school participates (whether or not forming part of the curriculum).

Adopting the framework of the *Equality Act 2010* (UK) on which this drafting is modelled, the proposal would require the school to demonstrate that there is a link between the maintenance of the religious ethos and the conduct taken by the school, and that the student's conduct will impact on that ethos (see paragraphs 29 to 30 as to accepted judicial tests to evidence this). The proposal is accompanied by a requirement that the religious educational institution also act in 'good faith' (see comments above at paragraph 28). This proposal would address the concern that a schools' ethos may be undermined by students who are already enrolled at the school, including as illustrated by the examples provided on the preceding page.

c) Justice Derrington's proposal will not provide the certainty that religious educational institutions may continue to teach their beliefs in the absence of the existing exemption at section 38(3) of the SDA. Australian courts have recognised that, in certain contexts, comments can amount to *discrimination*, a statutory concept that is distinct from *vilification* (see for example *Nationwide News Pty Ltd v Naidu;*[25]*Qantas Airways v Gama*[26] and *Singh v Shafston Training One Pty Ltd and Anor*[27]*)*. On the removal of section 38, a separate provision will need to clarify that religious educational institutions can continue to teach in accordance with their religious beliefs. The following provision is modelled on provisions proposed as an amendment during Parliamentary debate on the *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018,* with modifications to align the drafting with Derrington J's proposal:

> (1) A person does not discriminate against a person where they engage in teaching activity if that activity is in good faith in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed.
>
> (2) In this section:
>
> > teaching activity means any kind of instruction of a student by a person employed or otherwise engaged by an educational institution that is conducted in accordance with doctrines, tenets, beliefs or teachings of a particular religion or creed.

d) As is the case in respect of Justice Derrington's proposal in respect of employment, the provision needs to make clear that it not only applies to a person 'acting on behalf of a religious institution', but also to the religious institution itself.

[25] *Nationwide News Pty Ltd v Naidu; ISS Security Pty Ltd v Naidu* [2007] NSWCA 377 [378] Basten J.
[26] (2008) 157 FCR 537, [78].
[27] [2013] QCAT 008 (ADL051-11) Michelle Howard, Member 8 January 2013.

ANNEXURE A

Contents

Introduction and Summary

1. This Annexure sets out an analysis of the ALRC's treatment of international human rights law. Demonstrating how the ALRC's four Propositions rely upon a deficient interpretation of the applicable requirements of international human rights law entails a separate exercise from the positing of recommendations for reform made in the body of the submission. The ALRC states its 'preliminary view' that Propositions B to D 'can be implemented in a way that is consistent with Australia's international legal obligations'.[1] A similar claim is made in respect of Proposition A.[2] Three central contentions underpin the ALRC's proposed framework. They are:
    a. Religious educational institutions cannot discriminate on the basis of attributes protected under the *Sex Discrimination Act 1984* (SDA), even in respect of religious teaching roles;
    b. Religious educational institutions can preference staff that share the relevant faith where 'participation in the teaching, observance or practice of the religion' is a 'genuine occupational qualification'; and
    c. Conduct by the religious educational institution should be proportionate to the objective of upholding its religious ethos.

    The consistency of each of these respective propositions with the obligations arising for Australia according to international human rights law is considered in the following three parts. This Annexure first analyses the effect of the Propositions (paragraphs 7 to 12) and considers the ALRC's claim that they are consistent with the law in Victoria (paragraphs 13 to 18). It then turns to analyse the respective key interpretations of international human rights law stated by the ALRC in support of the Propositions (Parts I to III). As set out below, the interpretation of Australia's international obligations developed in the Consultation Paper is lacking in several fundamental respects, each of which call into question the claims that the Propositions are consistent with international human rights law.
2. First, the following comments are made in respect of the proposal that religious educational institutions cannot discriminate on the basis of an SDA attribute:
    a. In support of Propositions B and C the ALRC reads the statements of the United Nations Human Rights Committee (UNHRC) and the United Nations High Commissioner for Human Rights to mean that wherever a protected attribute arises under the SDA, a religious institution loses its ability to act in accordance

[1] Australian Law Reform Commission *Consultation Paper, Religious Educational Institutions and Anti-Discrimination Laws* (27 January 2023) ('ALRC Consultation Paper') [51].
[2] Ibid [45].

with its beliefs and to determine its religious ethos. With respect, this claim relies upon a misapplication of the cited sources. Consecutive Special Rapporteurs have confirmed that the applicable standard for determining the permissible limitations upon religious institutions in respect of their employment practices is Article 18(3).[3] It is incorrect to claim that the statement relied upon by the ALRC in respect of permissible limitations on the basis of widely-held morals overrides the remaining jurisprudence concerning permissible actions undertaken in the maintenance of religious communities (see paragraphs 20 to 32).

b. The ALRC has failed to record, and thus consider the import of, several of the key statements made by United Nations Special Rapporteurs concerning religious institutional autonomy and the important role it plays in ensuring 'institutionalized diversity within a modern pluralistic society.[4] These statements contradict the interpretation the ALRC develops from a limited selection of statements from one Special Rapporteur concerning the treatment of 'internal dissidents' (see Annexure generally and paragraphs 24 to 32 in particular).

3. illustrating the concerns held, the ALRC has failed to record the central comment from a Special Rapporteur on Freedom of Religion or Belief concerning the specific situation of private schools under the ICCPR. Heiner Bielefeldt's 2010 comments offer a summary of the important recognition accorded to 'private denominational schools' within human rights law as a 'way for parents to ensure a religious and moral education of their children in conformity with their own convictions'. The Special Rapporteur emphasised the 'distinct' factors that arise in respect of those schools:

> The situation of religious instruction in private schools warrants a distinct assessment. The reason is that private schools, depending on their particular rationale and curriculum, *might accommodate the more specific educational interests or needs of parents and children, including in questions of religion or belief*. Indeed, many private schools *have a specific denominational profile which can make them particularly attractive to adherents of the respective denomination, but frequently also for parents and children of other religious or*

[3] Heiner Bielefeldt, *Report to the General Assembly of the Special Rapporteur on Freedom of Religion or Belief*, UN Doc A/68/290 (7 August 2013) ('Bielefeldt A/68/290') [60]; Heiner Bielefeldt, *Interim report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/69/261 (5 August 2014) ('Bielefeldt A/69/261') [41] see also [38]; Ahmed Shaheed, *Report of the Special Rapporteur on Freedom of Religion or Belief*, UN Doc A/HRC/43/48 (24 August 2020) ('Shaheed A/HRC/43/48') [59], [66], [74].
[4] Heiner Bielefeldt, *Report of the Special Rapporteur on freedom of religion or belief,* UN Doc A/HRC/16/53 (15 December 2010) ('Bielefeldt A/HRC/16/53') [54]-[55] (emphasis added).

belief orientation. In this sense*, private schools constitute a part of the institutionalized diversity within a modern pluralistic society.*[5]

For the reasons outlined below, by withdrawing the ability of private religious schools to maintain their distinct religious ethos, the ALRC's proposals undermine 'institutionalised diversity within [Australia's] modern pluralistic society'. The prohibition on any form of discrimination under the SDA, even when exercising a preference for persons of the same faith fails to take regard the existing jurisprudence that holds that regard must be had to the religious institution's own asserted beliefs and its self-conception of the requirements of those beliefs when weighing applicable limitations on religious institutions (see paragraphs 33 to 34). The prohibition frustrates the allowance the ALRC purportedly makes for a religious educational institution's ability to 'continue to build a community of faith by giving preference, in good faith, to persons of the same religion as the educational institution in the selection of staff.' In this respect Propositions B to D fail to acquit the ALRC's terms of reference.

4. At paragraphs 35 to 37 it is argued that inherent requirement/genuine occupational requirements/qualifications tests are best suited to meeting the needs of diversity as applied to *particular* roles within a wider secular organisation. They are ill-suited for religious ethos institutions. This is because where they are applied across every role within a religious institution, they have the potential to remove over time the very ethos of the institution itself.
5. In support of the 'genuine occupational qualifications' test the ALRC:
    a. erroneously applies the criteria for determining discriminatory conduct applying to all secular institutions to religious institutions and thus negates application of the specific criteria for limitation of religious manifestation, including through communities of religious believers, stated at Article 18(3). In so doing the ALRC essentially posits that Article 18 can only be expressed through Article 26. However, the two Articles contain distinct standards. They comprise two separate stand-alone criteria (see paragraphs 38 to 41).
    b. The ALRC places heavy reliance on European Council Directive 2000/78 (the Directive) issued under European Union labour law. It also relies on cases that have issued from the European Court of Justice under that Directive. The Directive is a key plank of the ALRC's argument that Propositions B, C and D concerning employment are consistent with international human rights law.[6]

[5] Bielefeldt A/HRC/16/53 (n 4) [54]-[55] (emphasis added).
[6] See the reliance placed upon the Directive at ALRC Consultation Paper (n 1) [53], [55], [60], [66], [103] and [A.47].

The ALRC's reliance on the Directive in interpreting Australia's human rights obligations is misplaced, for the primary reason that the Directive and the jurisprudence that has developed around it directly departs from the standards concerning religious institutional autonomy that have developed under the United Nations framework to which it is a signatory. Indeed, the 'distinct' nature of the Directive and its departure from the ICCPR and ECHR regimes has been observed by the United Nations High Commissioner for Human Rights (see paragraphs 42 to 48).[7]

c. The final source within international human rights law cited by the ALRC in support of its recommendation of a genuine occupations qualifications test is found in two Periodic Reviews by United Nations bodies. The first concerns the comments of the Committee on Economic, Social and Cultural Rights in its Periodic Review of Germany 2018 which were not repeated by the Human Rights Committee in its subsequent review of the same legislation. The second concerns the Concluding Observations of the Human Rights Committee on the fourth periodic review of Ireland.[8] The contextual pressures that gave rise to the UNHRC's concern for the application of Article 26 to employees within the Irish education section simply do not apply in Australia. This is because, contrasted with the position in Australia, non-denominational schools remain a tiny proportion of the overall number of schools within Ireland. Further, at no stage has the Human Rights Committee or the Committee on Economic, Social and Cultural Rights made a recommendation in their Periodic Reviews that Australia is non-compliant with the ICCPR or the ICESCR as a result of section 38 of the SDA (see paragraphs 49 to 54).

6. The application of a proportionality test as a condition for the exemption introduces high levels of uncertainty, both for religious institutions, and also their employees. This is illustrated by the range of religious practices that, as the ALRC admits, a religious institution would need to satisfy a Court are 'proportionate' in order for those practice to remain lawful under the Propositions (see paragraphs 55 to 56). Finally paragraphs 57 to 61 consider the ALRC's assertion that 'if an educational institution is in Queensland, and certain conduct is prohibited under Queensland law but not Commonwealth law, the educational institution must comply with the Queensland law.'[9] It is noted that this fails to take account of the operation of section 109 of the

[7] 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) 54.
[8] ALRC Consultation Paper (n 1) [66]; [A.12], [A.24]-[A.25].
[9] Ibid [49].

Australian Constitution. As Rees, Rice and Allen have clarified with specific reference to the interaction between section 38 of the SDA and the more limited exemptions contained in Queensland and Tasmania anti-discrimination laws: 'were a court to find that a s 109 inconsistency exists, it is likely that the offending provision would be severable rather than a finding that the entire Act is invalid ... the State or Territory law is vulnerable … because it prohibits discriminatory conduct that the Commonwealth law allows.'[10]

Interpreting the Propositions Concerning Employment

7. In order to analyse the compliance of the ALRC Propositions with international human rights law, it is first necessary to understand precisely what it is those Propositions entail. The Propositions are set out at Appendix B. Propositions B, C and D respectively posit that a school must not discriminate on the basis of protected attributes under the SDA *even when* exercising a preference for persons who share their faith. The relevant excerpts within the Propositions are:
    a. Proposition B - 'Religious educational institutions should not be allowed to discriminate against any staff (current or prospective) on the grounds of sex, sexual orientation, gender identity, marital or relationship status, or pregnancy.'
    b. Proposition C – 'In relation to selection, appointment, and promotion, religious educational institutions should be able to preference staff based on the staff member's religious belief or activity, where this is justified because … the criteria for preferencing in relation to religion or belief would not amount to discrimination on another prohibited ground (such as sex, sexual orientation, gender identity, marital or relationship status, or pregnancy), if applied to a person with the relevant attribute.'
    c. Proposition D – 'Religious educational institutions should be able to expect all staff to respect their institutional ethos. A religious educational institution should be able to take action to prevent any staff member from actively undermining the institutional ethos of their employer. … 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.'

[10] Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 81-2.

As the ALRC clarifies, the 'Propositions interact — Proposition B (making discrimination on Sex Discrimination Act grounds unlawful) limits the operation of Propositions C and D (allowing for some differential treatment on the grounds of religion, but not where it is discriminatory under the Sex Discrimination Act).'[11]

8. The true effect of Propositions B to D must be understood in the light of section 8 of the SDA (set out at paragraph 21 in the body of this submission). In this respect the ALRC draws upon the complicated test for determining the 'ground' of an allegedly discriminatory act within anti-discrimination law. The implications of that test for Propositions B, C and D may not be readily apparent to the non-legally trained. The 'on the ground of' test looks to the 'real reason' for the action. As noted in the body of this submission at paragraphs 21-25, section 8 of the SDA recognises that there can be multiple reasons for the one act. Thus, even though an act may be done 'on the basis' of the inconsistent religious beliefs of the person in question, if a court holds that a separate attribute is also a reason (it need not even be a substantial reason under section 8), the separate prohibition from discrimination (at subsections 5(1), 5A(1), 5B(1), 5C(1), 6(1), 7(1) or 7AA(1), section 7A or subsection 28AA(1), as may apply) will be breached. This means that Propositions B and C would remove all discretion wherever a person is otherwise protected under the SDA, even where the religious institution seeks to prefer persons who share their faith; even where the role in question is to teach religion.
9. This understanding is consistent with the interpretation applied by the ALRC, as disclosed in the various examples provided to illustrate the operation of each Proposition. In respect of Proposition B these include:
    a. a school could no longer refuse to hire a teacher on the grounds that they are LGBTQ+;
    b. a university could not refuse to consider a lecturer's application for promotion because they were gay and in a same-sex relationship;
    c. a school could not refuse to consider a person's application for promotion to a leadership position because she was divorced and in a new relationship;
    d. 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.[12]

[11] Ibid [51].
[12] Ibid [54].

e. Not allowing religious educational institutions to exclude staff members who do not adhere to or personally endorse particular beliefs of the religion around sexuality and relationships has the potential to interfere with institutional autonomy connected to the right to manifest religious belief in community with others, parents' freedoms in relation to their children's religious and moral education, and freedoms of expression and association.[13]

10. The ALRC provides the following examples to illustrate the operation of each Proposition C:

    a. a key aspect of this proposition is that preferencing on the grounds of religion cannot be used to justify discrimination in relation to attributes protected under the Sex Discrimination Act. For example, a religious educational institution could not refuse to consider a person as a 'practising' member of its religion because the person was LGBTQ+ or in a same-sex relationship, where the person adhered to other religious criteria that the institution reasonably applied. Discrimination could be based on a person's attributes, such as their sexual orientation or gender identity, or their beliefs about an attribute … this … is crucial to ensuring that Proposition B is not undermined in the implementation of Proposition C.[14]

    b. in selecting teachers of religion, a school could preference members of the religion who adhered to particular dietary restrictions or forms of dress, where this was proportionate in all the circumstances;

    c. 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.[15]

    d. However, this justification will not extend to differential treatment or detriment on Sex Discrimination Act grounds, because 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'. While Proposition B permits discrimination on Sex Discrimination Act grounds in the context of some manifestations of religious belief (such as in relation to training ministers of the religion and in religious observance and practice), it is (for the

[13] Ibid [A.39].
[14] Ibid [59].
[15] Ibid [60].

reasons discussed in relation to Proposition B) necessary and proportionate to prohibit such discrimination more generally in the context of religious educational institutions[16]

11. In respect of Proposition D, the ALRC states:
    a. The difference [between Proposition D and section 25 of the Queensland *Anti-Discrimination Act 1991*] is in the limits on what can be considered in relation to employee conduct, with Proposition D not countenancing any consideration of matters protected by the Sex Discrimination Act.[17]
12. The prohibition on any form of discrimination under the SDA, even when exercising a preference for persons of the same faith, thus frustrates the allowance the ALRC purportedly makes for a religious educational institution's ability to 'continue to build a community of faith by giving preference, in good faith, to persons of the same religion as the educational institution in the selection of staff.' For the reasons further articulated below, in this respect the Propositions B to D fail to acquit the ALRC's terms of reference.

Victorian Equal Opportunity Act

13. Further, it is arguable that the ALRC erroneously asserts that Propositions B and C are consistent with the recent amendments to the exemptions for religious schools found in the Victorian *Equal Opportunity Act 2010.* The ALRC states that Proposition B is 'consistent with the law as it already applies in … Victoria'.[18] In respect of Proposition C it is claimed that:

> Limiting availability of the exception to particular staff is generally consistent with amendments to the law … in force in Victoria (which limits preferencing by reference to inherent requirements, and explicitly excludes discrimination on other grounds).[19]

14. Section 83A of the Victorian Equal Opportunity Act 2010 provides:

> **83A Religious educational institutions: employment**
>
> (1) A person may discriminate against another person in relation to the employment of the other person in a particular position by a relevant educational entity in the course of establishing, directing, controlling or administering an educational institution if—

[16] Ibid [69].
[17] Ibid 26, fn 91.
[18] Ibid [53].
[19] Ibid [60].

(a) conformity with the doctrines, beliefs or principles of the religion in accordance with which the educational institution is to be conducted is an inherent requirement of the position; and

(b) the other person cannot meet that inherent requirement because of their religious belief or activity; and

(c) the discrimination is reasonable and proportionate in the circumstances.

(2) The nature of the educational institution and the religious doctrines, beliefs or principles in accordance with which it is to be conducted must be taken into account in determining the inherent requirements of a position for the purposes of subsection (1)(a).

(3) This section does not permit discrimination on the basis of any attribute other than as specified in subsection (1).

15. As Minister Hutchins clarified on Hansard, to the extent that the amended Act permits religious educational institutions to continue to maintain their religious ethos in respect of their employment practices, institutions must now satisfy a three-fold test:

> conformity with the doctrines, beliefs or principles of the religion is an inherent requirement of the particular position, the person cannot meet that inherent requirement because of their religious belief or activity, and the discriminatory action is reasonable and proportionate.[20]

16. It is important to note that the chapeau to subsection 83A(1) extends the section to any form of discrimination under the Act when it states 'A person may discriminate …'. (The equivalent drafting also applies at section 82A, which concerns employment by religious institutions, inclusive of churches, synagogues, mosques and temples.) The section is to be contrasted with the exemption in respect of students within religious educational institutions contained at subsection 83(2), which only pertains to acts performed 'on the basis of a person's religious belief or activity', and which the Minister clarified is intended to not apply to acts performed on the basis of any other attribute. Section 83A thus contemplates the scenario that where an employee has an inconsistent religious belief, this will negate consideration of any other protected attribute. In effect, a person's inability to meet an inherent requirement 'because of' their 'religious belief or activity' will override consideration of any other protected attribute. To the extent that non-religious actions can be relevant, they would only be relevant to the extent that they demonstrate the absence of a religious belief (for example where non-religious actions determinatively conclude that the teacher no longer shares the religious belief of the school).

[20] *Victoria, Parliamentary Debates, Legislative Assembly* 28 October 2021, Natalie Hutchins, Minister, 4369, see also 4370.

17. That such is the result under the section was clarified by the Minister in the following two statements in the Second Reading Speech for the Bill introducing the provisions:

> A person being gay is not a religious belief. A person becoming pregnant is not a religious belief. A person getting divorced is not a religious belief. A person being transgender is not a religious belief. Under the Bill, a religious body or school would not be able to discriminate against an employee *only on the basis* that a person's sexual orientation or other protected attribute is inconsistent with the doctrines of the religion of the religious body (emphasis added).

However, the Minister then goes on to note:

> Many religions have specific beliefs about aspects of sex, sexuality, and gender. For example, some religions believe marriage should only be between people of the opposite sex. If a particular religious belief about a protected attribute is an inherent requirement of the role, and a person has an inconsistent religious belief, it may be lawful for the religious organisation to discriminate against that person.

18. As the Minister said 'a person may discriminate' where the three elements to the exemption at section 83A are satisfied, being:
    a. conformity with the doctrines, beliefs or principles of the religion is an inherent requirement of the particular position,
    b. the person cannot meet that inherent requirement because of their religious belief or activity, and
    c. the discriminatory action is reasonable and proportionate.[21]

On that analysis, the ALRC is in error in positing that Propositions B and C reflect the Victorian model. On the above analysis the Victorian model permits a school to select persons on the basis of religious faith, where they have an inconsistent religious belief, regardless of the presence of any protected attribute. In Victoria the relevant consideration is whether the person has an inconsistent religious belief or engages in an inconsistent religious activity. As set out below, on this account the Victorian law is consistent with the applicable human rights law (although as I say below the use of an inherent requirements test is not consistent with that law and the proportionality test raises significant uncertainties).

[21] Ibid.

The ALRC's Analysis of International Law

19. The ALRC states its 'preliminary view' that Propositions B to D 'can be implemented in a way that is consistent with Australia's international legal obligations'.[22] A similar claim is made in respect of Proposition A.[23] Three central contentions underpin the ALRC's proposed framework. They are:
    a. Religious educational institutions can preference staff that share the relevant faith where 'participation in the teaching, observance or practice of the religion' is a 'genuine occupational qualification'
    b. Religious educational institutions cannot discriminate on the basis of an SDA attribute, even in respect of religious teaching roles;
    c. Conduct by the religious educational institution should be proportionate to the objective of upholding its religious ethos.

    The consistency of each of these respective propositions with the obligations arising for Australia according to international human rights law is considered in the following three parts.

Part I - Religious Institutions Cannot Discriminate on the Basis of an SDA Attribute

20. The first key contention considered is that the prohibiting of discrimination on the basis of SDA grounds by a religious educational institution in their employment practices under Propositions B and C is consistent with international human rights law.[24] In respect of Proposition C the ALRC claims that

> a key aspect of this proposition is that preferencing on the grounds of religion cannot be used to justify discrimination in relation to attributes protected under the Sex Discrimination Act. For example, a religious educational institution could not refuse to consider a person as a 'practising' member of its religion because the person was LGBTQ+ or in a same-sex relationship, where the person adhered to other religious criteria that the institution reasonably applied. Discrimination could be based on a person's attributes, such as their sexual orientation or gender identity, or their beliefs about an attribute. As discussed further in the human rights analysis in Appendix [A.6]–[A.10] this is consistent with the way that the relevant rights have been interpreted by UN bodies, and

[22] ALRC Consultation Paper (n 1) [51].
[23] Ibid [45].
[24] Ibid [53], [59]-[60].

is crucial to ensuring that Proposition B is not undermined in the implementation of Proposition C.[25]

Reliance on General Comment 22

21. The first authority that the ALRC provides for its claim that the qualification that discrimination must not occur on the basis of attributes protected under the SDA where a religious institution exercises a preference for religion is (care of the summary provided by the High Commissioner for Human Rights) the general comment statement of the UNHRC on permissible limitations under Article 18 where the limitation is made on the basis of morals.[26] The cited statement from the general comment is as follows: "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".[27] Relying on that statement the Office of Human Rights has claimed that 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'.[28] It is this statement on which the ALRC relies in positing that a religious institution must not discriminate on the basis of an attribute protected under the SDA where exercising a preference for religious believers.[29]
22. In support of Propositions B and C the ALRC reads the statements of the UNHRC and the Office of the High Commissioner to mean that wherever a protected attribute arises under the SDA, a religious institution loses its ability to act in accordance with its beliefs and to determine its religious ethos. With respect, this is a misapplication of the jurisprudence. The UNHRC general comment's statement concerning limitations on religious manifestation made on the basis of morals, and the Office of the High Commissioner's statement in reliance on it, are both to be read to be consistent with the remaining jurisprudence under Article 18 concerning limitations on religious manifestation, including the right to community manifestation of religious belief, as outlined in my enclosed article for the Australian Journal of Law and Religion.

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[25] Ibid [59].
[26] Ibid [69]. 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 (n 8) 149, which cites Human Rights Committee, general comment No. 22 (1993), para. 8; and general comment No. 34 (2011).
[27] Human Rights Committee, *General Comment No 22* (1993) [8]; and *General Comment No 34* (2011).
[28] ALRC Consultation Paper (n 1) [69] citing Office of the United Nations High Commissioner for Human Rights (n 8) 149.
[29] Ibid [69], [A.6].

Consecutive Special Rapporteurs have confirmed that the applicable standard for determining the permissible limitations upon religious institutions in respect of their employment practices is Article 18(3).[30] The statement of the Office of the High Commissioner relied upon by the ALRC itself relies upon the statements of Special Rapporteurs in which these principles are affirmed.[31]

23. Thus, the general comment's claim in respect of limitations on the basis of morals is to be read consistent with the strict principles for limitations on religious manifestation outlined in that document, as applied to the context of religious schooling in *Delgado Páez v Columbia;*[32] and as outlined in the enclosed journal article at paragraph 6. In general comment 22 the UNHRC states those principles as follows:

> Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18. The Committee observes that paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant.[33]

The General Comment's statement on limitations on the basis of morals is thus also to be read consistently with the statement of the Special Rapporteur that '*private schools constitute a part of the institutionalized diversity within a modern pluralistic society'.*[34] It is incorrect to claim that the statement made in respect of permissible limitations on the basis of widely-held morals overrides the remaining jurisprudence concerning permissible actions undertaken in the maintenance of religious communities. The ALRC itself acknowledges this when it later correctly asserts:

> where the aim or effect of criteria for preferencing on the grounds of religion is differential treatment in relation to (at least) sex, sexual orientation, or gender identity, such preferencing will engage equality and non-discrimination rights under the relevant treaty. It is a separate question whether that discrimination is nevertheless to be permitted, which is to be considered in line with the limitation criteria set out in Article 18(3) of the ICCPR.[35]

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[30] Bielefeldt A/68/290 (n 3) [60]; Bielefeldt A/69/261 (n 3) [41] see also [38]; Shaheed A/HRC/43/48 (n 3) [59], [66], [74].
[31] Office of the United Nations High Commissioner for Human Rights (n 8) 149; including Bielefeldt ibid and Shaheed ibid.
[32] *William Eduardo Delgado Páez v Colombia* Communication No. 195/1985, U. N. Doc. CCPR/C/39/D/195/1985 (1990), [5.7] ('*Delgado Páez*').
[33] ALRC Consultation Paper (n 1) [8].
[34] Bielefeldt A/HRC/16/53 (n 4) [54]-[55] (emphasis added).
[35] ALRC Consultation Paper (n 1) [A.9].

Despite this acknowledgement, the ALRC fails to appreciate its import by positing at paragraph [69] that the presence of a protected attribute under the SDA automatically disentitles a religious school from seeking to preserve its religious ethos through its employment practices.

Special Rapporteur Ahmed Shaheed

24. The second authority cited for the ALRC's proposition that a religious educational institution should not be permitted to act where a protected attribute arises under the SDA is the statements of the immediate past Special Rapporteur, Ahmed Shaheed in his 2020 Report to the Human Rights Council. Making the same error of conflating the standards under Article 26 with those under Article 18, the ALRC also cites Special Rapporteur Shaheed's statement that religious beliefs cannot be a legitimate justification for 'violence *or discrimination* against women and girls or against people on the basis of their sexual orientation or gender identity'.[36] As the following analysis shows, this is not to be read as negating any differential treatment that might arise within religious institutions in pursuit of the freedoms protected under Article 18. In that context, the ALRC also quotes former Special Rapporteur Shaheed's questioning of the idea that 'religion should be "all or nothing" — either you choose to take part in a religion and must accept its inequalities, or you must cease to belong to that religion'.[37] The ALRC also cites the former special rapporteur's view that

> the rights of individuals should be protected even within groups, by creating an enabling environment where dissenters are protected against incitement to violence, and are able to assert their agency through the exercise of their fundamental human rights, including freedom of expression, right to information, freedom of religion or belief, the right to education, the right work [sic], freedom from coercion and equality before the law, among others. Equal liberties and protections in society, such as the right to equality and non-discrimination or the right to physical integrity, can only be maintained if individuals are never deemed as having waived said rights and liberties, even by voluntarily joining an organization.[38]

These comments are cited in support of the contention that schools should be required to employ persons who do not share their religious beliefs. In addition to the reliance placed upon Shaheed's comments for the propositions that religious educational

[36] Ibid [A.8] citing Shaheed A/HRC/43/48 (n 3) [69] (emphasis added).
[37] ALRC Consultation Paper (n 1) 41, [A.16].
[38] Ibid [A.17] citing Shaheed A/HRC/43/48 (n 3) [52].

institutions should not be permitted to discriminate on SDA protected attributes, Shaheed's 2020 Report to the Human Rights Council is the sole authority derived from international human rights law in support of Proposition A. It is cited in support of the statement that 'the fact of exclusion is in itself a significant burden on the person's rights … particularly where membership of a religious community is part of a person's family and social identity.'[39]

25. However, the ALRC fails to report that in that same document former Special Rapporteur Shaheed goes on to acknowledge:

> Freedom of religion or belief includes the right to maintain the internal institutional affairs of religious community life without State intervention (A/69/261, para. 41; and A/HRC/22/51, para. 25). As outlined by the Special Rapporteur's predecessor, the autonomy to determine the rules for appointing religious leaders or for governing "monastic life", for example, allows religious communities to adhere to the self-understanding of the respective group and their traditions (A/69/261, para. 41). It must also be noted, however, that the autonomy of religious institutions falls within the forum externum dimension of freedom of religion or belief, which, if the need arises, can be restricted in conformity with the criteria spelled out in article 18 (3) of the International Covenant on Civil and Political Rights (A/68/290, para. 60).[40]

In this the Special Rapporteur draws upon the statements of prior Special Rapporteur Heiner Bielefeldt, which contain the following strong statement concerning the interaction of Article 18(3) and religious institutional autonomy:

> It should be noted in this context that religious institutions constitute a special category, as their raison d'être is, from the outset, a religious one. Freedom of religion or belief also includes the right to establish a religious infrastructure which is needed to organize and maintain important aspects of religious community life. For religious minorities this can even become a matter of their long-term survival. The autonomy of religious institutions thus undoubtedly falls within the remit of freedom of religion or belief. It includes the possibility for religious employers to impose religious rules of conduct on the workplace, depending on the specific purpose of employment. This can lead to conflicts with the freedom of religion or belief of employees, for instance if they wish to manifest a religious conviction that differs from the corporate (i.e., religious) identity of the institution. Although religious institutions must be accorded a

[39] ALRC Consultation Paper (n 1) [A.17], [A.34].
[40] ALRC Consultation Paper (n 1) [66].

broader margin of discretion when imposing religious norms of behaviour at the workplace, much depends on the details of each specific case.[41]

26. In the same statement cited by the ALRC as authority for its contention that a religious institution may never discriminate in respect of an attribute protected under the SDA, Ahmed Shaheed also cites the prior statement of Special Rapporteur Bielefeldt concerning the importance of preserving institutional autonomy for religious minorities, including in respect of religious schools:

> Positive measures are often urgently needed to facilitate the long-term development of a religious minority and its members. The added value of article 27 of the International Covenant and similar minority rights provisions is that they call upon States to undertake such measures, which thus become an obligation under international human rights law. According to article 4(2) of the 1992 Minorities Declaration, States should "take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national laws and contrary to international standards". This requires a broad range of activities. For instance, support measures may include subsidies for schools and training institutions, the facilitation of community media, provisions for an appropriate legal status for religious minorities, accommodation of religious festivals and ceremonies, interreligious dialogue initiatives and awareness-raising programmes in the larger society. Without such additional support measures the prospects of the long-term survival of some religious communities may be in serious peril, which, at the same time, would also amount to grave infringements of freedom of religion or belief of their individual members.[42]

Without further clarification, the ALRC could be perceived as failing to provide a complete and accurate representation of the accounts of the Special Rapporteurs.

Special Rapporteur Heiner Bielefeldt

27. The ALRC also separately quotes former Special Rapporteur Heiner Bielefeldt's assertion that '[i]ndeed, as a human right, freedom of religion or belief can never serve as a justification for violations of the human rights of women and girls'[43] in support of its proposition that a religious institution should not be permitted to discriminate in

[41] Bielefeldt A/69/261 (n 3) [41].
[42] Heiner Bielefeldt, *Report of the Special Rapporteur on Freedom of Religion or Belief*, UN Doc A/HRC/22/51 (24 December 2012) ('*Report of the Special Rapporteur on Freedom of Religion or Belief*').('Bielefeldt A/HRC/22/51') [25].
[43] Bielefeldt, UN Doc A/68/290 (n 3) [30] cited at ALRC Consultation Paper (n 1) [A.8].

respect of the attributes protected by the SDA. The ALRC also relies upon prior Special Rapporteur Bielefeldt's criticism of the fact that 'many women from religious minorities feel exposed to the expectation that they have to choose one of two seemingly contradictory options: allegedly, they can either emancipate themselves by more or less abandoning their religious tradition, or they can keep their religious heritage, thereby forfeiting their claims to freedom and equality' as 'an artificial antagonism'.[44] Both of these statements are cited in support of the proposition that a religious institution cannot discriminate on the basis of an attribute protected under the SDA.[45]

28. However, the ALRC fails to apprehend the import of the following lengthy statement made by Special Rapporteur Bielefeldt within the same document:

> 57. Freedom of religion or belief also covers the right of persons and groups of persons to establish religious institutions that function in conformity with their religious self-understanding. This is not just an external aspect of marginal significance. Religious communities, in particular minority communities, need an appropriate institutional infrastructure, without which their long-term survival options as a community might be in serious peril, a situation which at the same time would amount to a violation of freedom of religion or belief of individual members (see A/HRC/22/51, para. 25). Moreover, for many (not all) religious or belief communities, institutional questions, such as the appointment of religious leaders or the rules governing monastic life, directly or indirectly derive from the tenets of their faith. Hence, questions of how to institutionalize religious community life can have a significance that goes far beyond mere organizational or managerial aspects. Freedom of religion or belief therefore entails respect for the autonomy of religious institutions.
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> 58. It is a well-known fact that in many (not all) denominations, positions of religious authority, such as bishop, imam, preacher, priest, rabbi or reverend, remain reserved to males, a state of affairs that collides with the principle of equality between men and women as established in international human rights law. Unsurprisingly, this has led to numerous conflicts. While the Special Rapporteur cannot provide a general recipe for handling such conflicts in practice, he would like to point to a number of relevant human rights principles and norms in this regard.
>
> 59. It cannot be the business of the State to shape or reshape religious traditions, nor can the State claim any binding authority in the interpretation of

[44] Bielefeldt Ibid [35] cited at ALRC Consultation Paper (n 1) [A.16].
[45] ALRC Consultation Paper (n 1) [A.8] and [A.16].

religious sources or in the definition of the tenets of faith. Freedom of religion or belief is a right of human beings, after all, not a right of the State. As mentioned above, questions of how to institutionalize community life may significantly affect the religious self-understanding of a community. From this it follows that the State must generally respect the autonomy of religious institutions, also in policies of promoting equality between men and women.

60. At the same time, one should bear in mind that freedom of religion or belief includes the right of internal dissidents, including women, to come up with alternative views, provide new readings of religious sources and try to exercise influence on a community's religious self-understanding, which may change over time. In situations in which internal dissidents or proponents of new religious understandings face coercion from within their religious communities, which sometimes happens, the State is obliged to provide protection. It should be noted in this regard that the autonomy of religious institutions falls within the forum externum dimension of freedom of religion or belief which, if the need arises, can be restricted in conformity with the criteria spelled out in article 18, paragraph 3, of the International Covenant, while threats or acts of coercion against a person may affect the forum internum dimension of freedom of religion or belief, which has an unconditional status. In other words, respect by the State for the autonomy of religious institutions can never supersede the responsibility of the State to prevent or prosecute threats or acts of coercion against persons (e.g., internal critics or dissidents), depending on the circumstances of the specific case.

61. In addition, freedom of religion or belief includes the right to establish new religious communities and institutions. The issue of equality between men and women has in fact led to splits in quite a number of religious communities, and meanwhile, in virtually all religious traditions, reform branches exist in which women may have better opportunities to achieve positions of religious authority. Again, it cannot be the business of the State directly or indirectly to initiate such internal developments, which must always be left to believers themselves, since they remain the relevant rights holders in this regard. What the State can and should do, however, is to provide an open framework in which religious pluralism, including pluralism in institutions, can unfold freely. An open framework facilitating the free expression of pluralism may also

> improve the opportunities for new gender-sensitive developments within different religious traditions, initiated by believers themselves.[46]

29. The ALRC understand special Rapporteur Shaheed's comment that religious institutions should be required to include internal dissidents who defy their beliefs and must not 'discriminate' as encompassing the reach of actions that would comprise technical discrimination under the SDA. The ALRC cite Shaheed's questioning of the idea that 'religion should be "all or nothing" — either you choose to take part in a religion and must accept its inequalities, or you must cease to belong to that religion'[47] as authority for the idea that a religious educational institution must not discriminate on the basis of a protected attribute under the SDA.[48] That proposition is inconsistent with the jurisprudence concerning Article 18. It extends well beyond Special Rapporteur Bielefeldt's emphasis on pluralism through enabling the ability of dissidents to form their own institutions, subject to the proviso that States have an obligation to intervene in the case of 'coercion' of internal dissidents. Where Special Rapporteur Shaheed references 'discrimination' as impermissible, Special Rapporteur Bielefeldt references only 'coercion'. Under international law the notion of 'coercion' is strictly defined.[49] It is clear from the jurisprudence concerning the prohibition on coercion, that coercion does not include the imposition of requirements that employees adhere to and act consistently with their employers beliefs. The ALRC's application of Shaheed's comments defies the interpretation applied by all other prior Rapporteurs and the UNHRC in interpreting Article 18, including the UNHRC's consideration of Catholic schools statements in *Delgado Páez v Colombia*[50] (see enclosed journal article at paragraph 6). It also defies the ECHR's very clear statements concerning religious institutional autonomy in such seminal cases as *Hasan v Bulgaria,* wherein the Court said:

> the believer's right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully free from arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which article 9 affords. It directly concerns not only the organisation of the community as such but also the effective enjoyment of

[46] Bielefeldt A/68/290 (n 3) [57]-[61].
[47] ALRC Consultation Paper (n 1) 41, [A.16].
[48] ALRC Consultation Paper (n 1) [A.16].
[49] Bielefeldt, Heiner, Nazila Ghanea-Hercock and Michael Wiener, *Freedom of Religion or Belief : an International Law Commentary* (Oxford University Press, 2016), pt 1.2.
[50] *William Eduardo Delgado Páez v Colombia* Communication No. 195/1985, U. N. Doc. CCPR/C/39/D/195/1985 (1990), [5.7] ('*Delgado Páez*').

> the right to freedom of religion by all its active members. Were the organisational life of the community not protected by article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable.[51]

30. The ALRC acknowledges that membership of a 'faith community' is 'something [that is] personal and fundamental'. It acknowledges that religious schools are religious communities.[52] However, it then proceeds to recommend that a religious community should be required to continue to be formed by persons who do not, or who no longer, share its beliefs. In this the ALRC misunderstands the nature of religious faith and of religious community. The rationale for this requirement is stated by the ALRC in support of Proposition B: 'exclusion from any area of public life on Sex Discrimination Act grounds is a serious interference with a person's dignity, particularly where it relates to exclusion from something as personal and fundamental as a faith community'.[53] However, as Aroney points out this entails a very serious failure of logic:

> if any individual can decide whether he or she qualifies for membership of an organisation, no organisation will be able to maintain its distinctive identity. This *reductio ad absurdum* suggests that a radical individualist conception of religious liberty is simply incompatible with the existence of religious associations and communities as distinguishable groups within a society.[54]

Special Rapporteur Nazila Ghanea-Hercock

31. Moreover, judging from her prior statements the current Special Rapporteur will be reticent to support the interpretation applied by the ALRC to the comments of Special Rapporteur Shaheed. The current Special Rapporteur has, prior to her appointment when writing in co-authorship with former Special Rapporteur Bielefeldt made the following comments:

> to demand that States should directly enforce women's right of equality within religious institutions would lead to highly problematic consequences. It would give the State a genuine authority over the definition of theological issues,

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[51] *Hasan and Chaush v Bulgaria* (European Court of Human Rights, Grand Chamber, Application no. 30985/96, 26 October 2000, ('*Hasan and Chaush v Bulgaria*'). See also *Serif v Greece* Second Section, no 38178/97 Eur Court HR ('*Serif v Greece*').

[52] See, for eg, ALRC Consultation Paper (n 1) [49]. Indeed, the third limb of the terms of reference acknowledge this wherein they state the ALRC should recommend laws that 'ensure that an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed … can continue to build a community of faith'.

[53] ALRC Consultation Paper (n 1) [A.42].

[54] Nicholas Aroney, 'Freedom of Religion as an Associational Right' (2014) 33(1) *University of Queensland Law Journal* 153, 184.

> thereby creating enormous new risks for freedom of religion or belief, particularly in countries governed by authoritarian or totalitarian Governments. It can neither be the business of the State to shape or reshape religious traditions, nor should the State claim any theological authority in the interpretation of religious sources or in the definition of the tenets of faith. Going along that road and giving the State the authority to decide on certain theological issues could result in heavy-handed State interferences and concomitant abuses, to the detriment of autonomous religious life. Freedom of religion or belief is a right of human beings, after all, not a right of the State. From this it follows that the State must generally respect the autonomy of religious institutions, also when it seeks to promote equality between men and women.[55]

32. Ghanea-Hercock and Bielefeldt go on to clarify that

> freedom of religion or belief includes the right to establish new religious communities and institutions. The issue of equality between men and women has in fact led to splits in quite a number of religious communities, and meanwhile in virtually all religious traditions reform-branches exist in which women may have better opportunities to achieve positions of religious authority, including leadership positions. Again, it cannot be the business of the State directly to initiate such internal developments, which must always be left to believers themselves; they are and remain the relevant rights holders in this regard. What the State can and should do, however, is to provide an open framework in which religious pluralism, including pluralism in understanding and shaping of religious institutions, can unfold freely.[56]

This aligns with Bielefeldt's comments as Special Rapporteur emphasising the importance of institutional diversity and the freedom of dissidents to establish new institutions as a means to retain the character of existing institutions (see paragraph 28). Bielefeldt and the current Special Rapporteur's account defies the ALRC's interpretation of prior Rapporteur Shaheed's comments to the extent that the ALRC asserts that religious institutions should be required to continue to employ persons who no longer share the beliefs of the institution.

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[55] Heiner Bielefeldt, Nazila Ghanea-Hercock and Michael Wiener, *Freedom of Religion or Belief : an International Law Commentary* (Oxford University Press, 2016) 380-1.

[56] Ibid 387.

Is the ALRC Correct when it says Religious Institutions can be Required to Ignore Certain Beliefs?

33. To conclude consideration of the ALRC's contention that a religious school cannot act in respect of its beliefs concerning an attribute protected under the SDA it is necessary to understand how international law treats the interaction between religious institutional autonomy and the protection against discrimination on the basis of the SDA attributes. The following example provided by the ALRC of the effect of Proposition C illustrates the ALRC's proposal that certain beliefs should be earmarked as not suitable for a religious institution to enact:

> a religious educational institution could not refuse to consider a person as a 'practising' member of its religion because the person was LGBTQ+ or in a same-sex relationship, where the person adhered to other religious criteria that the institution reasonably applied.[57]

The ALRC is correct when it asserts in its comments on the UNHRC and the European Court of Human Rights (ECtHR) jurisprudence that 'None of these cases have involved alleged direct discrimination on the grounds of sex, sexual orientation, or gender identity.'[58] However, the existing jurisprudence holds that regard must be had to the religious institution's own asserted beliefs and its self-conception of the requirements of those beliefs when weighing applicable limitations on religious institutions. A central relevant determinant is how the institution itself conceives of the impact the conduct or belief in question will have on the ethos of the institution. *Siebenhaar v Germany*, for which the ALRC offers only brief passing reference, is the classic example of this principle. The comments made on that decision in the attached journal article are of immediate relevance:

> The Court restated its jurisprudence that 'except in very exceptional cases, the right to freedom of religion as understood by [lit. "such as intended by"] the Convention excludes any assessment on the part of the State of the legitimacy of religious beliefs or of the methods of expressing them'.[59] From that jurisprudence flowed the Court's affirmation of the Church's own conception of the conduct or beliefs of its employees that would detrimentally impact on its ability to 'form a community of service *regardless of their position or*

[57] ALRC Consultation Paper (n 1) [59]
[58] Ibid [A.19].
[59] See also *Hasan and Chaush v Bulgaria* European Court of Human Rights, Grand Chamber, Application no. 30985/96, 26 October 2000.

professional functions'.[60] That jurisprudence is consistent with the frequently adopted approach that courts should apprehend the genuineness, or sincerity, of the religious beliefs in question.[61]

34. *Siebenhaar v Germany* reflects the Court's long maintained practice of placing high regard on the ability of religious institutions to define their own beliefs. The decision shows that enfolded within this practice is a willingness to have regard to an institution's assertions as to what is necessary for the maintenance of its religious ethos. This application of these principles within the United Nations jurisprudence is summarised by former Special Rapporteur Bielefeldt:

> It cannot be the business of the State to shape or reshape religious traditions, nor can the State claim any binding authority in the interpretation of religious sources or in the definition of the tenets of faith. Freedom of religion or belief is a right of human beings, after all, not a right of the State… *questions of how to institutionalize community life may significantly affect the religious self-understanding of a community. From this it follows that the State must generally respect the autonomy of religious institutions, also in policies of promoting equality between men and women.*[62]

The proposition that a religious institution can act on its beliefs in respect of persons who do not hold their beliefs, provided those persons are not protected by SDA protected grounds, compels religious institution to render a distinction between theological precepts. The ALRC's Propositions mean that religious institutions may act to preserve their ethos where a person's inconsistent religious belief is a factor, but cannot not preserve their ethos where an attribute under the SDA is a factor (by operation of section 8 of the SDA, as outlined above). This does not reflect the regard that international law has for an institution's own ability to interpret the implications of its religious commitments.

Part II - Genuine Occupational Qualification Tests

35. In the following section I consider the ALRC's contention that a 'genuine requirement'[63] (later described as a 'genuine occupational qualification'[64] and a 'genuine occupational

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[60] *Siebenhaar v Germany* European Court of Human Rights Application no 18136/02 [9] [tr author] (emphasis added).
[61] See Mark Fowler, 'Judicial Apprehension of Religious Belief under the Commonwealth Religious Discrimination Bill' in Michael Quinlan and A Keith Thompson (ed), *Inclusion, Exclusion and Religious Freedom in Contemporary Australia* (Shepherd Street Press, 2021); Neil Foster, 'Respecting the Dignity of Religious Organisations' (2020) 47(1) *University of Western Australia Law Review* 175.
[62] Bielefeldt A/68/290 (n 3) [57]-[61] (emphasis added).
[63] ALRC Consultation Paper (n 1) 22.
[64] Ibid [66], [A.36].

requirement'[65]) test, as is incorporated within Proposition C, is consistent with Australia's international obligations. The ALRC draws upon three sources of international law to make three separate interpretive claims that such a test is consistent with international human rights law. The first concerns the understanding that Article 26 of the ICCPR is the relevant consideration in respect of religious institutions practice toward employees. The second relies upon the European Council Directive 2000/78. The third relies upon Periodic Reviews of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights. Before turning to consider whether the ALRC's claims are correct, it is necessary to consider the nature and effect of genuine occupational qualification tests for religious institutions.

Genuine Occupational Qualification Tests are not Suitable for Religious Institutions

36. Genuine occupational requirements tests, drawn from wider labour law, are particularly suited to the situation of accommodating the unique aspects of a particular role within a wider secular organisation or undertaking. As Aroney and Taylor posit

> The inherent requirements test exists to meet the generic needs of all organisations, whatever their nature or purpose. It is not a substitute for the specific protections accorded to religious organisations under the ECHR as interpreted by the ECtHR.[66]

Section 14 of the New South Wales *Anti-Discrimination Act 1977,* concerning an exception to the prohibition on racial discrimination, provides a useful illustration of this principle. The following activities are listed therein as 'genuine occupational qualifications':

> (a) participation in a dramatic performance or other entertainment in a capacity for which a person of a particular race is required for reasons of authenticity,
>
> (b) participation as an artist's or photographic model in the production of a work of art, visual image or sequence of visual images for which a person of a particular race is required for reasons of authenticity,
>
> (c) working in a place where food or drink is, for payment or not, provided to and consumed by persons in circumstances in which a person of a particular race is required for reasons of authenticity, or

[65] Ibid [93], [97].
[66] Nicholas Aroney and Paul Taylor, 'The Politics of Freedom of Religion in Australia' (2020) 47(1) *University of Western Australia Law Review* 42, 57.

(d) providing persons of a particular race with services for the purpose of promoting their welfare where those services can most effectively be provided by a person of the same race.

Genuine occupational requirements/qualifications and inherent requirements tests are best suited to meeting the needs of diversity as applied to *particular* roles within a wider secular organisation. They are ill-suited for religious ethos institutions. This is because where they are applied across every role within a religious institution (as opposed to particular roles within a dramatic production (subsections 14(a) or (b) above), or waiters within a Thai restaurant (subsection 14(c)), or an aboriginal health worker within a secular hospital (subsection 14(d)) they have the potential to remove over time the very ethos of the institution itself. Further the test is specific to the individual role in question, and seen in light of the employing institution, the ability of existing judgements to guide future conduct in respect of other institutions or roles will be limited.

37. The decision of the Queensland Anti-Discrimination Tribunal in *Walsh v St Vincent de Paul Society Queensland*[67] provides a classic illustration of how this is the case. In that matter the religious institution respondent was unable to implement a requirement that the President of its local chapter be a Catholic because it had in the past employed a person who was not a Catholic. In finding that its desire to appoint a Catholic was unlawful, the Tribunal effectively negated the Society's control over the ethos of the organisation through that central role. As argued in the enclosed journal article:

> If the temporary occupation of a teaching position by a person who is not able to perform religious devotions can provide evidence that such an activity is not an 'inherent requirement', there is nothing limiting that evidence from applying to all equivalent teaching positions. Thus, any equivalent teacher that no longer shares the religious beliefs of the school could assert the temporary employment of another teacher as evidence for their subsequent unlawful dismissal. If each equivalent teaching position can be performed without the relevant requirement, this element of the school's efforts to reflect its religious ethos in its interactions with its students will be lost. Over time such a test has the distinct potential to 'white-ant' an institution through the amassing of evidence arising from the temporary placement of non-adherents in response to transitory staff shortages. The maintenance of the school's ethos could then

[67] *Walsh v St Vincent de Paul Society Queensland (No.2)* [2008] QADT 32 ('*Walsh*').

be relegated to roles such as the chaplain and the leadership of the school (presuming such persons also retain the religious beliefs of the school).

Misapplication of Article 26 of the ICCPR

38. The first interpretation of international law cited by the ALRC in support of a 'genuine occupational qualification' test is associated with a particular application of Article 26 of the ICCPR. The ALRC makes the following claim in support of the imposition of a 'genuine occupational qualification' test at Proposition C:

> Some stakeholders involved with religious educational institutions have suggested that it is important that they be able to preference individuals on religious grounds for all roles within their schools, in order to create a 'community of faith' or to maintain a 'critical mass' of co-religionists, where staff are seen as authentic role models for living a religious life. However, preferencing staff on the grounds of religion disadvantages those who are not of the same religion, and can have particular impacts on those from minority religious communities, *so such preferencing must be justified as reasonable, entailing consideration of proportionality*. *In the context of employment by religious institutions, such preferencing is generally considered reasonable where a job has explicitly religious or doctrinal content. In these circumstances, the religious grounds for preferencing can be seen as a 'genuine occupational qualification' for the role*.[68]

39. Here, the ALRC applies the criteria for determining discriminatory conduct applying to all secular institutions to religious institutions. In so doing it negates application of the specific criteria for limitation of religious manifestation, including through communities of religious believers, stated at Article 18(3) (the same issue was identified in respect of the ALRC's reliance on General Comment 22 above at paragraphs 21 to 23). As authority for the above proposition the ALRC cites a discussion by the Office of the United Nations High Commissioner for Human Rights, wherein the Commissioner canvasses the obligations pertaining to secular organisations, including businesses, that arise under the prohibition on discriminatory conduct under Article 26 of the ICCPR.[69] In so doing the ALRC conflates the Article 18 and Article 26 standards. The two Articles contain distinct standards. They comprise separate stand-alone criteria. As Special Rapporteurs Shaheed and Bielefeldt have both clarified, the applicable

[68] ALRC Consultation Paper (n 1) [57] (emphasis added).
[69] The citation provided is to the Office of the United Nations High Commissioner for Human Rights (n 8) 51–6. See also ALRC Consultation Paper (n 1) [69].

standard for determining the permissible limitations upon religious institutions in respect of their employment practices is Article 18(3).[70] It is in that context that Bielefeldt makes the claim that 'religious institutions constitute a special category, as their *raison d'être* is, from the outset, a religious one. Freedom of religion or belief also includes the right to establish a religious infrastructure which is needed to organize and maintain important aspects of religious community life.'[71]

40. This misunderstanding also arises in the ALRC's subsequent reliance on the General Comment that sets out the UNHRC's view on Article 26 in support of the genuine occupational qualification test:

> Proposition C is framed so that it allows for differential treatment of prospective staff on legitimate grounds — preferencing in relation to religion where it is a genuine requirement of the role to be involved in the teaching, observance, or practice of religion. In such a case, religious affiliation, belief, or adherence can be considered a genuine occupational qualification. This is justified because this is a reasonable and objective criterion that pursues the legitimate aim of allowing a school to maintain its religious ethos and teach its religious doctrine, as long as such criteria are used in a proportionate way.[72]

41. At the Annexure the ALRC correctly observes that General Comment 18 states:

> the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.[73]

The ALRC also cites the 'proportionality' analysis adopted by the UNHRC in *Yaker v France* as authority for its proposition that 'a proportionality analysis is relevant to determining whether particular preferencing is justified under international law.'[74] However, that matter concerned a woman who 'was stopped for an identity check while wearing her niqab on the street in Nantes' and who 'was then prosecuted and convicted of the minor offence of wearing a garment to conceal her face in public.'[75] It

[70] Bielefeldt A/68/290 (n 3) [60]; Bielefeldt A/69/261 (n 3) [41] see also [38]; Shaheed A/HRC/43/48 (n 3) [59], [66], [74].
[71] Bielefeldt A/69/261 (n 3) [41]. The full quote is provided above at [28].
[72] ALRC Consultation Paper (n 1) [68].
[73] Human Rights Committee, *General Comment No 18: Non-discrimination*, 39th sess, UN Doc HRI/GEN/1/Rev.9 (Vol I) (10 November 1989) 197 [13].
[74] Human Rights Committee Views: Communication No 2747/2016, UN Doc CCPR/C/123/D/2747/2016 (17 July 2018) (*Yaker v France*) ALRC Consultation Paper (n 1) [A.5].
[75] Ibid [2.1].

applies the general principles of discrimination as apply to a State party. To apply this standard to the criteria for determining limitations upon religious manifestation under Article 18 is an error. The equation of Article 18 with the criteria for determining discriminatory conduct in Article 26 explicates the erroneous statement that a genuine occupations qualification test is consistent with the ICCPR jurisprudence. Nowhere has a United Nations authority claimed that a 'genuine occupational requirements' test as applied to religious institutions is consistent with Article 18 of the ICCPR. Essentially, this is a failure to apply the applicable rules for limitations that apply to religious institutions. For the reasons put above in the discussion on the effect of genuine occupational requirements tests for religious institutions, it amounts to a lowering of the applicable standard.

European Council Directive 2000/78

42. The ALRC places heavy reliance on European Council Directive 2000/78 (the Directive) issued under European Union labour law. It also relies on cases that have issued from the European Court of Justice under that Directive. The Directive is a key plank of the ALRC's argument that Propositions B, C and D concerning employment are consistent with international human rights law.[76] The Directive is also specifically cited in respect of Proposition B.[77] Relying on the Directive the ALRC states that Proposition B 'reflects practice in a number of overseas jurisdictions considered, including the European Union framework law, implemented across most European countries.'[78] The Directive is also critical to the ALRC's proposal that a 'genuine occupational qualification test' should be adopted.
43. Article 4 of the Directive relevantly states:

> 1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

[76] See the reliance placed upon the Directive at ALRC Consultation Paper (n 1) [53], [55], [60], [66], [103] and [A.47].
[77] See Ibid [55] fn 76
[78] Ibid [A.47].

> 2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground. Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.

44. The ALRC's reliance on the Directive in interpreting Australia's human rights obligations is misplaced, for the primary reason that the Directive and the jurisprudence that has developed around it directly departs from the standards concerning religious institutional autonomy that have developed under the United Nations framework to which it is a signatory. It also departs from the jurisprudence of the European Court of Human Rights interpreting the European Convention for the Protection of Human Rights and Fundamental Freedoms.[79] The ALRC is aware of this. The jurisprudence of the European Court of Justice administering the Directive is cited by the ALRC as a basis to marginalise the much stronger protections to religious institutional autonomy developed by the European Court of Human Rights (considered in the attached paper):

> On the other hand, more recent decisions by the Court of Justice of the European Union have (in other employment contexts) adopted a more restrictive view of institutional autonomy, including concerning marital status, and the state's margin of appreciation in relation to it.[80]

[79] *European Convention for the Protection of Human Rights and Fundamental Freedoms* opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('*ECHR*').
[80] ALRC Consultation Paper (n 1) [A.21]. The judgements cited are *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* (Court of Justice of the European Union, Grand Chamber, C-414/16, ECLI:EU:C:2018:257, 17 April 2018) and *IR v JQ* (Court of Justice of the European Union, Grand Chamber, C-68/17, ECLI:EU:C:2018:696, 11 September 2018).

As I outlined in the attached article there is no basis to assert that the ICCPR and the ECHR frameworks mandate a genuine occupational requirements test for religious institutions. Rather those frameworks depart from such a test in formulating standards that require reference to a stricter range of factors. As noted above at paragraph 22 the applicable standards under the ICCPR jurisprudence include the standards for limitation under Article 18(3). As the enclosed journal article shows, the ECHR jurisprudence incorporates decisions that have no regard to genuine occupational requirements tests and which incorporate a range of factors that are not relevant to such a test.

45. Aroney and Taylor have summarised the key points of the Directive's departure from the relevant human rights law in their 2020 analysis.[81] Their analysis was thorough, and the key contentions are worth quoting directly. The first is that

> the Directive expressly acknowledges "the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos".[82]

This is an important clarification. For the reasons noted above, when applied to every role within a religious institution genuine occupational qualification tests have the potential to remove over time the very ethos of the institution itself. This is why the European Directive recognises that the standard 'genuine occupational requirements test' as applied to secular contexts must be modified to take account of the impact of the test on the ethos of the religious institution in its application.

46. Aroney and Taylor further note that

> it is important to distinguish the purpose and coverage of the Directive (as an aspect of EU labour law) from the human rights protection provided by the ECHR across a broader spectrum. The Directive draws its inspiration at a general level from the protection against discrimination as a universal right expressed in various UN instruments. The ECHR is mentioned in that context (with obvious relevance given its signatories).[83]

[81] Aroney and Taylor (n 65).
[82] Ibid 57.
[83] Aroney and Taylor (n

The 'distinct' nature of the Directive and its departure from the ICCPR and ECHR regimes has also been observed by the Office of the United Nations High Commissioner for Human Rights:

> The approach to justification under the European Union equal treatment directives is perhaps the most distinct among international and regional instruments: under the directives, direct discrimination cannot be justified. Instead, a series of limited exceptions to the anti-discrimination law framework are established, which permit differential treatment only when the criteria set out under the directives are met. These include some narrow, ground-specific, exceptions, established on the basis of age, and religion or belief; and a broader exception covering "genuine occupational requirements", which may be applied to all grounds listed under the directives (and applies to both direct and indirect discrimination). In practice, this approach serves to limit the areas in which (otherwise) directly discriminatory measures may be adopted. In situations in which a policy or measure falls within the scope of an exception under national law, it must still be shown to be necessary and proportionate to its aim.[84]

However, it is this 'distinct' body of law that the ALRC relies upon in asserting that the proposed regime is consistent with Australia's international obligations.

47. Aroney and Taylor further observe that:

> much closer to the Directive's own purpose, and mentioned separately, is the 1958 ILO Convention concerning Discrimination in Respect of Employment and Occupation. The titles of the Directive and the ILO convention signify their commonality. Article 1.2 of the ILO convention takes a "requirements-based" approach (as does the Directive) in providing that "[a]ny distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination." The inherent requirements test exists to meet the generic needs of all organisations, whatever their nature or purpose [see paragraphs 36 to 37 further above]. It is not a substitute for the specific protections accorded to religious organisations under the ECHR as interpreted by the ECtHR. The Directive acknowledges this through the express acknowledgement that organisations which have a religious ethos

[84] Office of the United Nations High Commissioner for Human Rights (n 8) 54.

have a positive right to require employees to act in good faith and with loyalty to that ethos.

48. On the basis of the Directive's distinctiveness, Aroney and Taylor summarise that:

> Considered on their own terms, therefore, the Directive and ILO convention reinforce the point … about the inappropriateness of Australian anti-discrimination legislation treating, as exceptions, those provisions which give effect to religious freedom and related rights. It is for this reason that the Directive expressly articulates the legitimate need for loyalty to an organisation's religious ethos to be protected … it is important to mark the difference in approach between the Directive and the ECtHR (with its specialist human rights competence). The ECtHR's decisions in support of religious institutional ethos are appropriately more generous than the Directive's genuine and determining occupational requirements. In its determinations in a number of cases the ECtHR has found there to have been no violation of the rights of the employee, without applying narrow occupational requirements, even when the ethos requirements of the employer organisation impinge on the employee's fundamental human rights.[85]

The correctness of the claim that the ECtHR jurisprudence is 'more generous' than the Directive and that the Court has explicitly eschewed a reductive genuine occupation requirements test is further demonstrated by the analysis of the authorities provided at paragraphs 25 to 32 of the enclosed journal article. For these reasons the ALRC's reliance on the judgements of the European Court of Justice in *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV*[86] and *IR v JQ* is similarly misplaced.[87] As I argued in the enclosed article: 'the authorities do not accord with the simplistic distinction between teaching roles that demonstrate an inherent requirement and those more functional non-teaching roles that do not.' As argued therein, the decision of the ECtHR in *Siebenhaar v Germany*[88] directly refutes the assertion that a determinative 'genuine occupational qualifications' test 'will satisfy the requirements of international human rights law.' The ALRC makes only passing reference to this pivotal illustrative judgement. Paragraphs 25 to 32 of the enclosed article set out this argument in full. In summary, the European Council Directive is not applicable to Australia's

[85] Aroney and Taylor (n 65) 57-8.
[86] Court of Justice of the European Union, Grand Chamber, C-414/16, ECLI:EU:C:2018:257, 17 April 2018.
[87] Court of Justice of the European Union, Grand Chamber, C 68/17, ECLI:EU:C:2018:696, 11 September 2018.
[88] *Siebenhaar v Germany* (n 59).

international obligations and departs from the relevant human rights frameworks in several material respects.

Comments Made in Periodic Reviews

Germany

49. The final source within international human rights law cited by the ALRC in support of its recommendation of a genuine occupations qualifications test is found in two Periodic Reviews by United Nations bodies. The first Periodic Review cited by the ALRC is the Periodic Review of Germany conducted by the Committee on Economic, Social and Cultural Rights in 2018:

> in its periodic review of Germany's compliance with the International Covenant on Economic, Social and Cultural Rights in 2018, the Committee on Economic, Social and Cultural Rights expressed its concern at the repeated reports of discrimination on grounds of religious belief, sexual orientation or gender identity in employment in non-ecclesiastic positions in church-run institutions, such as schools and hospitals (arts 2 (2) and 6). The Committee recommended that Germany review its General Equal Treatment Act, 'to ensure that no discrimination is permitted against non-ecclesiastical employees on grounds of religious belief, sexual orientation or gender identity'.[89]

Significantly, in its subsequent review of Germany for compliance with the ICCPR the Human Rights Committee made no mention of the same concern in its reference to *General Equal Treatment Act*.[90]

50. Australia has not signed or ratified the Optional Protocol to the International Covenant on Economic Social and Cultural Rights, even though it has ratified that Covenant, and is then part of the Periodic Review process. The differences between the obligations imposed by the ICCPR and the ICESCR are well-known. The latter contains weaker duties and is absent the stronger requirements applicable under the ICCPR. Whereas article 2(1) of the ICCPR obliges State parties 'to respect and to ensure [civil and political rights] without distinction of any kind' the ICESCR 'uses much more cryptic language about how the compliance of states to the treaty on economic, social and cultural rights will be monitored',[91] stating:

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[89] ALRC Consultation Paper (n 1) [A.22]-[A.23].
[90] Human Rights Committee *Concluding Observations on the Seventh Periodic Report of Germany* CCPR/C/DEU/CO/7 (30 November 2021).
[91] Koldo Casla 'After 50 years, it's time to close the gap between different human rights' *The Conversation* (16 December 2016) https://theconversation.com/after-50-years-its-time-to-close-the-gap-between-different-human-rights-70239

> Each state party to the present covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present covenant by all appropriate means, including particularly the adoption of legislative measures.

As Casla has said: 'It's difficult to assess compliance if rights are meant to be "achieved progressively", or to decide the "appropriateness" of the "means" authorities are making use of.'[92] Unlike the ICCPR, Australia has not adopted the Optional Protocol to the ICESCR, which would grant individuals the ability to make complaint to a body that can provide guidance on the respective obligations.

Ireland

51. The second Periodic Review cited by the ALRC as authority for its recommendation of a genuine occupations qualifications test (and also for the proposition that a religious educational institution must not discriminate on SDA grounds) concerns the Concluding Observations of the Human Rights Committee on the fourth periodic review of Ireland.[93] The pivotal quote underpinning the ALRC's assertion that religious educational institutions are to be treated distinctly from other religious institutions is found at [A.12]: 'The Human Rights Committee has indicated, however, that this autonomy is qualified with respect to all forms of discrimination in employment in the field of education.' At paragraphs [A.24]-[A.25] the ALRC states:

> In its periodic review of Ireland's compliance with the ICCPR in 2014 (prior to amendments to significantly restrict the operation of the relevant section of its Employment Equality Acts), the Human Rights Committee expressed concern that under section 37(1) of the *Employment Equality Acts*, religious-owned institutions, including in the fields of education and health, can discriminate against employees or prospective employees to protect the religious ethos of the institution (arts 2, 18, 25 and 27). The Committee recommended that Ireland amend the relevant section 'in a way that bars all forms of discrimination in employment in the fields of education and health'.[94]

52. However, the ALRC fails to point out the very important limitations to be placed upon the UNHRC's comment arising from context of the Committee's concern. In the same extract cited at paragraphs [A.24]-[A.25] the Committee states its concern 'about the

[92] Ibid.
[93] ALRC Consultation Paper (n 1) [66]; [A.12], [A.24]-[A.25].
[94] Ibid [A.24]-[A.25].

slow progress in increasing access to secular education through the establishment of non-denominational schools'.[95] Shortly before the Periodic Review in question O'Toole reported that in 2010/11 'approximately 96% of [Irish] primary schools remain under denominational patronage.'[96] The following table contains a breakdown of the Irish education sector as reported by Coolahan, J, C Hussey, and F Kilfeather in 2012:[97]

The Current School and Demographic Profile

Profile of Primary Schools in Ireland

There were some 3,169 primary schools in Ireland in 2010/2011. Currently 96% of primary schools are under denominational patronage, as noted in Table 1.

Table 1. Total number of primary schools by patron body (2010/11)*

Patron Body	No of Schools	% of Total
Catholic	2,841	89.65
Church of Ireland	174	5.49
Presbyterian	17	0.54
Methodist	1	0.03
Jewish	1	0.03
Islamic	2	0.06
Quaker	1	0.03
John Scottus Educational Trust Ld	1	0.03
Lifeways Ireland Ltd	2	0.06
An Foras Pátrúnachta na Scoileanna Lán-Ghaeilge Teo	57	1.80
Educate Together Ltd (national patron body)	44	1.39
Schools in Educate Together network with their own patron body	14	0.44
Vocational Education Committees**	5	0.16
Minister for Education & Skills***	9	0.29
Total	**3,169**	**100%**

*This table outlines the patronage of ordinary mainstream primary schools and does not include special schools

** Community National Schools are under the interim patronage of the Minister while draft legislation to confirm VEC patronage is being processed

***The Minister for Education and Skills is patron of the nine Model Schools.

[95] Ibid [21].

[96] Barbara O'Toole (2015) 1831–2014: an opportunity to get it right this time? Some thoughts on the current debate on patronage and religious education in Irish primary schools, *Irish Educational Studies*, 34:1, 91.

[97] J Coolahan, C Hussey, and F Kilfeather *The Forum on Patronage and Pluralism in the Primary School: Report of the Forum's Advisory Group,* (2012) Department of Education and Skills 29.

By way of contrast, in Australia in 2018 40.8% of secondary school children attended a private, or independent, school, as opposed to 59.2% of secondary school children who attended a public school.[98]

53. In the Irish context, genuine alternative employment opportunities for teachers that do not uphold the ethos of religious schools are simply not available. That this was the chief underlying concern of the Human Rights Committee was disclosed in its questions to the State Party, which included a request to '[p]lease provide information on steps being taken to ensure that the right of children of minority religions or non-faith are also recognized in the Education Act 1998, and the number of non-denominational primary schools that have been established during the reporting period.'[99] The inconsistency of the recommendations in respect of Ireland with the wider human rights framework surrounding religious schools as outlined above demonstrates that the UNHRC's comments are situation-specific and fail to contribute meaningfully to the argument that international law permits the Commonwealth to place limitations on Article 18 manifestation. The contextual pressures that gave rise to the UNHRC's concern for the application of Article 26 to employees within the Irish education section simply do not apply in Australia. This is not an authority that can be relied upon for limiting the Article 18 as applied to religious educational institutions within Australia.

Periodic Reviews of Australia

54. It should also be observed that section 38 of the SDA is a statutory provision with equivalent effect to those provisions referenced in the Human Rights Committee reports for both Ireland and Germany. At no stage has the Human Rights Committee or the Committee on Economic, Social and Cultural Rights made a recommendation in their Periodic Reviews that Australia is non-compliant with the ICCPR or the ICESCR as a result. Furthermore, in his compendium of the 'UN Human Rights Committee's Monitoring of ICCPR Rights', Taylor references no similar instance in which the UNHRC has expressed a view recommending that a State Party restrict the operation of a domestic law that permits religious educational institutions to maintain their religious ethos. To the contrary, in its 2017 Concluding Observations the Human Rights Committee welcomed '[t]he amendments to the Sex Discrimination Act 1984, prohibiting discrimination on the basis of sexual orientation, gender identity and

[98] Emma Rowe 'Counting National School Enrolment Shares in Australia: the Political Arithmetic of Declining Public School Enrolment' *The Australian Educational Researcher* (2020) 47(4) 517, 527.
[99] Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant List of Issues in Relation to the Fourth Periodic Report of Ireland Addendum Replies of Ireland to the List of Issues 111th session* (7–25 July 2014) CCPR/C/IRL/Q/4/Add.1 [26].

intersex status, in 2013'.[100] Those amendments introduced the exemptions applied to religious school in respect of the attributes of sexual orientation, gender identity and intersex status contained at section 38.

Part III - Proportionality Test

55. The application of a proportionality test as a condition for the exemption introduces high levels of uncertainty, both for religious institutions, and also their employees. This is illustrated by the range of religious practices that under section 38 of the SDA need only be justified by reference to whether the act was performed 'in order to avoid injury to the religious susceptibilities of adherents of that religion or creed', and having regard to whether the institution has acted in 'good faith'. By contrast, as the ALRC admits, under the Propositions a religious institution will now need to satisfy a Court that all of the following conduct is 'proportionate' in order for it to be lawful:
    a. In respect of Proposition A:
        i. the educational institution would be allowed to impose such policies (for example uniform or behaviour policies) that were reasonable and proportionate in the circumstances[101]
    b. In respect of Proposition C:
        i. in selecting teachers of religion, a school could preference members of the religion who adhered to particular dietary restrictions or forms of dress, where this was proportionate in all the circumstances;
        ii. a requirement for appointment or promotion that a staff member attend a particular temple, synagogue, mosque or church (for example) would need to be assessed on a case by case basis, by reference to the nature of the role and whether the requirement was proportionate to maintaining the religious ethos of the school[102]
    c. In respect of Proposition D:
        i. a university would not be prevented by the religious discrimination provisions of the Fair Work Act from terminating the employment of a social work lecturer who publicly denigrated the religion of the educational institution, if this was proportionate in the circumstances;

[100] Human Rights Committee *Concluding observations on the sixth periodic report of Australia,* (1 December 2017), CCPR/C/AUS/CO/6.
[101] ALRC Consultation Paper (n 1) [46].
[102] ALRC Consultation Paper (n 1) [60].

ii. a kindergarten could terminate the employment of a staff member who actively tried to convert parents of students to another religion, if this was proportionate in the circumstances (subject to the requirements of employment law). [103]

56. This amounts to a very serious incursion into the autonomy of religious institutions. Critically, if a Court considers that the action effecting the asserted belief is not 'proportionate', even where it is done in 'good faith', it will be unlawful. Because the test is situation specific, the ability of existing judgements to guide future conduct in respect of other institutions, positions or roles will be limited. The comments of the former and current Special Rapporteurs concerning religious institutional autonomy are apposite. Such a proposal permits a court to restrict the actions of religious institutions in conformity with their understanding of their religious tenets. The existing law which has regard to whether the institution is acting in accordance with a belief and acts in good faith avoids such an incursion.

Constitutional Invalidity and Claims that the Propositions are Already Law and thus 'Would be Minimal or Have no Effect in Practice'

57. In respect of Proposition A, the ALRC claims that 'the majority of states and territories have narrower exceptions for religious educational institutions than those that apply under the Sex Discrimination Act. As such, in a number of states and territories the effect of Proposition A would be minimal or have no effect in practice.'[104] The same statement is made in respect of Proposition B.[105] Curiously the ALRC asserts 'if an educational institution is in Queensland, and certain conduct is prohibited under Queensland law but not Commonwealth law, the educational institution must comply with the Queensland law.'[106] However this fails to take account of the operation of section 109 of the Australian Constitution, which provides 'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.' At Senate Estimates an officer of the ALRC indicated '[w]e're interested to hear more about this view'.[107]

58. Associate Professor Neil Foster argues that:

[103] ALRC Consultation Paper (n 1) [66].
[104] ALRC Consultation Paper (n 1) [48] see also [49], [A.36].
[105] Ibid [54], [55], [A.45].
[106] Ibid [49].
[107] Commonwealth of Australia, Senate Legal and Constitutional Affairs Legislation Committee, Estimates, Proof Committee Hansard, 125 (Matthew Corrigan).

> where a State or Territory law dealing with discrimination provides a narrower balancing clause in relation to religious bodies or educational institutions than the Commonwealth law provides, the State or Territory law will, to the extent of that inconsistency, be inoperative by virtue of s 109 of the Constitution, and the religious body will be free to act within the parameters permitted by the Commonwealth law.[108]

This is because the State laws remove or diminish entitlements under Commonwealth law to engage in conduct which would otherwise be unlawful discrimination. Rees, Rice and Allen make the same point with specific reference to the interaction between section 38 of the SDA and the more limited exemptions contained in Queensland and Tasmania anti-discrimination laws. They state 'were a court to find that a s 109 inconsistency exists, it is likely that the offending provision would be severable rather than a finding that the entire Act is invalid... the State or Territory law is vulnerable … because it prohibits discriminatory conduct that the Commonwealth law allows.'[109] Section 11 of the SDA attempts to deal with the question by stating that where an action has commenced in a State jurisdiction, the complainant may not make a complaint under the SDA.

59. The question of the Constitutional invalidity of State anti-discrimination law in interaction with a Commonwealth prohibition was considered by the High Court in *Citta Hobart Pty Ltd v Cawthorn*.[110] The matter concerned an argument that a prohibition against disability discrimination under Tasmanian law was invalidated by the Commonwealth *Disability Discrimination Act 1992* (Cth). The complainant had argued that the failure to provide wheelchair access to a Parliamentary building was discrimination under the State Act. It was argued in defence against the claim of disability discrimination that the State Act was invalidated because the Commonwealth Act did not make the failure to provide the ramp unlawful. The ramp was not required under Commonwealth law, and thus any prohibition under the State Act that required such a ramp was invalidated.
60. At first instance, the Tasmanian Civil and Administrative Tribunal made the decision that it did not have the jurisdictional authority to determine the complaint, as it required a decision as to the scope of the Commonwealth power. On appeal the Full Court of the Supreme Court of Tasmania held that the invalidity argument was 'misconceived' and returned the matter to the Tribunal for determination.[111] On appeal of the Full Court's decision, the High Court majority focussed on the question of whether the

[108] Foster, Neil J, (2022) 'Religious Freedom, Section 109 of the Constitution, and Anti-discrimination Laws' available at https://works.bepress.com/neil_foster/144/
[109] Rees, Rice and Allen (n 10) 81-2.
[110] [2022] HCA 16 (04 May 2022).
[111] Ibid [50] (Edelman J).

Tasmanian Civil and Administrative Tribunal had jurisdiction to consider the argument and did not determine whether the Commonwealth Act did invalidate the State Act. Rather, the majority found that 'the defence was genuinely raised in answer to the complaint in the Tribunal and was not incapable on its face of legal argument.'[112] In so holding the Court majority dismissed the prior finding of the Full Court of the Supreme Court of Tasmania that the invalidity argument was 'misconceived'.[113]

61. In substance the High Court affirmed that the question of the operation of the two Acts and the inconsistency of the State Act was a 'genuine' question to be determined (although it did not determine the question itself). Justice Edelman issued the same orders and in a separate judgement stated that there was a 'real question' to be determined, also overturning the decision of the Full Court of the Supreme Court of Tasmania.[114] As Rees, Rice and Allen argue, it is certain that the question of Constitutional invalidity in the context of discrimination law is an area of the law that requires greater clarification. As they acknowledge, the question of whether a more restrictive State or Territory law will be invalidated by a more accommodating Commonwealth remains a genuine issue.

[112] Ibid [9].
[113] Ibid [50] (Edelman J).
[114] Ibid [79]-[80] (Edelman J).

The Position of Religious Schools under International Human Rights Law

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CONTENTS

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INTRODUCTION

1. This article considers the international human rights law concerning the employment of persons by religious schools. In particular, it considers the claim, increasingly made in support of Australian domestic legislative reform, that the application of an 'inherent requirements' test to employees within religious schools appropriately gives effect to the requirements of international law. The article observes that that law is found in two primary protections: the protection provided to religious schools as the collective manifestations of the religious beliefs of individuals, including parents and guardians, and the protection against discrimination. The article illustrates the domestic implications of these regimes by considering the human rights rationales offered by the Governmental proponents of the Victorian *Equal Opportunity Amendment Religious Exceptions Bill 2021*.

I CONTEXT

2. Australian discrimination law is a complex interaction of prohibition and exemption, operating within differing, but interacting, overlays of Commonwealth and State law. Until November 2022, all Australian jurisdictions provided exemptions in variant forms to religious educational institutions in both the areas of employment[1] and in respect of the supply of services to students (although only the former is the focus of this article).[2] In the past year alone these exemptions have been the subject of a proliferation of reform proposals. As further outlined below, in May 2022 the Law Reform Commission of Western Australia (LRCWA) and in July 2022 the Queensland Human Rights Commission (QHRC) have, at the request of their respective State Governments, both issued reports that propose reforms to the exceptions for religious educational institutions that replicate amendments to the Victorian *Equal Opportunity Act 2010* that came into effect on 14 June 2022.[3] As the LRCWA recognised, those amendments 'substantially narrowed' the religious exceptions in Victoria.[4]

3. In November 2022 the Northern Territory became the first Australian jurisdiction to remove the distinct exemption that pertains to religious schools in respect of both staff and students. In that jurisdiction such schools may only have regard to the 'genuine occupational qualification' exception available to all employers when seeking to maintain their religious ethos.[5] The climate of reform will proceed unabated for the foreseeable future, with the Australian Law Reform Commission (ALRC) having been requested to draft Commonwealth reforms that would 'ensure that an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed: …

    - must not discriminate against a member of staff on the basis of sex, sexual orientation, gender identity, marital or relationship status or pregnancy;

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[1] *Discrimination Act 1991* (ACT) ss 33(1), 44(a); *Anti-Discrimination Act 1977* (NSW) ss 25(3)(c), 38C(3)(c), 40(3)(c), 49ZH(3)(c); *Equal Opportunity Act 2010* (Vic) s 83A; *Anti-Discrimination Act 1998* (Tas) s 51; *Equal Opportunity Act 1984* (SA) s 34(3); *Equal Opportunity Act 1984* (WA) ss 66(1)(a), 73(1); *Anti-Discrimination Act 1991* (Qld) s 25.

[2] *Discrimination Act 1991* (ACT) ss 33(2), 46; *Anti-Discrimination Act 1977* (NSW) ss 38K, 46A, 49ZO; *Equal Opportunity Act 2010* (Vic) ss 39(a), 61(a), 83; *Anti-Discrimination Act 1998* (Tas) s 51A; *Equal Opportunity Act 1984* (SA) s 35(2b); *Equal Opportunity Act 1984* (WA) ss 66(1)(a), 73(3); *Anti-Discrimination Act 1991* (Qld) s 41(a).

[3] *Review of the Equal Opportunity Act 1984 (WA)* Law Reform Commission of Western Australia,, (Final Report No Project 111 May 2022) ('*LRCWA Report*') 16-7, 178-84; *Building Belonging* Queensland Human Rights Commission, July 2022) ('*QHRC Report*').46-7; 575-583.

[4] *LRCWA Report* (n 3) 168.

[5] *Anti-Discrimination Act 1992* (NT) s 35(1)(b)(i).

- can continue to build a community of faith by giving preference, in good faith, to persons of the same religion as the educational institution in the selection of staff.'[6]

4. In their 2018 report the Commonwealth Expert Panel on Religious Freedom (Expert Panel) emphasized 'the pivotal role of exceptions to discrimination laws in the protection of freedom of religion'.[7] In recommending the retention of existing exceptions, with some minor curtailments, the Panel affirmed the legitimacy of the positions expressed to it by religious schools. These included that many schools 'consider that the freedom to select, and to discipline staff who act in a manner contrary to the religious teachings of the school, is essential to their ability to foster an ethos that is consistent with their religious beliefs.'[8] They noted that a 'key theme in' their discussions with religious schools 'was the need for staff to model the religious and moral convictions of the community and to uphold, or at least not to undermine, the religious ethos of the school. The Panel heard repeatedly that faith is "caught not taught"'.[9] The Panel recognised that '[f]or some religious schools … the only way to create a community consistent with the teachings of the faith is to be selective in employment, including with respect to non-teaching staff, who are also important members of the school community.'[10] As we will see these propositions lie at the very heart of the recent contention inspired by legislative reforms that affect religious schools. These assertions by religious schools frame the context for the key consideration of this article: are such practices by religious schools in accordance with the relevant international human rights law?

II INTERNATIONAL HUMAN RIGHTS LAW

A *United Nations Jurisprudence*

5. The right to establish private schools is protected by international human rights law that Australia has ratified. The starting place for the consideration of the rights of religious schools is the protection to the right to manifest religion contained Article 18 of the *International Covenant on Civil and Political Rights 1966* (ICCPR):[11]

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
>
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

[6] 'Religious Educational Institutions and Anti-Discrimination Laws', *Australian Law Reform Commission*, 04 November 2022 <https://www.alrc.gov.au/inquiry/anti-discrimination-laws/>.
[7] Expert Panel on Religious Freedom, *Religious Freedom Review*, 18 May 2018 [1.418].
[8] Ibid 62 [1.245].
[9] Ibid 56 [1.210].
[10] Ibid 56 [1.212].
[11] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18 ('*ICCPR*'). See also UN General Assembly, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, A/RES/36/55, (25 November 1981) art 6 ('*Religious Declaration*') and *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v Sri Lanka*, Communication No 1249/2004, UN Doc CCPR/C/85/D/1249/2004 (2005).

> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
>
> 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

The right to found religious schools is protected under each of the above sub-articles. As the Expert Panel recognised: 'A key aspect of the right to manifest one's belief in article 18(1) of the ICCPR is a right for religious groups to establish their own private schools conducted according to the beliefs of their religion.'[12] As Taylor further notes, Article 18(4) protects the freedom to establish independent religious schools: 'Private religious schools may be seen as a means of supporting the religious and moral education of children in conformity with parental convictions.'[13] In his commentary on the ICCPR Nowak concludes that '[w]ith respect to the express rule in Art.13(3) of the *International Covenant on Economic, Social and Cultural Rights* and the various references to this provision by the delegates in the 3d Committee of the General Assembly during the drafting of Article 18(4), it may be assumed that the parental right covers the freedom to establish private schools.'[14] The *United Nations Universal Declaration of Human Rights* (UNDHR),[15] the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)[16] and the *Convention on the Rights of the Child*[17] (CRC) also provide relevant protections to children and their parents.

6. In *Delgado Páez v Colombia* the United Nations Human Rights Committee (UNHRC) considered a complaint by a teacher within the Colombian Catholic schools system who had received differential treatment by his employer due to his advocacy of 'liberation theology'. In finding that the complainant's 'right to profess or to manifest his religion has not been violated' the UNHRC stated 'that Colombia may, without violating [Article 18], allow the Church authorities to decide who may teach religion and in what manner it should be taught.'[18] Similarly, the UNHRC found no breach of Article 19, concerning the right to freedom of expression by the employee. Subsequently in its General Comment on Article 18 the Committee emphasised the foundational importance of Article 18(4) when it recognised that, unlike the general protection to religious manifestation at Article 18(3), 'the liberty of the parents and guardians to ensure religious and moral education cannot be restricted.'[19]

7. In 2010 former United Nations Special Rapporteur on freedom of religion or belief Heiner Bielefeldt concluded that 'private schools constitute a part of the institutionalised diversity within a modern pluralistic society'.[20] He emphasised that 'the right of persons and groups of persons to establish religious institutions that function in conformity with their religious self-

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[12] Expert Panel on Religious Freedom (n 7) 59 [1.225].
[13] Paul Taylor, *A Commentary on the International Covenant on Civil and Political Rights* (Cambridge University Press, 2020) 533.
[14] Manfred Nowak, *U.N. Covenant on Civil and Political Rights : CCPR Commentary* (N.P. Engel, 2nd rev ed ed, 2005) 443.
[15] UN General Assembly, *Universal Declaration of Human Rights*, General Assembly resolution 217A(III), (10 December 1948) ('*Universal Declaration of Human Rights*') art 26(3).
[16] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*') art 13(3)&(4).
[17] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (signed and entered into force 2 September 1990) ('*CRC*') arts 5, 14(2). See also Julian Rivers, *The Law of Organized Religions* (Oxford University Press, 2010) 243.
[18] *William Eduardo Delgado Páez v Colombia* Communication No. 195/1985, U. N. Doc. CCPR/C/39/D/195/1985 (1990), [5.7] ('*Delgado Páez*').
[19] *Human Rights Committee, General Comment No 22: Article 18, 48th sess, (20 July 1993).*
[20] Heiner Bielefeldt, *Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/HRC/16/53 (15 December 2010) [54].

understanding … is not just an external aspect of marginal significance.' Without 'an appropriate institutional infrastructure … their long-term survival options as a community might be in serious peril'. In respect of their treatment of staff he acknowledged that for many 'questions, such as the appointment of religious leaders or the rules governing monastic life, directly or indirectly derive from the tenets of their faith.' The means by which they 'institutionalize religious community life can have a significance that goes far beyond mere organizational or managerial aspects.'[21] While recognising that 'religious institutions must be accorded a broader margin of discretion when imposing religious norms of behaviour at the workplace' than secular institutions he emphasised that 'much depends on the details of each specific case.' For these reasons the Special Rapporteur concludes that '[t]he autonomy of religious institutions thus undoubtedly falls within the remit of freedom of religion or belief.'[22] These principles also apply to religious schools, noting that limitations on the ability to incorporate private religious schools 'may have negative repercussions for the rights of parents or legal guardians to ensure that their children receive religious and moral education in conformity with their own convictions.'[23]

8. The exercise of control by religious schools over the appointment of staff entails competing rights. Chief among these is the right to equality of staff under Article 26, and the right to maintain a religious school, as an effectuation of the rights granted to individuals under Article 18. Other rights that may be enlivened include the right to privacy, the right to family life and the rights to work and education, where the actions of a religious school would deprive persons of employment opportunities. As the current Special Rapporteur has noted, in such cases 'every effort must be made, through a careful case-by-case analysis, to ensure that all rights are brought in practical concordance or protected through reasonable accommodation'.[24] However, while regard to 'the details of each specific case'[25] is required in determinations of whether the conduct of religious institutions constitutes a permissible limitation on the rights of others, as we will see, much turns on the precise means adopted within domestic law by which those specific circumstances are incorporated.

B *European Court of Human Rights*

9. The European Court of Human Rights (ECtHR) provides the most developed body of applied human rights law at an international level. This includes its treatment of the right to maintain private schools. However, important distinctions between the jurisprudence of the ECtHR and that developed under the ICCPR should not be overlooked. The UNHRC has specifically eschewed the jurisprudence of the ECtHR in several respects, and in some cases has imposed more stringent protections for religious manifestation.[26] Chief among these distinctions is the

[21] Heiner Bielefeldt, *Report to the General Assembly of the Special Rapporteur on freedom of religion or belief*, UN Doc A/68/290 (7 August 2013) [57].
[22] Heiner Bielefeldt, *Interim report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/69/261 (5 August 2014) [41].
[23] Heiner Bielefeldt, *UN General Assembly, Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/HRC/19/60 (22 December 2011) [47].
[24] Ahmed Shaheed, *UN Human Rights Council, Report of the Special Rapporteur on freedom of religion and belief*, UN Doc A/HRC/37/49 (28 February 2018) [47]. See also Asma Jahangir, *UN Economic and Social Council, Civil and political rights, including the question of religious intolerance: Report of the Special Rapporteur on freedom of religion or belief*, UN Doc E/CN.4/2006/5 (2006) [51]–[52]: 'contentious situations should be evaluated on a case-by-case basis' and 'the competing human rights and public interests put forward in national and international forums need to be borne in mind'.
[25] Bielefeldt, *Interim report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/69/261 (n 22).
[26] See for example *Bikramjit Singh v France*, CCPR/C/106/D/1852/2008, (1 November 2012) [8.6] cf *Ranjit Singh v France (dec.)* no 27561/08, 30 June 2009.

UNHRC's eschewal of the margin of appreciation doctrine.[27] As Taylor shows, the UNHRC has also been less willing to adopt the 'progressive' conception of its chief enabling treaty as a 'living instrument' than has the ECtHR.[28]

1 *Religious Institutional Autonomy*

10. Following the approach of the European Court of Human Rights itself, consideration of its jurisprudence concerning religious schools must commence with its framing of the broad philosophical correlation between religious institutional autonomy and plural democratic society. In *Hasan v Bulgaria* the Court stated:

> the believer's right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully free from arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which article 9 affords … Were the organisational life of the community not protected … all other aspects of the individual's freedom of religion would become vulnerable.[29]

In respect of members' rights, in *Sindicatul "Păstorul Cel Bun" v Romania*[30] the Grand Chamber of the ECtHR stated that:

> In accordance with the principle of autonomy, the State is prohibited from obliging a religious community to admit new members or to exclude existing ones … in the event of a disagreement over matters of doctrine or organisation between a religious community and one of its members, the individual's freedom of religion is exercised through his freedom to leave the community.[31]

In that matter the Court stated:

> religious communities are entitled to their own opinion on any collective activities of their members that might undermine their autonomy and that this opinion must in principle be respected by the national authorities. However, a mere allegation by a religious community that there is an actual or potential threat to its autonomy is not sufficient … It must also show, in the light of the circumstances of the individual case, that the risk alleged is real and substantial and that the impugned interference with freedom of association does not go beyond what is necessary to eliminate that risk and does not serve any other purpose unrelated to the exercise of the religious community's autonomy.[32]

The Court's consideration of the employment practices of faith-based institutions proceeds from these broad principles of democratic liberal political philosophy. A further developed account of this jurisprudence is provided in Part II, where the consistency of reforms within Australian law with that jurisprudence is considered.

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[27] *Länsman v Finland*, CCPR/C/52/D/511/1992, (26 October 1994) [7.13] [9.4]; *Bikramjit Singh v France*, (n 27).

[28] Taylor (n 13) 19.

[29] *Hasan and Chaush v Bulgaria* (European Court of Human Rights, Grand Chamber, Application no. 30985/96, 26 October 2000, ('*Hasan and Chaush v Bulgaria*'). See also *Serif v Greece* Second Section, no 38178/97 Eur Court HR ('*Serif v Greece*'). See also Nicholas Aroney, 'Freedom of Religion as an Associational Right' (2014) 33(1) *University of Queensland Law Journal* 153

[30] *Sindicatul "Păstorul Cel Bun" v Romania* (2014) 58 EHRR 284, 319 [137] (citations omitted) ('*Sindicatul "Păstorul Cel Bun" v Romania*') 324 [165].

[31] Ibid.

[32] Ibid.

2 *Right to Establish Private Religious Institutions*

11. The provision corresponding to the parental rights protection at Article 18(4) of the ICCPR is contained within Article 2 of the First Protocol to the *European Convention on Human Rights* (ECHR):

> No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

The seminal ECtHR judgement in *Kjeldsen, Busk Madsen and Pedersen v Denmark (Kjeldsen)*[33] concerned the right of parents to remove children from sex education. Therein the European Court of Human Rights held that Article 2 'aims in short at safeguarding the possibility of pluralism in education which possibility is essential for the preservation of the "democratic society" as conceived by the Convention.'[3435] The Court considered this right took effect as 'the discharge of a natural duty towards their children - parents being primarily responsible for the "education and teaching" of their children – [whereby] parents may require the State to respect their religious and philosophical convictions.'[36] The Court noted the important role private schools play in ensuring parents may excuse their children from education that does not align with their religious or philosophical convictions:

> the Danish State preserves an important expedient for parents who, in the name of their creed or opinions, wish to dissociate their children from integrated sex education; it allows parents either to entrust their children to private schools … or to educate them or have them educated at home[37]

12. In *Ingrid Jordebo Foundation of Christian Schools v Sweden*[38] the European Commission on Human Rights further articulated the principles set out in *Kjeldsen* as applied to the context of independent schools. Therein the Commission acknowledged that the *travaux preparatories* [the records of the deliberations of State Parties that led to the ECHR] recognise:

> that the principle of the freedom of individuals, forming one of the corner-stones of the Swedish society, requires the existence of a possibility to run and to attend private schools … In particular, it was pointed out that … the activity in a private school should be allowed 'within very wide ranges to bear the stamp of different views and values'.[39]

In light of these principles the Commission criticised the Swedish Government, which:

> seem[ed] to regard the right to keep a school as something entirely within 'le fait du Prince' [permissible acts of government]. … The Government seem[ed] to look at schooling the same way as at military service, where of course no competing 'private regiments' could be tolerated.[40]

13. In a lengthy analysis the Commission was critical of the unitary nature of the Swedish schooling system, linking diversity in private schooling to a flourishing democratic State:

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[33] *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1979-80) 1 EHRR 711 ('*Kjeldsen*').
[34] Ibid [21]. Also affirmed in *Folgero and Others v Norway* European Court of Human Rights, Grand Chamber, Application No 15472/02, [84(b)] ('*Folgero*'). See also Rivers (n 17) 245, commenting upon the decision of *Kjeldsen* (n 33).
[35]
[36] *Kjeldsen* (n 33) [22].
[37] Ibid [24].
[38] *Ingrid Jordebo Foundation of Christian Schools v Sweden European Commission of Human Rights, Application No 11533/85 ('Ingrid Jordebo').*
[39] *Ingrid Jordebo* (n 38). See also Klaus Beiter, *The Protection of the Right to Education in International Law* (Martinus Nijhoff, 2006).
[40] Ibid.

> In Sweden it is a basic political idea, which has governed the political leaders for a long time, that the State and the local municipal authorities must control the education: what the children have to learn and in which ways they have to receive the education must in every instance be decided by the political majority of the country … The whole Swedish school system is very close to violating Article 9 of the Convention [freedom of religion or belief] when it says that everyone is guaranteed the right to think freely. The idea is that the Swedish school children are in principle led to think only in the directions that are decided by the political majority of the Parliament.[41]

In conclusion the Commission held 'the right to start and run a private school' had been breached.[42]

C *Summary*

14. In summary, the above rulings, fashioned as extensions of the foundational philosophical conceptions underpinning democratic society, support the offering of strong protections for faith-based schools in respect of their employment decisions. Legislative reforms that fail to afford religious education associations the ability to maintain their ethos through restrictions on their ability to employ persons who share their beliefs require strict scrutiny to ensure they do not evince a movement towards a society in which children are 'led to think only in the directions that are decided by the political majority of the Parliament', breaching 'the 'guaranteed … right to think freely'.[43] This is because, as the application of these principles to domestic legislation in Part II considers, such limitations may jeopardise the ability of religious schools to offer students a holistic religious education in accordance with the human right that protects the ability of parents to choose a school consistent with their religious and moral convictions. Under both the ICCPR and the ECHR, regard must be had to the specific circumstances of each case in balancing the rights of individuals to freedom from discrimination, and the rights of religious individuals to form collective institutions, and the associated parental right. However, as will be seen in Part II, the precise means adopted to incorporate the specific circumstances can have a significant impact on the ability of schools to maintain their unique ethos.

III DOMESTIC APPLICATION

15. Having outlined the general principles applying to the religious institutional autonomy of private schools under international human rights law, this article now considers the alignment of domestic Australian legislation with that law. The enactment of the Victorian *Equal Opportunity Amendment Religious Exceptions Bill 2021*, (the Victorian Bill) limited the 'exemptions' available to religious institutions and schools found within the Victorian *Equal Opportunity Act 2010* (the EOA). The Victorian model is proving to provide somewhat of a template for reform. In its May 2022 *Final Report on the Review of the Equal Opportunity Act 1984* (WA) the Law Reform Commission of Western Australia concludes that 'the approach taken in the Victorian Religious Exceptions Act should be adopted.'[44] The Western Australian Attorney-General has confirmed that the Government 'has broadly accepted the recommendations' with reforms 'strengthening equal opportunity protections for LGBTIQA+ staff and students in religious schools' being one of 'several key reforms … expected to be included'.[45] In its response to a review commissioned by the Queensland Attorney-General, in

[41] Ibid.
[42] Ibid (citations omitted). Having set out these this general statement of rights, the Commission held that on the particular facts that the education provided did not meet the quality control requirements legitimately imposed by the Government.
[43] Ibid. See also *Verein Gemeinsam Lernen v Austria* (1995) 20 EHRR CD 78.
[44] *LRCWA Report* (n 3) 182.
[45] John Quigley, 'WA's anti-discrimination laws set for overhaul' 16 August 2022 <https://www.mediastatements.wa.gov.au/Pages/McGowan/2022/08/WAs-anti-discrimination-laws-set-for-overhaul.aspx>.

July 2022 the Queensland Human Rights Commission recommended a reform closely aligning with the Victorian Bill. At the time of writing the Queensland Government is yet to release its response to the Commission's 'Building Belonging' report. The following discussion considers the extent to which the Victorian model can be said to be consistent with international human rights law.

16. The Statement of Compatibility (SoC) provided with the Victorian Bill sets out its key function:

> The Bill promotes the right to equality by amending the religious exceptions in the EO Act to remove the ability for religious bodies and educational institutions to discriminate on the basis of a person's sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity in employment, education and the provision of goods and services.[46]

Under section 83A of the resultant amended EOA a religious school can only 'discriminate' if an employee has an inconsistent 'religious belief' or engages in an inconsistent religious 'activity'. To the extent that the Bill permits religious institutions and religious educational institutions to continue to maintain their religious ethos in respect of their employment practices, institutions must now satisfy a three-fold test:

> conformity with the doctrines, beliefs or principles of the religion is an inherent requirement of the particular position, the person cannot meet that inherent requirement because of their religious belief or activity, and the discriminatory action is reasonable and proportionate.[47]

As the SoC argues: 'This replaces the current blanket exception with an exception that is tailored to the specific position and restricts the discrimination to only those positions where it is necessary.'[48]

17. These reforms have significant impact for religious schools and their associated parents in Victoria, Western Australia and Queensland. They rely on a particular interpretation of international human rights law in two key respects. First, that non-religious activity can be irrelevant to the suitability of an employee of a religious institution under that law. Second, that an 'inherent requirements test' is consistent with that law. It is noteworthy that for both contentions the Statement of Compatibility that accompanies the Bill fails to provide one citation expressing reliance on the judgements of international human rights bodies for its interpretation. The following discussion considers the accuracy of these claims.

1 *The Relevance of an Employee's Inconsistent, but Non-Religious Conduct*

18. The Victorian Bill sparked significant concerns for religious institutions. One of the primary concerns was associated with the legislation's attempt to limit a religious institution's consideration of non-religious conduct that is inconsistent with the teachings of a religious institution when determining the suitability of employees. While the SoC states that it preserves the ability of faith communities to 'exclude individuals who do not share their faith', it also states that it removes

> the ability of religious organisations and schools to discriminate on the basis of sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity in employment. Teachers and other employees at religious organisations and educational institutions should not need to hide their identity in order to avoid risking their livelihoods.[49]

[46] *Victoria, Parliamentary Debates, Legislative Assembly* 28 October 2021, Natalie Hutchins, Minister, 4368.
[47] Ibid 4369, see also 4370.
[48] Ibid 4369.
[49] Ibid.

Prima facie, these two statements could appear to be in tension. What guiding principles are we provided with that could reconcile these competing demands? The SoC states the clear intention to allow some ongoing form of discretion to schools when it posits that the Bill

> limits the right to equality by allowing religious organisations and educational institutions to continue to discriminate against individuals on the basis of a religious belief or activity (a protected attribute under the EO Act) in employment, education and the provision of government-funded goods and services. The purpose of this limitation is to protect the ability of religious organisations and educational institutions to demonstrate their religion or belief as part of a faith community, and exclude individuals who do not share their faith. The formation of religious schools and organisations is an important part of an individual's right to enjoy freedom of religion with other members of their community.[50]

19. However, again in apparent tension with that statement in her Second Reading Speech Hutchins stated:

> A person being gay is not a religious belief. A person becoming pregnant is not a religious belief. A person getting divorced is not a religious belief. A person being transgender is not a religious belief. Under the Bill, a religious body or school would not be able to discriminate against an employee only on the basis that a person's sexual orientation or other protected attribute is inconsistent with the doctrines of the religion of the religious body.[51]

However, the Minister then goes on to note:

> Many religions have specific beliefs about aspects of sex, sexuality, and gender. For example, some religions believe marriage should only be between people of the opposite sex. If a particular religious belief about a protected attribute is an inherent requirement of the role, and a person has an inconsistent religious belief, it may be lawful for the religious organisation to discriminate against that person.[52]

In calling into question the extent to which private conduct of a non-religious nature is relevant to the determination of an employee's suitability, the resulting interaction between non-religious 'activity' and religious 'belief' introduced into Victorian law has the potential to cause significant uncertainty, both for schools and their employees. Each will now need to consider the extent to which belief can be informed by action that is not inherently religious, but which nonetheless is inconsistent with religious belief. This uncertainty calls into question the ability of the Victorian law to satisfy the requirement that limitations on human rights be 'prescribed by law' under Article 18(3). The *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* interprets this requirement as encompassing the dual obligation that '[l]aws imposing limitations on the exercise of human rights shall not be arbitrary or unreasonable' and that '[l]egal rules limiting the exercise of human rights shall be clear and accessible to everyone.' [53]

20. The judgement of the ECtHR in *Obst v Germany*[54] also raises serious questions for the compliance of this aspect of the Victorian Bill with international human rights law. That matter concerned the Director for Europe at the public relations Department of the Mormon Church

[50] Ibid 4368-9.
[51] Ibid 4375.
[52] Ibid.
[53] *UN Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 41st sess, E/CN.4/1985/4 (28 September 1984) arts 16 & 17.
[54] *Obst v Germany* (2010) ECtHR, App. No. 425/03.

who had engaged in an extramarital affair. No question was raised of any activity or views that would fall within the definition of 'religious belief or activity' under the EOA. The private activity of the employee, which would (absent an exemption) fall within the protected attribute of 'lawful sexual activity' under the EOA, was not a 'religious activity'. The Court held that the Church was justified in dismissing him, on the ground that to do so was vital for its credibility.[55] The private nature of the conduct was not a decisive factor, as the special nature of the professional requirements imposed on the Applicant was due to the fact that they were established by an employer whose ethos is based on religion or belief.[56] To the extent that the Victorian Bill requires that a religious institution disregard the same activities of a similarly placed employee of a religious institution, it is inconsistent with the recognition provided to religious institutional autonomy by the ECtHR.

21. *Fernández Martínez v Spain*[57] concerned a Catholic priest and scripture teacher in public schools who in the context of a campaign against Catholic teaching on clergy celibacy disclosed to the media that he was married. The decision provides a further illustration of the Court's recognition that, in the case of religious institutions, private conduct may impact upon the ability of an employee to perform their professional activities:

> In the present case the interaction between private life *stricto sensu* and professional life is especially striking as the requirements for this kind of specific employment were not only technical skills, but also the ability to be 'outstanding in true doctrine, the witness of Christian life, and teaching ability', thus establishing a direct link between the person's conduct in private life and his or her professional activities.[58]

In the context of religious schools, it is of particular interest that the Court considered that the concerns of the Church in ensuring alignment between its representative's private lives and its teachings 'were all the more important as the applicant had been teaching adolescents, who were not mature enough to make a distinction between information that was part of the Catholic Church's doctrine and that which corresponded to the applicant's own personal opinion.'[59]

22. *Travaš v Croatia* also raises significant concerns as to the compliance of the Victorian Bill with international human rights principles.[60] That matter concerned a religious teacher at a State School who divorced and remarried, in contravention of Catholic Canon Law. However, unlike *Fernández Martínez v Spain* where the applicant had voluntarily disclosed the inconsistency in his private life to the media, in *Travaš v Croatia* the applicant teacher's private conduct was not publicly disclosed. The Court noted that the question of the public awareness of the actions of the teacher was not relevant:

> the question is rather whether a particular religious doctrine could be taught by a person whose conduct and way of life were seen by the Church at issue as being at odds with the religion in question, especially where the religion is supposed to govern the private life and personal beliefs of its followers.[61]

In answering that question in the negative the Court concluded 'it does not appear that the decision to withdraw his canonical mandate, justified by the interest of the Church to preserve

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[55] Ibid [51].

[56] Ibid.

[57] *Fernández Martínez v Spain* (2014) European Court of Human Rights, Grand Chamber, no 56030/07.

[58] Ibid [110] (citations omitted).

[59] Ibid [141].

[60] See further *Travaš v Croatia* European Court of Human Rights, Application no 75581/13, 04 October 2016, [97]-[98] ('*Travaš v Croatia*'). and *Fernández Martínez v Spain* (n 57) [137], in the context of teachers of religious doctrine.

[61] *Travaš v Croatia* (n 60) [97].

the credibility of its teachings, was in itself excessive'.[62] In reaching that conclusion the Court reasoned

> in order for a religion to remain credible, the requirement of a heightened duty of loyalty may relate also to questions of the way of life of religious teachers. Lifestyle may be a particularly important issue when the nature of an applicant's professional activity results from an ethos founded in the religious doctrine aimed at governing the private life and personal beliefs of its followers, as was the case with the applicant's position of teacher of Catholic religious education and the precepts of the Catholic religion. In observing the requirement of heightened duty of loyalty aimed at preserving the Church's credibility, it would therefore be a delicate task to make a clear distinction between the applicant's personal conduct and the requirements related to his professional activity.[63]

23. Finally, attention is drawn to *Siebenhaar v Germany*,[64] a decision concerning the German Protestant church's dismissal of a member of a religious community called the 'Universal Church/Brotherhood of Humanity' from employment as 'a childcare assistant in a day nursery … and later in the management of a kindergarten'.[65] In that matter the Court upheld the determination of the domestic court that

> the applicant did not have the right to belong to or participate in an organization whose objectives were in conflict with the mission of the Protestant Church, which could require its employees to abstain from activities that put in doubt their loyalty to it and to adopt both professional *and private conduct* that conforms to these requirements.[66]

The crucial point arising from the preceding cases is that the ECtHR has emphasized that the credibility of religious institutions whose moral code governs private conduct, requires that such institutions be entitled to discipline employees whose conduct does not conform to that moral code, regardless of whether that conduct is inherently religious, or publicly known.

24. If private non-religious activity is not determinative under the newly amended Victorian regime, even the prominent position occupied by a Church public relations director would not justify disciplinary action, if the conduct complained of was in the employee's personal life (as in *Obst v Germany*) and where the protagonist continued to affirm the beliefs of the religious institution notwithstanding their conduct. Practically speaking, the Anglican Church could not act where a bishop was discovered to have a porn addition, the Catholic church could not act where a Catholic bishop was discovered to be covertly married, and an Islamic institution could not act where an imam was discovered to be in an extra-marital affair (whether heterosexual or otherwise) where each of those protagonists were repentant. In this respect, the Victorian Bill is not compatible with international human rights law.

2 *Inherent Requirements Test*

25. The second contentious issue contained in the Victorian legislation is the limitation of the exemption for religious institutions and schools to an 'inherent requirements' test for certain roles. In her second reading speech Natalie Hutchins explicated the distinctions that this aspect of the Victorian Bill seeks to draw:

> In most religious schools it would be an inherent requirement of a religious education position that employees must closely conform to the doctrines, beliefs or principles of

[62] Ibid [107].
[63] Ibid [98].
[64] *Siebenhaar v Germany* European Court of Human Rights Application no 18136/02.
[65] Ibid.
[66] Ibid [44] [tr author] (emphasis added).

> the school's religion. On the other hand, a support position, such as a gardener or maintenance worker, is unlikely to have religious conformity as an inherent requirement of their role.[67]

The test is intended to protect persons from being 'discriminated against for reasons that have nothing to do with their work duties'.[68] Similar statements are made by the LRCWA.[69] The QHRC has recommended the adoption of a 'genuine occupational requirements test', with the complementing clarification that '[t]he Act should include examples to demonstrate that the exception does not permit discrimination against employees who are not involved in the teaching, observance or practice of a religion, such as a science teacher in a religious educational institution.'[70] For the purposes of Queensland law 'there is no relevant distinction between the two tests' of 'genuine occupational requirements' and 'inherent requirements'.[71]

26. That the provision introduces significant uncertainty both for schools and employees is accentuated by the following selection of examples provided within the SoC:

- 'a teacher changes their religious beliefs and becomes accepting of marriage equality. They now hold an inconsistent religious belief. The teacher continues to promote the religious views of the school on [traditional] marriage to students but also tells students that there are those in the broader community that hold different views. Depending on the circumstances, it *may not* be reasonable and proportionate to dismiss a teacher who is willing to convey the religious views of the school, even if they differ from their own.'[72]
- 'a religious school may state that it is an inherent requirement of all teaching positions that conformity with the religion of the school is required because all teachers carry pastoral care duties. However, it may be that for various reasons, the school hires several teachers who are unable to meet this inherent requirement. This would suggest that religious conformity may not be an actual inherent requirement of the teaching roles.'[73]

27. The latter example illustrates a key effect of the 'inherent requirements' test. If the temporary occupation of a teaching position by a person who is not able to perform religious devotions can provide evidence that such an activity is not an 'inherent requirement', there is nothing limiting that evidence from applying to all equivalent teaching positions.[74] Thus, any equivalent teacher that no longer shares the religious beliefs of the school could assert the temporary employment of an equivalent teacher as evidence for their subsequent unlawful dismissal. Over time such a test has the distinct potential to 'white-ant' an institution through the amassing of evidence arising from the temporary placement of non-adherents in response to transitory staff shortages. With the effluxion of time the maintenance of the school's ethos would be relegated to roles such as the chaplain and the leadership of the school (presuming such persons also retain the religious beliefs of the school). This risk is particularly pronounced for those schools experiencing difficulty in recruiting suitably qualified persons who hold the relevant faith.[75] Such an outcome would risk frustrating the operations of those schools who seek, as recorded by the Expert Panel, to inculcate an institutional ethos by applying a preference for staff that

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[67] *Victoria, Parliamentary Debates, Legislative Assembly* 28 October 2021, Natalie Hutchins, Minister, 4374.
[68] Ibid.
[69] *LRCWA Report* (n 3) 182.
[70] *QHRC Report* (n 3) 583.
[71] *Toganivalu v Brown and Department of Corrective Services* [2006] QADT 13 (18 April 2006) (Mullins M). For the position outside of Queensland see Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) [11.2.32] – [11.2.33].
[72] Ibid 4375 (emphasis added).
[73] Ibid 4375.
[74] Such an approach was adopted by the Queensland Anti-Discrimination Tribunal in *Walsh v St Vincent de Paul Society Queensland (No.2)* [2008] QADT 32 ('*Walsh*').
[75] Greg Walsh, 'The Right to Equality and Employment Decisions of Religious Schools' (2014) 16 *University of Notre Dame Australia Law Review* 107, 123-4.

share their faith across the employee cohort wherever possible, operating on the notion that faith is 'caught not taught'.[76]

28. Further, through their vague and imprecise application, inherent requirements tests risk running afoul of the requirement that limitation on religious exercise be 'prescribed by law', which incorporates the obligation that they be sufficiently clear to enable application. Given these effects, serious consideration is required as to whether the 'inherent requirements' test sufficiently acquits the obligations Australia has accepted under international human rights law. Again, the Statement of Compatibility is notably scant on detail. As noted above, the Special Rapporteur has commented that under the ICCPR 'much depends on the details of each specific case'.[77] Similarly, although not ratified by Australia, the ECtHR jurisprudence recognizes that, amongst a range of factors, 'the nature of the post occupied by those persons is an important element to be taken into account when assessing the proportionality of a restrictive measure taken by the State or the religious organisation concerned'.[78] However, as the following analysis demonstrates, both of these recognitions do not equate to an assertion that the adoption of an 'inherent requirements' test will assure compliance with the applicable human rights law. Indeed, if the jurisprudence of the ECtHR is to provide any guide, the adoption of such a test will lead to non-compliance. This is because, as Aroney and Taylor have summarised:

> In its determinations in a number of cases the ECtHR has found there to have been no violation of the rights of the employee, without applying narrow occupational requirements, even when the ethos requirements of the employer organisation impinge on the employee's fundamental human rights.[79]

In contrast, in their review of decisions of the ECtHR, Hilkemeijer and Maguire claim that:

> Since the right to manifest religion expressly protects the right to teach religion, the ECtHR has held that religious organisations may expect a high level of loyalty from persons employed to teach religion. However, employees of religious organisations such as administrators, teachers of non-religious subjects, gardeners and bus drivers, are less likely to owe a heightened duty of loyalty that extends to living their private lives in accordance with religious precepts.[80]

However, as the following analysis shows, the authorities do not accord with the simplistic distinction between teaching roles that demonstrate an inherent requirement and those more functional non-teaching roles that do not.

29. *Siebenhaar v Germany*[81] directly refutes the assertion that a determinative 'inherent requirements' test that only looks to the functions performed by the particular role in question, the 'work duties' to use the terminology employed by the Victorian Attorney-General,[82] will satisfy the requirements of international human rights law. The matter concerned the dismissal of person employed as 'a childcare assistant in a day nursery … and later in the management

[76] Expert Panel on Religious Freedom (n 7) 56 [1.210]
[77] Ibid [41].
[78] *Fernández Martínez v Spain* (n 57) [130] (see also *Obst v Germany* (n 54) [48]-[51], and *Schüth v Germany* European Court of Human Rights, Grand Chamber, Application no 1620/03 ('*Schüth v Germany*') [69].
[79] Nicholas Aroney and Paul Taylor, 'The Politics of Freedom of Religion in Australia' (2020) 47(1) *University of Western Australia Law Review* 42, 58.
[80] Anja Hilkemeijer and Amy Maguire, 'Religious Schools and Discrimination Against Staff on the Basis of Sexual Orientation: Lessons from European Human Rights Jurisprudence' (2019) 93(9) *Australian Law Journal* 752, 758.
[81] *Siebenhaar v Germany* (n 64).
[82] *Victoria, Parliamentary Debates, Legislative Assembly* 28 October 2021, Natalie Hutchins, Minister, 4374.

of a kindergarten'[83] run by the German Protestant church. Critically, the Court recorded the that terms of the contract of employment provided:

> Service in the church and in the diakonia is determined by the mission to proclaim the gospel in word and deed. The employees and the employer put their professional skills at the service of this objective and *form a community of service regardless of their position or of their professional functions* ...[84]

The dismissal related to behaviour outside of work hours, namely Ms Siebenhaar's membership of, and proselytisation for, the Universal Church/Brotherhood of Humanity. The Court restated its jurisprudence that 'except in very exceptional cases, the right to freedom of religion as understood by [lit. "such as intended by"] the Convention excludes any assessment on the part of the State of the legitimacy of religious beliefs or of the methods of expressing them'.[85] From that jurisprudence flowed the Court's affirmation of the Church's own conception of the conduct or beliefs of its employees that would detrimentally impact on its ability to 'form a community of service *regardless of their position or professional functions*'.[86] That jurisprudence is consistent with the frequently adopted approach that courts should apprehend the genuineness, or sincerity, of the religious beliefs in question.[87] The Court saw fit to have regard to the self-conception of the Protestant Church as to the impact Ms Siebenhaar's private conduct and belief would have on the ethos of the relevant child-care centres. In affirming that the actions taken on the basis of the employment contract (and its clarification that the Church's assessment could be made 'regardless of their position or professional functions'),[88] the Court expressly disavowed an inherent requirements test as a determinative feature of the law concerning religious institutional autonomy. It is also of particular note that the Court specifically referenced both the administrative and managerial duties engaged in by Ms Siebenhaar when acknowledging the Church's concern for the impact on the credibility of the Protestant Church 'in the eyes of the public and the parents of the children'. Regardless of her ability to perform these functions, the credibility issue also arose because of the perceived 'risk of influence' Ms Siebenhaar might pose, notwithstanding the young age of the children. The Court's regard for a religious institution's own assessment of what will impact upon the maintenance of its ethos, and its engagement with the wider public, is in opposition to an 'inherent requirements' style test that would have regard to the particular 'work duties'[89] assigned to a role without regard to the wider institutional context in which the employee is placed, as is proposed by the SoC. Instead, the Court acknowledged that 'the particular nature of the professional requirements imposed on the applicants resulted from the fact that it was established by an employer whose ethos [lit. 'ethic'] is founded on religion or beliefs'.[90]

30. In *Rommelfanger v Germany*,[91] the ECtHR found no violation in respect of a Catholic hospital's discipline of staff that had publicly criticized the Catholic Church's position on abortion. The judgement provides a further example of the Court giving credence to the self-conception of a religious institution concerning the fitness of a person to fulfill the responsibilities of their

[83] *Siebenhaar v Germany* (n 64).
[84] Ibid [9] [tr author] (emphasis added).
[85] See also *Hasan and Chaush v Bulgaria* (n 29) [62], [78].
[86] *Siebenhaar v Germany* (n 64) [9] [tr author] (emphasis added).
[87] See Mark Fowler, 'Judicial Apprehension of Religious Belief under the Commonwealth Religious Discrimination Bill' in Michael Quinlan and A Keith Thompson (ed), *Inclusion, Exclusion and Religious Freedom in Contemporary Australia* (Shepherd Street Press, 2021); Neil Foster, 'Respecting the Dignity of Religious Organisations' (2020) 47(1) *University of Western Australia Law Review* 175.
[88] *Siebenhaar v Germany* (n 64) [9] [tr author].
[89] *Victoria, Parliamentary Debates, Legislative Assembly* 28 October 2021, Natalie Hutchins, Minister, 4374.
[90] *Siebenhaar v Germany* (n 64) [46] [tr author].
[91] *Rommelfanger v Germany* (1989) ECHR 27.

employment, and the impact of their extra-work activities on the religious ethos of an institution. Therein the ECtHR held:

> If, as in the present case, the employer is an organisation based on certain convictions and value judgments *which it considers as essential* for the performance of its functions in society, it is in fact in line with the requirements of the Convention to give appropriate scope also to the freedom of expression of the employer. An employer of this kind would not be able to effectively exercise this freedom without imposing certain duties of loyalty on its employees. As regards employers such as the Catholic foundation which employed the applicant in its hospital, the law in any event ensures that there is a reasonable relationship between the measures affecting freedom of expression and the nature of the employment *as well as the importance of the issue* for the employer.[92]

The applicant in question was a physician whose employment contract provided that his conduct would 'be governed by … the duties which flow from charity (Caritas) as an essential expression of Christian life. The employees are required to perform their services in loyalty and to show a behaviour *inside and outside their professional functions* which, as a whole, corresponds to the responsibility which they have accepted. It is presupposed that in performing their professional duties they will be guided by Christian principles.'[93] Again, the decision defies the proposition that an inherent requirement test that looks only to the 'work duties'[94] of the role is determinative. Finally, as noted above, in the decision of *Fernández Martínez v Spain,*[95] concerning a Catholic priest and scripture teacher, the Court recognized that 'the requirements for this kind of specific employment were *not only technical skills*, but also the ability to be "outstanding in true doctrine, the witness of Christian life, and teaching ability"'.[96]

B *Summary*

31. In applying the broad philosophical principles outlined at part II, rather than an 'inherent requirements' test, the ECtHR has focused on a range of factors, including whether a 'heightened degree of loyalty' exists;[97] the impact of the impugned conduct or belief on the ethos of the religious institution;[98] 'the proximity between the applicant's activity and the Church's proclamatory mission';[99] whether procedural fairness according to the rules of the religious institution has been afforded;[100] whether the relevant documents sufficiently clarified the expectations of the employer;[101] whether the applicant had knowingly placed themselves in a position of conflict;[102] whether the domestic courts had conducted 'a detailed assessment of all the competing interests and provided sufficient reasoning when dismissing the applicant's complaints';[103] and the availability of alternative employment,[104] all to be exercised with the understanding that the Court is not to engage in an exercise of assessing the legitimacy of the asserted beliefs of the institution, or the means by which they are expressed.[105] In particular, as

[92] Ibid (emphasis added).
[93] Ibid (emphasis added).
[94] *Victoria, Parliamentary Debates, Legislative Assembly* 28 October 2021, Natalie Hutchins, Minister, 4374.
[95] *Fernández Martínez v Spain* (n 57).
[96] Ibid [110] (citations omitted) (emphasis added).
[97] *Travaš v Croatia* (n 60); *Obst v Germany* (n 54) [51]; *Schüth v Germany* (n 78).
[98] *Siebenhaar v Germany* (n 64).
[99] *Schüth v Germany* (n78) [69]; *Fernández Martínez v Spain* (n 57) [139].
[100] *Schüth v Germany* (n 78).
[101] *Travaš v Croatia* (n 60) [93]; *Siebenhaar v Germany* (n 64).
[102] *Fernández Martínez v Spain* (n 57) [144]-[145]; *Siebenhaar v Germany* (n 64).
[103] *Travaš v Croatia* (n 60) [69] summarising *Schüth v Germany* (n 78).
[104] *Schüth v Germany* (n 78); *Fernández Martínez v Spain* (n 57).
[105] *Hasan and Chaush v Bulgaria* (n 29).

noted above, the ECtHR's jurisprudence recognizes that personal conduct engaged in within the 'private life' of an employee can impact upon the ethos of a religious institution.[106]

32. The foregoing authorities establish that the 'real and substantial' risk to religious autonomy test[107] does not preclude a religious community from considering that the private life and beliefs of employees may give rise to a legitimate concern that its religious ethos would be undermined. Further, as *Travaš v Croatia* demonstrates, while the public nature of acts undertaken in the private life of an employee may be relevant, the importance of fidelity to teachings means that for some religious institutions, inconsistent acts need not be public, having regard to the conception of the religious institution employer. As the Court stated in *Obst v Germany* 'the absence of media coverage … cannot be decisive … the special nature of the professional requirements imposed on the applicant were due to the fact that they were established by an employer whose ethos is based on religion or belief'.[108] Further, as *Siebenhaar v Germany* demonstrates, even where an employee is engaged in managerial tasks and the education provided is directed to small children the Court is willing to recognize that 'the particular nature of the professional requirements imposed on the applicants resulted from the fact that it was established by an employer whose ethos is founded on religion or beliefs' and that the detrimental impact of the employee's beliefs on the credibility of the institution 'in the eyes of the public and the parents' may be a sufficient factor.[109] Seen as a whole, the Court has placed great weight on the effect of the conduct or private belief on the credibility of the religious institution, having regard to the self-conception of the institution, against the backdrop of the principle that the Court is not competent to undertake 'any assessment on the part of the State of the legitimacy of religious beliefs or of the means of expressing them'.[110] As Aroney and Taylor summarise, an 'inherent requirements test exists to meet the generic needs of all organisations, whatever their nature or purpose. It is not a substitute for the specific protections accorded to religious organisations under the ECHR as interpreted by the ECtHR.'[111] As the Special Rapporteur acknowledges in interpreting the jurisprudence of the ICCPR, the means by which religious bodies 'institutionalize religious community life can have a significance that goes far beyond mere organizational or managerial aspects.'[112]

CONCLUSION

33. This article has set out the primary international human rights law that pertains to religious schools. The right to found and maintain private schools is protected by the international human rights law that Australia has ratified, primarily found in Article 18 of the ICCPR. It has also considered the developed application of that right, as enunciated within the jurisprudence of bodies exercising jurisdiction under the European Convention on Human Rights. In the light of the foundational principles of democratic political philosophy articulated particularly by the latter, it has argued that close scrutiny of any legislative proposals that may impact upon the ability of private education associations to maintain their distinct religious ethos is required. It has considered how restrictions on the ability of a private faith-based school to ensure that those persons appointed as its representatives also share its faith can impact upon its ability to maintain a unique religious identity, and thus breach the right to establish private religious schools. It has demonstrated the domestic application of these principles by consideration of

[106] *Siebenhaar v Germany* (n 64).
[107] *Sindicatul "Păstorul Cel Bun" v Romania* (n 30); *Fernández Martínez v Spain* (n 57) [131].
[108] *Obst v Germany* (n 54) [51] [tr author].
[109] *Siebenhaar v Germany* (n 64) [46] [tr author].
[110] Ibid. See also *Hasan and Chaush v Bulgaria* (n 29) [62], [78].
[111] Aroney and Taylor (n 79).
[112] Heiner Bielefeldt, *Report to the General Assembly of the Special Rapporteur on freedom of religion or belief*, UN Doc A/68/290 (7 August 2013) [57].

the Victorian *Equal Opportunity Amendment Religious Exceptions Bill 2021* which has framed the recent recommendations for reform provided by the Law Reform Commission of Western Australia and the Queensland Human Rights Commission. That Bill has served as an important illustration of how domestic legislation may fail to adequately acquit the obligations of international human rights law.