Submission to the Australian Law Reform Commission regarding Religious Educational Institutions and Anti-Discrimination Laws

Research Expertise in this area

My name is Dr Alex Deagon. I am a Senior Lecturer in the School of Law at the Queensland University of Technology. I am a leading authority on religious freedom in Australia. In regard to this issue I have published peer-reviewed journal articles, presented at national and international conferences, and have written opinion pieces and provided expert commentary on religious freedom issues to the media. I am also the founding co-editor of the *Australian Journal of Law and Religion*. Some relevant publications are listed below. My scholarly monograph on religious freedom and discrimination in Australia, the US and the UK, will be published in February 2023 with Hart Publishing, Oxford, a legal publisher of international repute. I draw on this monograph, my below publications, and my previous submissions for this submission. For a full catalogue of my experience and publications in this area, please see https://staff.qut.edu.au/staff/alex.deagon.

- A Principled Framework for the Autonomy of Religious Communities: Reconciling Freedom and Discrimination, Hart Publishing, Oxford, UK; 2023 (forthcoming).
- Reconciling Freedom and Equality for Peaceful Coexistence: On the Need to Reframe the Exemptions in the *Sex Discrimination Act* (2023) 1(2) *Australian Journal of Law and Religion* (forthcoming).
- Creating Peaceful Coexistence through Virtue: A Theological Approach to Institutional Religious Freedom, Equality and the First Amendment (2023) 61 *Journal of Catholic Legal Studies* (forthcoming).
- The Influence of Secularism on Free Exercise Jurisprudence: Contrasting US and Australian Interpretations (2022) 13 *International Journal of Religious Freedom* 123-137.
- The Religious Questions Doctrine: Addressing (Secular) Judicial Incompetence (2021) 47(1) *Monash University Law Review* 60-87.
- Religion and the Constitution: A Response to Luke Beck's Safeguard Against Religious Intolerance Theory of Section 116 (2021) 44(4) *UNSW Law Journal* 1558-1583. (with Benjamin Saunders)
- State (non-)Neutrality and Conceptions of Religious Freedom in Jasper Doomen and Mirjam van Schaik (eds) *Religious Ideas in Liberal Democratic States* (Rowman & Littlefield, 2021) 65-85.
- Is Religious Liberty Loving in Principle? in Michael Quinlan (ed) *Inclusion, Exclusion and Religious Freedom in Contemporary Australia* (Connor Court Publishing, 2021) 17-47.
- Principles, Pragmatism and Power: Another Look at the Historical Context of Section 116 (2020) 43(3) *Melbourne University Law Review* 1033-1068. (with Benjamin Saunders)

- Equal Voice Liberalism and Free Public Religion: Some Legal Implications in Michael Quinlan, Iain Benson and Keith Thompson (eds) *Religious Freedom in Australia: A new* Terra Nullius*?* (Connor Court Publishing, 2019) 292-332.
- A Christian Framework for Religious Diversity in Political Discourse in Michael Quinlan, Iain Benson and Keith Thompson (eds) *Religious Freedom in Australia: A new* Terra Nullius*?* (Connor Court Publishing, 2019) 130-162.
- Religious Schools, Religious Vendors and Refusing Services After Ruddock: Diversity or Discrimination? (2019) 93(9) *Australian Law Journal* 766-777.
- Maintaining Religious Freedom for Religious Schools: Options for Legal Protection after the Ruddock Review (2019) 247(1) *St Mark's Review: A Journal of Christian Thought and Opinion* 40-61.
- Liberal Secularism and Religious Freedom in the Public Space: Reforming Political Discourse (2018) 41(3) *Harvard Journal of Law and Public Policy* 901-934.
- Liberal Assumptions in Section 116 Cases and Implications for Religious Freedom (2018) 46(1) *Federal Law Review* 113-137.
- Defining the Interface of Freedom and Discrimination: Exercising Religion, Democracy and Same-Sex Marriage (2017) 20 *International Trade and Business Law Review* 239-286.

I have also contributed significantly to religious freedom law and policy in Australia. My submissions have been cited in multiple Commonwealth Government reviews and inquiries. The Australian Law Reform Commission Freedoms Inquiry (2015) agreed with and adopted my submission that religious speech might be protected by both Section 116 and the implied freedom of political communication (p 134). The Australian Senate Select Committee Inquiry into the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill (2016) extensively quoted me and relied on my written submissions and expert evidence in relation to religious freedom (2.88, 2.90), which helped inform the national debate and government policy on religious freedom protections during the process of legalising same-sex marriage. I was also invited to give expert evidence on the legal foundations for religious freedom in Australia, and contemporary challenges, to the Joint Standing Committee on Foreign Affairs, Defence and Trade (Human Rights Sub-Committee) Inquiry into the status of the human right to freedom of religion or belief (2017).

This Inquiry released an Interim Report in November 2017. The Report extensively cited and relied on my written and oral submissions in relation to interpretation of the free exercise clause in s 116 of the Constitution, and the tension between religious freedom and anti-discrimination law. For example, the Inquiry adopted my positive characterisation of the High Court's definition of religion and accepted that definition (p 16), agreed with my submission that the constitutional protection of free exercise extends to individuals (p 20), and relied on my submission as the leading view on how the free exercise clause has been interpreted narrowly (p 32). The Report further relied on my submission as the leading authority on the tension between religious freedom and anti-discrimination (p 76). The

Report specifically relied on my submissions to clarify the nature and limits of any religious freedom protections, including draft proposals for legislation (pp 79, 86). Based on a written submission I was also invited to appear before the Ruddock Religious Freedom Review Panel (2018) to give expert oral evidence, one of only 21 academics around Australia to appear.

After the release of the Ruddock Review, Senator Penny Wong moved a bill to remove religious exemptions for religious schools in the Sex Discrimination Act, which gave rise to two Senate inquiries. First, I made a written submission to the Legal and Constitutional Affairs References Committee Inquiry on Religious Exemptions for Religious Educational Institutions (2018). The Committee released their report on 26th November 2018, which consisted of a majority report (ALP/Greens) and a dissenting report (Coalition). I was cited by the majority report in relation to potential constitutional issues with any attempt to remove religious exemptions in Commonwealth legislation. In particular, the majority report noted my argument that removing religious exemptions in Commonwealth law would breach s 116 of the Constitution (p 26). I was cited extensively by the dissenting report on similar constitutional issues, as well as to support arguments regarding the need for the religious freedom of religious educational institutions to be maintained and substantively protected.

The dissenting report extensively quoted and relied on my arguments that the harm against religious educators is greater if the exemptions were removed than the harm against those discriminated against if they are retained (p 64), that international law requires legal protection for faith-based schools to positively select staff who uphold the ethos of the school (p 68), that religious freedom requires the protection of minority beliefs from the prevailing orthodoxy of uniform equality (pp 69-70), that removing exemptions actually promotes inequality by failing to take into account due accommodations for religious entities disproportionately targeted by equality legislation (pp 72-73), that removing religious exemptions in Commonwealth law for religious educational institutions would breach s 116 by prohibiting the free exercise of religion (pp 81-82), that withdrawing state support of religious educational institutions would limit pluralism and undermine democracy (p 83), and that religious educational institutions need legal protection to maintain the distinct and unique religious ethos which undergirds their approach to education (p 93). The dissenting report further quoted from two citations in my submission: The dissent in the Canadian Trinity Western University case (2018) which noted that the accommodation of difference serves the public interest (p 84), and a quote from Professor Nicholas Aroney expressing religious practice as broader than just belief and worship; it also includes social, cultural, commercial, educational, medical and charitable activities (p 92). I was also quoted by Government Minister Senator Zed Seselja during the Senate Debate on 3/12/18 on the need to maintain religious freedom for religious schools, which was used to justify proposed Government amendments to the bill (Senate Hansard, p 2).

Second, I made a written submission to the Legal and Constitutional Affairs Legislation Committee on Religious Exemptions for Religious Educational Institutions (2018), and was invited to present expert oral evidence to the Committee in February 2019. The Committee

released their Report on 14th February 2019. I was cited in support of a proposed Government amendment to the bill which would protect the ability of religious schools to teach in accordance with their religious doctrine (3.31), and in support of the fact that the bill was rushed, flawed and a more detailed consideration was needed (3.68). Consistent with my submissions the Committee recommended that the bill not be passed and the issue be referred to the Australian Law Reform Commission for further consideration (3.80-3.84). Consequently, the Senate did not pass the bill and the Government did refer the issue to the ALRC.

I also made submissions to the Attorney-General's Department on the first and second exposure drafts of the *Religious Discrimination Bill*. Four of my recommendations with respect to the first Exposure Draft were adopted in the second Exposure Draft: the extension of religious bodies to charities and hospitals, a more generous and consistent test for determining whether conduct is discriminatory, a clear definition of 'vilify', and the prevention of 'lawful religious activities' being prohibited by local council by-laws.

After a revised version of the *Religious Discrimination Bill 2021* (Cth) was introduced to Parliament in 2021, I made a written submission to Parliamentary Joint Committee on Human Rights. Consistent with my written submission the Committee recommended that the bills be passed (with minor amendments). I was cited 5 times: in support of empowering religious corporations as litigants (3.35), in support of parents having the right to educate in conformity with their convictions (5.45), in support of protection for statements of belief (6.3), and in support of overriding the Tasmanian law against offensive statements because it is too broad (6.23 and 6.25).

I also made a written submission to the Legal and Constitutional Affairs Legislation Committee considering the same bill, and was invited to give oral submissions to that Committee. Consistent with my written and oral submissions the Committee recommended that the bills be passed (with minor amendments). I was cited over 15 times: in support of the bills generally to protect against discrimination and fulfil our international obligations (2.28), that allowing religious schools to preference staff consistent with an ethos is a fundamental human right (2.40), that a unique religious discrimination package is needed because religion is unique as expressive and communal (2.52), in support of the statement of belief provisions because they are appropriately expressed to protect moderately expressed beliefs in a pluralist and democratic society (2.62), in support of overriding the Tasmanian law against offensive statements because it is too broad (2.69), in providing constitutional and international law support for empowering religious corporations as litigants (2.84 and 3.71), and that changes to the SDA should be left to the ALRC (3.77).

Executive Summary of General Detailed Submissions

1. The following submissions are made in my personal capacity and I do not claim to speak for any organisation.

2. Protection for religious belief and activity is necessary to address increasing hostility to religion and to fulfil our international obligations.
3. Section 116 of the Constitution protects the free exercise of religion from infringement by a Commonwealth law. Passing a law to remove the religious exemptions in the *Sex Discrimination Act* is likely to breach the clause, unless legislation providing equivalent rights is passed in their place.
4. The exemptions are problematic for two reasons. They unfairly and unnecessarily target sexual minorities, and they frame religious freedom rights as subservient to equality rights, and they do not provide schools with what they need, which is positive associational rights.
5. Positive associational rights would allow religious schools to preference staff and students with belief and behaviour consistent with the ethos of the school. Such preferencing is a fundamental human right. It fulfills Article 18(4) of the *International Covenant on Civil and Political Rights*, which obliges states (without limitation) to facilitate parents educating their children in accordance with their own convictions. This entails the ability for religious schools to preference staff and students who adhere to the religious beliefs and activities of the school's religious ethos. As held by the European Court of Human Rights considering the issue under the European Convention of Human Rights, such preferencing is a necessary aspect of a pluralist democracy with diverse views.

Specific Response to Consultation Paper

1. Here I provide responses to particular aspects of the Consultation Paper, pointing to the more detailed scholarly arguments below in this submission as appropriate. The Consultation paper formally acknowledges in a number of places the fundamental importance of freedom of religion, that religion is of great importance, and that burdens on religion can cause significant distress. This is welcome. However, this formal acknowledgement is not implemented in the propositions and proposals. The Consultation Paper admits that the propositions and proposals will result in significant burdens on the freedom of religious schools to build an ethos, but claim these are necessary and proportionate. They are not. They almost universally privilege equality above religious freedom, belying the inquiry approach, international law and scholarly argument which states that religious freedom are co-equal rights and religious freedom must not always be subservient to equality (see generally pp 22-33 below). There are alternatives and perspectives which have not been duly considered by the Consultation Paper which more appropriate support both religious freedom and equality. As they stand, these propositions and proposals will significantly curtail the ability of religious schools to build a community of faith. If that happens, some religious schools will be forced to close, reducing choice and educational quality for parents and students, and producing resourcing issues for governments seeking to educate displaced students.

2. Contrary to [29] in the Consultation Paper, section 116 is likely to be relevant here. The cumulative effect of the propositions and proposals is to remove significant protection for religious educational institutions, which would constitute an undue

interference on the free exercise of religion (see generally pp 12-18 below). Furthermore, it is legally incorrect to say that where State laws overlap with Commonwealth laws, 'the educational institution must comply with the [state] law'. Section 109 of the Constitution provides that Commonwealth laws prevail to the extent of the inconsistency. The statement in the Consultation Paper is a significant legal error which should be immediately corrected.

3. Proposition A states that religious schools (apart from theological colleges) should no longer be allowed to discriminate against students on the basis of sexual orientation and gender identity, in effect removing the exemptions in the Sex Discrimination Act. Schools are still allowed to teach their views on sexuality and gender identity in accordance with curriculum and duty of care requirements. Though the carve-out for theological colleges and the schools teaching their views is welcome, there are a number of problems which are borne out in the examples. First, schools can impose uniform requirements as long as adjustments can be made for transgender and gender diverse students. But this is precisely the issue. Many schools have entrenched theological views about the nature of human sexuality and gender and will see supporting a social transition as undermining the ethos of the school as it pertains to human sexuality. It is also incoherent that schools will be allowed to impose requirements on the basis of (their theological view of) sex for the purpose of segregating for prayers, but not for uniforms. It is disturbing that the state is purporting to decide what theological views a religious school can choose to implement. If schools can refuse to admit a transgender male to male prayers because they are biologically female, then there is no good reason why they can't also refuse to permit a transgender male from wearing a male uniform. The broader point is if a school has a theological perspective on human sexuality and gender and can teach that perspective, for the ethos of the school to be consistently built and implemented, the school should also be able to impose requirements on students as a function of that ethos. Similarly, if a school is forced to appoint a LGBTQ school captain who believes and behaves inconsistently with their ethos, that also fundamentally undermines the ethos of the school because the captain represents the school at public and private events and is a role model for other students (see below pp 27-35).

4. The Consultation paper claim these reforms are necessary and proportionate because of the harmful impacts on students and their rights and that alternate educational options may not be realistic. With respect, this is flawed for two reasons. First, the Consultation paper provides little evidence that alternate educational options may not be realistic. No student is forced to attend any particular school, and given most of these reforms affect independent schools, there will almost always be public school options, in conjunction with other independent schools who do not have an ethos which is an issue for the student. Second, the proportionality consideration should also take into account the rights of students, parents and teachers who are part of building the ethos and may have their religious and associational rights infringed by a school

being unable to impose rules on all students. Religious freedom for associations such as religious schools acknowledges 'the group itself as possessing legal identity and rights' as a result of the 'intrinsically collective dimension to religious freedom and the centrally communal component of manifesting religion'.[1] Consequently, 'religious group association may [and must] sometimes trammel individual rights' because that is intrinsic to the definition of association itself; the ability to associate necessarily entails the ability to exclude, and it is up to the association to put standards in place to make these decisions in relation to leadership, membership, employment, and external activities.[2] As a reasonable accommodation, individuals have a right to leave the group if they wish and, if they like, form a new association with others of similar mind. 'As a general principle, and putting aside situations where no meaningful right of exit exists, it is not for the state to force a religious body to change its ethos to suit belligerent or disgruntled individuals'.[3] In short, the balance favours the inconvenience of individual students rather than undermining the ethos of the entire community and infringing their rights (see below pp 27-35).

5. Proposition B states that religious schools (apart from theological colleges) should no longer be allowed to discriminate against staff on the basis of sexual orientation and gender identity, in effect removing the exemptions in the Sex Discrimination Act. Schools are still allowed to require staff to teach their views on sexuality and gender identity in accordance with curriculum and duty of care requirements. Again, though the carve-out for theological colleges and the schools teaching their views is welcome, there are a number of problems which are borne out in the examples. Behaviour reflects beliefs, and if a prospective or current staff member is behaving in a way which undermines the ethos of the school (by for example explicitly or implicitly indicating certain behaviours are theologically acceptable), then the school should be able to discipline or impose requirements on that staff member. Staff agree to be part of a religious association, and all associations impose rules on their members. It is no different for religious schools. Staff are free to choose another school. If staff, parents or students are uncomfortable with the position of the school, they are free to choose a different school, rather than forcing the school to change their ethos and practices to suit them. Such schools operate in accordance with religious beliefs and behaviour which forms the ethos of that organisation. Forcing them to hire persons who do not adhere to the ethos will undermine the religious nature of the organisation, effectively destroying it. Freedom of association therefore necessarily entails freedom to exclude, and this does not impinge on any rights of disadvantaged individuals as long as a genuine right of exit exists (see below pp 19-30).

[1] Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State*, 2nd edn (Oxford University Press, 2013) 375-377.
[2] Ibid 392.
[3] Ibid 392-394.

6. The same points above in 3. and 4. also apply here with respect to staff. There is an additional concern in one example, which states that schools can require LGBTQ staff to teach the position of the school on matters of sexuality, but *as long as they are able to provide objective information on other viewpoints*. This sounds dangerously close to the state imposing a specific curriculum on religious schools, which would be a significant infringement on freedom of religion. The state should not be imposing secular perspectives on religious schools (see below pp 29-30).

7. Proposition C states that schools can preference staff on the basis of religion where the teaching, observance and practice of religion is a genuine requirement of the role (taking into account the nature of the school and the position), and the preference is proportionate to the objective of upholding an ethos. There are some positive aspects of this Proposition. The discussion and examples contemplate that particular schools want to build a community of faith where the staff members actively contribute to that ethos, and for example a staff leading homeroom devotions in the morning can be preferred on the basis of religion. However, there are also a number of problems. First, a school cannot require a staff member to affirm a theological perspective on sexual issues through a contract, which undermines the ability of a school to build an ethos by requiring staff to hold particular theological beliefs. It is a problematic interference of the state in the autonomy of a religious school that a school is only allowed to require certain theological positions 'approved' by the state (see above points 3. and 6.). Again, as above in points 3. and 6., an example states that schools can preference a religious education teacher willing to teach the school's position on sexuality, *as long as* they are permitted to objectively discuss alternate views. The Consultation Paper's assumption that it is reasonable for the state to determine the religious curriculum of a religious school betrays a disturbing lack of awareness of the potential impact on faith-based education these proposals have, and of the requirements of freedom of religion and freedom of association more broadly.

8. The other more generally problematic aspect of this proposition is it in effect proposes a genuine occupational requirement model which involves an objective test of whether the preference is a genuine requirement in the context of the particular role and school. Genuine occupational requirement models significantly limit the religious associational freedom of religious groups because they entail the secular imposition of theological perspectives (I.e. the state through a court determines what a genuine requirement is theologically for the school) which fail to adequately consider the perspective of the school (see below pp 27-35).

9. Proposition D requires all staff to respect the ethos of the school and allows a school to impose reasonable requirements on staff to uphold the ethos. This should go without saying and is an absolute minimum. Unfortunately, the Paper's understanding of respect is quite limited. The examples indicate that a staff member entering a same-

sex marriage or attending a Pride March would not amount to a lack of respect for the ethos, despite the significant repercussions this could have for the perception of the school by students, parents or the broader community. Again, it should be for the school to determine what respect for their ethos entails, not the state. It is strange that the proposition in effect encourages hypocrisy by allowing schools to require staff to teach the ethos in the school while they actively reject that ethos outside the school. This, too, would not seem to be respecting the ethos of a religious school.

10. Proposal 11 purports to make religious schools subject to the inquiry powers of the AHRC. Subjecting schools to such inquiries may impose a significant burden on them, and again is fraught with danger in terms of state bodies imposing theological requirements on religious schools. The additional costs and requirements associated with the change may also result in religious schools increasing their fees, reducing choice for parents.

11. Proposal 14 indicates that a Human Rights Act should be considered as a future reform option. There are problems with recognising religious freedom rights in a Human Rights Act, including that religious freedom is often viewed as subservient to equality (see below pp 35-39).

12. In short, the Consultation Paper and proposals do not adequately protect freedom of religion for religious schools, and fail to acquit the term of reference which ask the ALRC to provide recommendations which allow religious schools to build a community of faith. Positive associational rights along the lines suggested in my detailed general submissions should instead be adopted.

Thank you for your consideration.

Kind regards,

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Detailed General Submissions

Religious Exemptions in the Sex Discrimination Act

Section 5A of the Act, for example, states that discrimination occurs on the ground of sexual orientation where, in equal circumstances, the aggrieved person is treated less favourably than a person of a different sexual orientation by reason of the aggrieved person's sexual orientation. Sections 5 to 7A of the Act provide an equivalent provision for discrimination on other grounds. Sections 14 to 27 of the Act provide for instances of discrimination in specific

areas. For example, s 14(1) of the Act states 'it is unlawful for an employer to discriminate against a person on the ground of the person's… sexual orientation' in 'determining who should be offered employment or in the terms and conditions on which employment is offered', or 'by dismissing the employee'. Sections 14 and 16 of the Act provide that it is not lawful to discriminate against employers or contract workers on the basis of protected attributes (such as sex, sexual orientation, gender identity, pregnancy, and so on) in the context of employment. Section 21 of the Act provides that it is not lawful to discriminate in the provision of education on the basis of these attributes. Sections 37 and 38 of the Act provide exemptions for religious bodies and educational institutions established for religious purposes. Section 37(1) states that none of the sections outlined above affect the ordination, appointment, training or selection of members of any religious order, or any other act or practice of a body established for religious purposes which conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion. This effectively means any religious body or community has the freedom to select, appoint and train a person without constraint from anti-discrimination law, which is a robust protection for the freedom of a religious community.[4]

The more contentious religious exemptions are contained in s 38 of the Act:

> (1) Nothing in paragraph 14(1)(a) or (b) or 14(2)(c) renders it unlawful for a person to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, marital or relationship status or pregnancy in connection with employment as a member of the staff of an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.
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> (2) Nothing in paragraph 16(b) renders it unlawful for a person to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, marital or relationship status or pregnancy in connection with a position as a contract worker that involves the doing of work in an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.
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> (3) Nothing in section 21 renders it unlawful for a person to discriminate against another person on the ground of the other person's sexual orientation, gender identity, marital or relationship status or pregnancy in connection with the provision of education or training by an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-

[4] Sarah Moulds, 'Drawing the Boundaries: The Scope of the Religious Bodies Exemptions in Australian Anti-Discrimination Law and Implications for Reform' (2020) 47(1) *University of Western Australia Law Review* 112, 131.

> mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

Similar to s 37, s 38(1) specifies that nothing in the relevant paragraphs of s 14 renders it unlawful for a person to discriminate on the ground of sexual orientation in connection with employment as a member of an education institution conducted in accordance with the doctrines of a particular religion. Section 14 does not apply if the discrimination occurs in good faith and is necessary to avoid injury to the religious susceptibilities of adherents of that religion. Essentially, this means religious schools can 'discriminate' on the basis of any sex-related attribute (or put positively, select, preference and regulate) for their communities in order to uphold the religious ethos of that school.

Section 116: Freedom of Religion

Section 116 of the Australian Constitution provides:

> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.[5]

Section 116 is subject to a number of limitations.[6] First, s 116 only applies to laws (including laws which authorise executive acts amounting to a breach) rather than general executive or personal action.[7] This means s 116 is not an individual right but a limit on legislative power.[8] Second, s 116 only applies to Commonwealth laws and does not apply to the states.[9] Finally, the High Court of Australia has given s 116 a very conservative and limited interpretation, such that the boundaries of free exercise and issues of discrimination have largely been left to

[5] For a recent detailed examination of the provision, see Luke Beck, *Religious Freedom and the Australian Constitution: Origins and Future* (Routledge, 2018).
[6] See Nicholas Aroney, 'Freedom of Religion as an Associational Right' (2014) 33 *University of Queensland Law Journal* 153, 155-156.
[7] *Minister for Immigration and Ethnic Affairs v Lebanese Moslem Association* (1987) 17 FCR 373.
[8] *Attorney-General (Vic); Ex rel Black v Commonwealth(DOGS Case)* (1981) 146 CLR 559, 605 (Stephen J).
[9] *Grace Bible Church v Reedman* (1984) 36 SASR 376

political and democratic processes. The Court has been generous and inclusive in defining religion, but very narrow in defining the scope of religious freedom.[10]

In regard to the scope of religious freedom, Chief Justice Latham in the *Jehovah's Witnesses* case argues that since the 'free exercise' of religion is protected, this includes but extends beyond religious belief or the mere holding of religious opinion; the protection 'from the operation of any Commonwealth laws' covers 'acts which are done in the exercise of religion' or 'acts done in pursuance of religious belief as part of religion'.[11] However, subsequent cases noted these acts must be religious conduct, or 'conduct in which a person engages in giving effect to his [sic] faith in the supernatural'.[12] Religious conduct protected by s 116 extends to 'faith and worship, to the teaching and propagation of religion, and to the practices and observances of religion'.[13] This is a narrow definition which restricts 'free exercise' to that conduct which is overtly religious and normally considered private in nature, such as prayer and church attendance.

In the first case considering the free exercise clause, the High Court glibly dismissed a claim that Commonwealth legislation infringed free exercise of religion by compelling a person who was a pacifist for religious reasons to engage in military training. According to Griffith

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[10] See in particular *Krygger v Williams* (1912) 15 CLR 366, 369; *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 149-150; *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 135-136. See also Carolyn Evans, 'Religion as Politics not Law: the Religion Clauses in the Australian Constitution' (2008) 36(3) *Religion, State and Society* 283, 284. Mortensen also observes the very narrow interpretation given to the free exercise clause, though he acknowledges that questions over s 116's applicability to the Territories and the fact that it only applies to Commonwealth legislation have also contributed to its restricted operation. See Reid Mortensen, 'The Unfinished Experiment: A Report on Religious Freedom in Australia' (2007) 21 *Emory International Law Review* 167, 170-171. The vast majority of eminent scholars in the field continue to hold this view: see eg Beck, *Religious Freedom* (n 6); Alex Deagon, 'Defining the Interface of Freedom and Discrimination: Exercising Religion, Democracy and Same-Sex Marriage' (2017) 20 *International Trade and Business Law Review* 239; Nicholas Aroney and Paul Taylor, 'The Politics of Freedom of Religion in Australia: Can International Human Rights Standards point the way forward?' (2020) 47(1) *University of Western Australia Law Review* 42, 45; Benjamin B Saunders and Dan Meagher, 'Taking Seriously the Free Exercise of Religion under the Australian Constitution' (2021) 43(3) *Sydney Law Review* 287-314.

[11] *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 124-125. So the free exercise clause likely protects religious speech which is expressed as part of a religious act. For further discussion and questions regarding the current applicability of this 'action-belief dichotomy', see Gabriel Moens, 'Action-Belief Dichotomy and Freedom of Religion' (1989) 12 *Sydney Law Review* 195. The implied freedom of political communication, which is a protection for political communication implied from the constitutional requirement for freely informed representative government, also protects religious communication which has relevance to political matters. See eg *Brown v Tasmania* (2017) 261 CLR 328; *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1. For this reason, it is likely the free exercise clause and the implied freedom of political communication simultaneously operate to protect the expression of religious speech or opinion with respect to political matters. See eg Nicholas Aroney, 'The Constitutional (In)Validity of Religious Vilification Laws: Implications for their Interpretation' (2006) 34 *Federal Law Review* 287, 297-303; Augusto Zimmermann, 'The Unconstitutionality of Religious Vilification Laws in Australia: Why Religious Vilification Laws Are Contrary to the Implied Freedom of Political Communication Affirmed in the Australian Constitution' (2013) *Brigham Young University Law Review* 457, 493-503. However, the High Court has not recognised an independent implied freedom of association, stating that such a freedom would only exist as a corollary of the implied freedom of political communication: *Wainohu v New South Wales* (2011) 243 CLR 181 [212], [72], [186].

[12] *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 136.

[13] Ibid 135-136.

CJ in the 1912 case of *Krygger v Williams*, s 116 protects religious opinion or the private holding of faith, and also protects 'the practice of religion—the doing of acts which are done in the practice of religion' (which was followed by Latham CJ in *Jehovah's Witnesses*, as above).[14] However, 'to require a man to do a thing which has nothing at all to do with religion is not prohibiting him from a free exercise of religion'.[15] On this view, again, s 116 protects private, overtly religious conduct such as prayer or attending church, but not the doing of public/political acts which are ostensibly separate from religious beliefs.[16] Finally, the last time the High Court considered the free exercise clause was the 1997 case of *Kruger v Commonwealth*.[17] In *Kruger*, the plaintiffs argued that a Northern Territory ordinance which authorised the forced removal of Indigenous children from their tribal culture and heritage was invalid as a law prohibiting the free exercise of religion. The majority held that the impugned law did not mention the term 'religion' and was not 'for' the purpose of prohibiting the free exercise of religion in its terms, and so the law was upheld. Only laws could breach s 116, not the administration of laws.[18] Chief Justice Brennan, Gummow and McHugh JJ (in separate majority judgments) reinforced the traditional narrow approach, stating that to be invalid under s 116 the impugned law 'must have the purpose of achieving an object which s 116 forbids', and upholding the law on the basis that 'no conduct of a religious nature was proscribed or sought to be regulated in any way'.[19]

Furthermore, not every interference with religion is a breach of s 116, but only those which 'unduly infringe' upon religious freedom.[20] At a minimum, the High Court has stated that the narrowest limitations on free exercise of religion are appropriate – that required for the 'maintenance of civil government' or 'the continued existence of the community'.[21] Thus the current High Court approach is narrow and focused on the explicit purpose of the legislation: if the impugned law does not restrict free exercise of religion as part of its purpose, it will be valid.[22] In *Church of the New Faith*, Mason ACJ and Brennan J even go so far as to say that 'general laws to preserve and protect society are not defeated by a plea of religious obligation to breach them'.[23]

[14] (1912) 15 CLR 366, 369.
[15] Ibid.
[16] See Alex Deagon, 'Liberal Assumptions in Section 116 Cases and Implications for Religious Freedom' (2018) 46(1) *Federal Law Review* 113-136.
[17] (1997) 190 CLR 1.
[18] Evans, 'Religion as Politics not Law' (n 10) 296.
[19] *Kruger* (1997) 190 CLR 1, 40, 161.
[20] *Jehovah's Witnesses* (1943) 67 CLR 116.
[21] Ibid 126, 131, 155.
[22] The result is foreseen by Moens: see Gabriel Moens, 'Church and state relations in Australia and the United States: The purpose and effect approaches and the neutrality principle' (1996) 4 *Brigham Young University Law Review*, 788-789, 809-810. For a more recent critique see Luke Beck, 'The Case Against Improper Purpose as the Touchstone for Invalidity under Section 116 of the Australian Constitution' (2016) 44(3) *Federal Law Review* 505.
[23] *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 136.

Despite this narrow interpretation of religious freedom, the definition of religion has been interpreted generously.[24] According to the High Court, the definition of religion in the Australian constitutional context extends beyond monotheistic or even theistic religions, and includes belief in a supernatural thing or principle, where supernatural means that which is beyond perception by the five natural senses. The category of religion is not closed.[25] In the seminal *Jehovah's Witnesses* case, Latham CJ outlined the broad and dynamic nature of what constitutes religion, and the consequent reluctance of the High Court to impose a precise definition.[26] He stated that religion may include a set of beliefs, code of conduct, or some kind of ritual observance. It is not for the High Court to 'disqualify certain beliefs as incapable of being religious in character'.[27] However, in the more recent *Church of the New Faith* ('Scientology') case, Mason ACJ and Brennan J clarified this general position and articulated more specific indicia to be referenced in the determination of whether particular conduct and/or beliefs is classified as religion:

> We would therefore hold that, for the purposes of the law, the criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief.[28]

Justices Wilson and Deane stated similar principles, though they provided more detailed indicia or guidelines:

> One of the more important indicia of "a religion" is that the particular collection of ideas and/or practices involves belief in the supernatural, that is to say, belief that reality extends beyond that which is capable of perception by the senses. If that be absent, it is unlikely that one has "a religion". Another is that the ideas relate to man's nature and place in the universe and his relation to things supernatural. A third is that the ideas are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices having supernatural significance. A fourth is that, however loosely knit and varying in beliefs and practices adherents may be, they constitute an identifiable group or identifiable groups. A fifth, and perhaps more controversial, indicium is that the adherents themselves see the collection of ideas and/or practices as constituting a religion.[29]

On this basis the High Court concluded 'Scientology' is a religion for constitutional purposes. Hence, the definition of religion in Australia is broad and dynamic; a definition has not been explicitly prescribed by the High Court and will be largely dependent on the flexible application of the indicia in each unique circumstance. Most significantly for the purposes of

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[24] For a detailed overview see Alex Deagon, 'Towards a Constitutional Definition of Religion: Challenges and Prospects' in Paul Babie, Neville Rochow and Brett Scharffs (eds), *Freedom of Religion or Belief: Creating the Constitutional Space for Fundamental Freedoms* (Edward Elgar, 2020).
[25] Luke Beck, 'Clear and Emphatic: The Separation of Church and State Under the Australian Constitution' (2008) 27(2) *University of Tasmania Law Review* 161, 164-167.
[26] *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116.
[27] Ibid 123-124.
[28] *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 137.
[29] Ibid 173-174.

this submission, all four justices were 'explicit about the group character of religion' in the sense that protection for freedom of religion in Australia extends to the autonomy of religious groups.[30]

Aroney argues that s 116 protects religious freedom as an associational right as a function of its text, clear acknowledgement in the case law, and the nature of Australian religious practice as communal in the late 19th century. This means s 116 protects religious organisations and communities.[31] The text of s 116 operates as a limit on Commonwealth power, which means persons (whether natural or artificial – including corporations and associations) are protected from laws which breach s 116. For example, if the free exercise of any religion includes 'conducting religious services, disseminating religious teachings, determining religious doctrines, establishing standards of religious conduct, identifying conditions of membership, appointing officers, ordaining religious leaders and engaging employees,', these practices are all protected regardless of whether they are engaged in by individuals or associations.[32]

In *Jehovah's Witnesses*, the impugned regulations prohibited the advocacy of doctrines which were prejudicial to the prosecution of the war in which the Commonwealth was engaged. It provided for the dissolution of associations propagating such doctrines and vested their property in the Commonwealth. The Jehovah's Witnesses challenged the constitutional validity of these regulations. The Court found that the regulations exceeded the purported head of power and were therefore invalid, but, following the narrow approach in *Krygger*, they held that the regulations did not breach s 116 because freedom of religion is not absolute.[33] This means they did not directly decide whether religious groups are protected by s 116, though a majority held that the Witnesses were competent to bring the action as an incorporated organisation – which implies the majority assumed the protection granted to s 116 extends to groups.[34]

Finally, in *Kruger* as discussed above, despite the existence of legislation which in effect prevented Indigenous Australians from practicing their culture and values in a community which formed their religion, there was no breach of s 116. Kerruish notes that the *Kruger* case concerns 'forcible removal of children from their families and culture on such a scale as to have the tendency to destroy the culture and cause serious harm to its bearers'.[35] The plaintiffs, five of whom were among the children taken and the sixth whose mother was taken, also framed this in terms of a law prohibiting the free exercise of religion, particularly given the importance of land, culture and community to the religious practice of Indigenous

[30] Aroney, 'Freedom of Religion' (n 6) 163.
[31] Ibid 154-155. See 169-171, 176-178 for the history.
[32] Ibid 156-157.
[33] *Jehovah's Witnesses* (1943) 67 CLR 116, 149-150.
[34] Aroney, 'Freedom of Religion' (n 6) 159-161, 166. This is further reflected in *Minister for Immigration & Ethnic Affairs v Lebanese Moslem Association* (1987) 17 FCR 373, where it was 'taken for granted' that the LMA could bring the action as a group to protect its right to select its religious leaders.
[35] Valerie Kerruish, 'Responding to *Kruger*: The Constitutionality of Genocide' (1998) 11(1) *Australian Feminist Law Journal* 65, 67–8.

Australians. However, only Gaudron J was prepared to assume that the empowering legislation 'prevented certain people from freely exercising their aboriginal religious practices in association with other members of their community'.[36] The majority rejected this on the basis that the legislation did not explicitly or purposefully target the free exercise of religion, even if they acknowledged (as Gummow J did) that a potential effect of the legislation was to deny 'instruction in the religious beliefs of their community'.[37] However, these statements still clearly support the view that the religious practices protected by s 116 may be 'pervasively communal'.[38]

The Religious Exemptions and Free Exercise

It is therefore worth noting that any attempt to remove the exemptions for religious educational institutions in the Commonwealth *Sex Discrimination Act*, without equivalent replacements, may breach the free exercise clause of s 116 of the Constitution and consequently be invalid. As discussed above, free exercise includes religious conduct such as 'faith and worship', 'the teaching and propagation of religion', and 'the practices and observances of religion'.[39] Since staff and students of religious educational institutions engage in or receive, at the very least, the teaching and propagation of religion, the ability of these institutions to select staff consistent with their religious convictions and regulate their teaching of students comes within the ambit of free exercise.

Furthermore, as discussed above, not every interference with religion is a breach of s 116, but only those which 'unduly infringe' upon religious freedom.[40] Free exercise should only be limited where it is required for the maintenance of civil government or the continued existence of the community.[41] More precisely, freedom of religion should extend to protect all external actions which are not dangerous to society or democracy, even if those views or actions are deemed unpopular according to community values.[42] As Latham CJ observes, 'section 116 is required to protect the religion (or absence of religion) of minorities, and in particular, of unpopular minorities'.[43] Given that exemptions for religious educational institutions appear to be unpopular according to community values (whether this unpopularity is warranted or not – they are certainly not dangerous to society or democracy), this supports the argument that they are protected by s 116.[44]

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[36] Sarah Joseph, '*Kruger v Commonwealth*: Constitutional Rights and Stolen Generations' (1998) 24 *Monash University Law Review* 486, 496.
[37] *Kruger* (1997) 190 CLR 1, 161.
[38] Aroney, 'Freedom of Religion' (n 6) 167.
[39] *Church of the New Faith* 135–36 (Mason ACJ and Brennan J).
[40] See generally *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth* (1943) 67 CLR 116.
[41] Ibid 126, 131 (Latham CJ), 155 (Starke J).
[42] Ibid 149–50 (Rich J).
[43] Ibid 124 (Latham CJ).
[44] See eg Mary Lou Rasmussen, Andrew Singleton, Anna Halafoff, Gary Bouma, 'There's no argument or support for allowing schools to discriminate against LGBTIQ teachers', *The Conversation*, October 16, 2018: https://theconversation.com/theres-no-argument-or-support-for-allowing-schools-to-discriminate-against-lgbtiq-teachers-104765.

Even on the narrow interpretation in *Kruger*, any proposal to remove religious exemptions for religious educational institutions directly targets these institutions and restricts their free exercise in its terms by preventing them from selecting staff consistent with their religious convictions.[45] Section 116 does extend to protect acts done in the practice of religion by religious bodies, and this includes teaching of students, and staff selections, of educational institutions.[46] Section 116 was designed precisely to prevent the direct targeting of religious practice by religious entities through Commonwealth laws, and since the provision of education by a religious institution is a religious practice in accordance with religious convictions, and any removal of exemptions would directly prohibit that practice in accordance with those convictions, it follows that the removal of exemptions would be likely to breach the free exercise clause. Thus, if the exemptions are no longer tenable, some equivalent replacement would be necessary for the repeal to not infringe s 116.

Evaluating the Exemptions: Targeting Sexual Minorities

The desirability of religious exemptions has been questioned.[47] The consensus which once supported religious exemptions no longer exists. Many have called for the repeal of all exemptions as enshrining unjust discrimination.[48] It must be emphasised that the claim from religious bodies is not a right to discriminate, but a right to positively select and preference such that religious communities are treated equally to other communities that may have legitimate reasons to only have members with beliefs and behaviour consistent with the ethos of the organisation (e.g. political parties).[49] Nevertheless, Parkinson notes that the exemptions have come under sustained attack recently as, in the view of opponents, they give religion a licence to unjustly discriminate.[50] Parkinson observes that the religious freedom and anti-discrimination debate has been 'polarised', 'divisive', 'alienating' and 'unhelpful'; it undermines the dignity of Christians and the LGBT community by creating a 'paradigm of conflict' which fails to acknowledge the intrinsic good of both sides and the common ground they have.[51]

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[45] *Kruger* (1997) 190 CLR 1, 40, 161.
[46] See *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth* (1943) 67 CLR 116; Nicholas Aroney, 'Freedom of Religion as an Associational Right' (2014) 33 *University of Queensland Law Journal* 153. It could be objected, following the narrow interpretation in *Krygger*, that teaching is a secular activity rather than a religious activity, and therefore not part of free exercise. However, putting aside this narrow and highly questionable secular/religious dichotomy, even on that view, removing exemptions will curtail the ability of religious schools to exist as genuinely religious, and therefore curtail their ability to engage in religious activities (e.g. home groups and chapel services) which are also part of the teaching curriculum. So free exercise would still be prohibited by the Commonwealth passing a law to remove the exemptions.
[47] See eg Carolyn Evans and Leilani Ujvari, 'Non-Discrimination Laws and Religious Schools in Australia' (2009) 30 *Adelaide Law Review* 31, 56.
[48] Nicholas Aroney and Patrick Parkinson, 'Associational Freedom, Anti-Discrimination Law and the New Multiculturalism' (2019) 44 *Australasian Journal of Legal Philosophy* 1, 4-6.
[49] Harry Hobbs and George Williams, 'Protecting Religious Freedom in a Human Rights Act' (2019) 93(9) *Australian Law Journal* 721, 728. See Patrick Parkinson, 'Christian Concerns about an Australian Charter of Rights' (2010) 15 *Australian Journal of Human Rights* 83.
[50] Patrick Parkinson, 'The Future of Religious Freedom' (2019) 93(9) *Australian Law Journal* 699, 701-702.
[51] Ibid 700.

The locus of this conflict is centered around the religious exemptions in the *Sex Discrimination Act* ('SDA'). The perception is that discrimination because of religion is exclusive and immoral, an affront to the equal dignity of members of the LGBT community. The exemptions, on this view, undermine peaceful coexistence because they treat members of the LGBT community with prejudice which causes dignity harms and financial harms. Termination for being in a same-sex relationship, for example, leads to 'serious harm' for the employee because 'they may experience this not only as a rejection of their sexuality and the worth of their relationship, but also as a rejection by their religious community'.[52] As such, Evans and Ujvari contend that the present exemptions as they stand go too far, acknowledging that religious schools 'play an important role' and are 'deserving of some protection of their distinctive worldview', but stating that such protection is 'consistent with the idea that that they should be subject to more aspects of discrimination law than is currently the case in Australia'.[53] In particular, they criticise permitting discrimination to avoid 'injuring religious susceptibilities' on the basis that the phrase is 'rather vague', 'provides little guidance', and that 'religious freedom does not normally protect religious sensibilities'.[54] This ambiguity and lack of clarity undermines peaceful coexistence by increasing the probability of harm because an employee or student is unable to know the circumstances in which they may be discriminated against.

Hilkemeijer and Maguire also argue that the s 38 exemptions are inconsistent with international human rights law, particularly that of the European Court of Human Rights. First, they also note the law is imprecise because 'injury to religious susceptibilities' is a broad and vague basis upon which the power to discriminate can be legitimately exercised.[55] Second, the scope of religious institutional autonomy to regulate members depends on whether the member is part of the religious community and employed for religious purposes, or whether they are merely an employee engaged in 'secular' activities. The exemptions do not allow for such distinctions, and also do not allow for any balancing of rights to privacy and equality for the employee with the religious autonomy of the organisation.[56] They 'allow a religious school to dismiss a teacher on the ground of their sexual orientation where the sexual orientation of that teacher has no negative impact on the church's ability to teach its religious doctrine'.[57] The fact that it may be difficult for dismissed teachers to find employment must also be taken into account.[58]

Ultimately, the exemptions are offensively and irrelevantly targeted at sexual minorities, undermining peaceful coexistence, when what religious schools really need is a

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[52] Greg Walsh, 'The Right to Equality and the Employment Decisions of Religious Schools' (2014) 16 *University of Notre Dame Australia Law Review* 107, 135.
[53] Evans and Ujvari (n 47) 56.
[54] Ibid 53.
[55] 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, 757.
[56] Ibid 757-760. It should be noted that this criticism relies on the problematic religious/secular distinction, which is addressed below.
[57] Ibid 760.
[58] Ibid 760-761.

> …freedom to conduct their educational functions through a curriculum and in a manner which is consistent with their religious ethos, delivered by and within a community of like-minded others. Their wish is to make suitable appointments based on the alignment of fundamental beliefs and practices… Substitution of legislation to similar effect, in place of the existing schools exemptions, could remove some of the impassioned hostility from current debate, in particular by enabling them to require employees to act in a manner that demonstrates loyalty to their religious ethos, rather than misplaced sexuality-focused exceptions and exemptions.[59]

So the exemptions fail to uphold peaceful coexistence because they offensively and unnecessarily target sexual minorities. However, religious bodies nevertheless require legal ability to select, preference and regulate their members to cultivate their communal ethos as a function of religious freedom.

Evaluating the Exemptions: A Problematic Form

Aroney and Parkinson suggest that the exemptions are also problematic because they do not acknowledge institutional autonomy or the communal rights of people of faith to set up and operate such institutions how they see fit. Instead they frame these rights as 'concessions' to religious 'susceptibilities' as a grudging exception to a general prohibition against any kind of discrimination.[60] Neil Foster has also persuasively contended that framing religious freedom protections as 'exemptions' from anti-discrimination laws might give the impression that powerful religious lobby groups are simply bullying politicians into giving them a special privilege to engage in otherwise unlawful conduct (which is not an unfounded concern).[61] In this sense, even those friendlier to the exemptions in principle question whether they are the best means of promoting peaceful coexistence, for the exemptions not only fail to articulate the proper basis for the freedom of religious communities in the sense of patiently and humbly supporting diverse pursuits of the good, but they also create a perception of religious bodies such as schools engaging in poor behaviour by seeking special privileges to discriminate based simply on prejudice. There seems to be a common reluctance to maintain the exemptions in their current form. Yet there must be an alternative.

Eliminating or narrowing the exemptions without an equivalent replacement would 'reduce greatly the freedom of religious organisations to have staffing policies consistent with their identity and ethos'.[62] Some schools may not have a strong religious identity and may not mind, but others see their religious ethos as critical to the identity and operation of the school.

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[59] Nicholas Aroney and Paul Taylor, 'The Politics of Freedom of Religion in Australia: Can International Human Rights Standards point the way forward?' (2020) 47(1) *University of Western Australia Law Review* 42, 61-62.
[60] Aroney and Parkinson, 'Associational Freedom' (n 48) 23.
[61] Neil Foster, 'Freedom of Religion and Balancing Clauses in Discrimination Legislation' (2016) 5 *Oxford Journal of Law and Religion* 385, 389.
[62] Parkinson, 'Future of Religious Freedom' (n 50) 702.

Freedom of religion contains a corporate dimension which, in such circumstances, needs to be accommodated.[63] Any association or community cannot exist without the ability to define the terms and character of the association and its members, including in matters of ideology (e.g. political parties) and practices (e.g. sexual morality). This is not a blanket freedom for people of faith to discriminate. In the setting of schools, transparency, clarity and consistency are essential to convey expectations of belief and conduct to prospective staff so they can make an informed decision whether they accept the employment with its attendant conditions.[64]

It is true that those who are discriminated against clearly 'suffer significant harm to their dignity, emotional well-being and in some cases their economic security'.[65] However, Walsh notes that the religious community who incidentally engages in discrimination in the process of maintaining a particular ethos consistent with their religious beliefs 'will typically suffer much greater harm' if there are no laws protecting their ability to do this, including 'severe emotional distress from the violation of their faith commitments', potentially the 'impairment of their relationship' with the rest of their faith community, and being the subject of 'protests, boycotts and complaints to anti-discrimination tribunals with the frequent result' that they will be forced to cease either their religious ethos or their activities – both fatal to the existence and nature of the community.[66] Conversely, in terms of comparing the severity of the harm, in the vast majority of cases the party discriminated against can simply choose another option at minimal cost. In terms of the frequency of the harm, given increasing support for vulnerable persons and groups (especially among the young) and potential financial incentives for the religious party to accept their requests, it is increasingly unlikely that discrimination will occur. The failure to realise that harm to the religious party from not protecting their freedom overrides harm to the party from being discriminated against only results from simply refusing to give the religious party's beliefs and interests any significant weight.[67] So providing religious schools with alternative legal infrastructure to operate in accordance with a religious ethos reconciles freedom and equality because it promotes diverse approaches to the good, while also avoiding the discriminatory nature of the current exemptions which undermine peaceful coexistence by explicitly and unnecessarily targeting sexual minorities.

Facilitating the religious freedom of schools to select, preference and regulate their community also actually preserves equality between religious and non-religious communities. An example already mentioned to illustrate this principle is political parties. Political parties, by their nature, discriminate on the basis of political opinion. It would be absurd for the law to compel a particular political party to hire someone who repudiates the ethos of the party in thought or conduct, and the law has long recognised this ability for political parties to

[63] Ibid 702-703.
[64] Aroney and Parkinson, 'Associational Freedom' (n 48) 25.
[65] Greg Walsh, 'Same-Sex Marriage and Religious Liberty' (2016) 35(2) *The University of Tasmania Law Review* 106, 126.
[66] Ibid 127.
[67] Ibid 127-128. See Nicholas Aroney and Benjamin Saunders, 'Freedom of Religion in Australia' in Matthew Groves, Daniel Meagher and Janina Boughey (eds), *The Legal Protection of Rights in Australia* (Hart Publishing, 2019) who also argue that there needs to be greater recognition of the wrongness and harm which results from compelling religious parties to act contrary to their conscience.

'discriminate'.[68] A more direct example is a LGBT Pride organisation (a type of ethos group) could lawfully decide to exclude someone like Fred Phelps as a member, despite general anti-discrimination laws prohibiting discrimination on the basis of religion or political beliefs. A similar notion applies to religious schools. So, in other words, since affirming dignity requires treating people equally, religious communities should have freedom to select, preference and regulate their members in the same way other ideological groups have the freedom to select, preference and regulate their members.

Hence, the exemptions in the *Sex Discrimination Act* rightly provide significant freedom for religious communities, but not in a way which promotes peaceful coexistence. The exemptions unfairly and unnecessarily target sexual minorities, giving the impression of a special privilege to maliciously discriminate. New legal infrastructure broadly in the form of positive associational rights is required to remove this impression while simultaneously maintaining the ability for religious communities to select, preference and regulate their members in accordance with their religious ethos.

Positive Associational Rights, Religious Schools and Discrimination

The principle of religious liberty is not merely limited to private, individual belief and action. It extends beyond private belief and acts of worship to public and associational contexts such as proselytization, social and business interactions, employment, cultural and charitable activities, education, and so on. For many religious people these external manifestations of religion are just as central and important to them as private belief, prayer and worship.[69] Article 18 of the *International Covenant on Civil and Political Rights* reflects this:

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.
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.

This indicates the actions associated with the principle of religious liberty are rights exercised by individuals and groups, individually and in community with others, and publicly or privately. It includes freedom of belief and to change beliefs, but also extends to

[68] Aroney and Saunders (n 67).
[69] Nicholas Aroney, 'Freedom of Religion as an Associational Right' (2014) 33(1) *University of Queensland Law Journal* 153, 161 at FN 46.

manifestation. Note in particular 18(4), which obliges states to have respect for the liberty of parents to educate their children in conformity with religious convictions without limitation. One significant method of achieving this obligation is facilitating the ability of faith-based schools to educate in accordance with their faith-based ethos as parents may wish to choose this. Religious liberty in principle, and with particular regard to associated actions, is subject only to legal limitation which is *necessary* (not merely reasonable) to protect public safety, order, health, morals or fundamental rights and freedoms of others. This is a high threshold which requires substantive proof before any legal limitation is appropriate.[70]

The fundamental question is why religious schools should be permitted to discriminate. Or, to rephrase the question in a less pejorative way, why should religious schools have a positive right to select and regulate the school community, including staff and students? The answer is because it allows the school to maintain a distinctive religious ethos. As mentioned earlier, Article 18(4) of the *International Covenant on Civil and Political Rights* obliges nations to have respect for the liberty of parents to educate their children in conformity with religious convictions. One significant method of achieving this obligation is facilitating the ability of faith-based schools to educate in accordance with their faith-based ethos as parents may wish to choose this. Framed as a legal right to select, allowing faith-based schools to select staff designed to consistently uphold this ethos is an essential aspect of maintaining the ability to educate in accordance with an ethos. Australia is merely fulfilling its international obligations by enabling faith-based schools to choose staff in accordance with their religious convictions.[71]

Since religious groups in particular provide the associational structures (including visionary and didactic resources) for training in discourse concerning advancement of human development and the common good, it is essential for moral engagement and civic virtue (and democracy itself) that these groups be protected by and from the state.[72] As legal scholar Hans-Martien Ten Napel argues, 'it is precisely within such faith and other communities that mature visions of the good life can develop, which simultaneously contribute to the notion of the common good'.[73] Thus, it is beneficial for all people if religious associations, including

[70] See Alex Deagon, 'Maintaining religious freedom for religious schools: options for legal protection after the Ruddock Review' (2019) 247(1) *St Mark's Review: A Journal of Christian Thought and Opinion* 40, 49-50. In accordance with the Siracusa Principles, any restriction must be necessary to achieve one of the objects listed, and must be proportionate to that object in the sense that it is the least restrictive means to achieve that object: 'Siracusa Principles on the Limitation and Derogation of Provisions' in the *International Covenant on Civil and Political Rights Annex*, UN Doc E/CN.4/1984/4 (1984), accessed February 19, 2019, https://www.uio.no/studier/emner/jus/humanrights/HUMR5503/h09/undervisningsmateriale/SiracusaPrinciples.pdf.

[71] See Deagon, Maintaining Religious Freedom (n 70) 49-50.

[72] Alex Deagon, 'Equal Voice Liberalism and Free Public Religion: Some Legal Implications' in Michael Quinlan, Iain Benson and Keith Thompson (eds), *Religious Liberty in Australia: A new* Terra Nullius*?* (Connor Court Publishing, 2019) 323-324.

[73] Hans-Martien Ten Napel, *Constitutionalism, Democracy and Religious Freedom* (Routledge, 2017) 97.

schools, are free to run according to their own rules, because this enables the development of more diverse and inclusive visions of how to achieve the public good.

This broad definition of religious liberty explained earlier means the actions associated with the principle of religious liberty extend not just to belief and worship, but also to teaching, propagation, identifying conditions of membership and standards of conduct, and appointing officers, leaders and employees.[74] Such practices are all protected, even if the organisations are formed for broader social, commercial or educational purposes.[75] These insights provide a persuasive basis for allowing religious schools the autonomy to choose employees and students who uphold their doctrines in belief and conduct. A religious school may want to preserve their distinctive identity as religious in order to be a community which approaches questions of education from that particular religious perspective. Indeed, they may see the practice of education itself as a religious injunction which is to be performed in accordance with their religious convictions. So it is not enough for only the headmaster and religious studies teacher to uphold Christianity, for example. The entire community is designed to cultivate a consistent ethos. Maintaining this religious identity allows the school to present a unique perspective in a democracy, and legally compelling them to accept employees or students with views or conduct inconsistent with that perspective undermines their religious identity and, consequently, their democratic position as equal and valued citizens.[76] Facilitating this action affirms the unique, equal and valued position of religious people and communities as citizens.

Equality does not necessarily trump religious freedom. 'The limits drawn around discrimination laws [are] an integral part of a structure designed to reflect the relevant human rights as a whole'.[77] In other words, since equality and religious freedom are both positive rights under international law, and there is no hierarchy of human rights, it is accurate to provide positive protection for religious freedom which reflects its status as a human right alongside and not inferior to the right of equality. This enables schools to select staff consistent with their religious and institutional ethos and to enforce generally applicable procedures and rules with regard to student advocacy, conduct, dress and so forth.[78] The framework recognises that schools are creating a community with a distinct ethos which will contribute to public good.

This proposition might well sit awkwardly with those who do not adhere to the doctrines of the particular religious institution. Nevertheless, if we desire a healthy and inclusive democracy which genuinely and equally tolerates freedom to differ, we must allow

[74] Carolyn Evans, *Legal Protection of Religious Freedom in Australia* (Federation Press, 2012) 35.
[75] Aroney, Freedom of Religion (n 3) 161 at FN 46.
[76] Deagon, Equal Voice Liberalism (n 72) 325.
[77] Neil Foster, 'Freedom of Religion and Balancing Clauses in Discrimination Legislation' (2016) 5 *Oxford Journal of Law and Religion* 385, 389.
[78] See Deagon, Maintaining Religious Freedom (n 70) 53-54.

associations the freedom to publicly conduct themselves in such a way as to maintain their unique identity on their terms. Only this will facilitate a robust, collective political encounter of perspectives for consideration and critique by citizens so they are fully informed to pursue the common good.

This principle is explicitly recognised in international human rights law. Though Australia is not a party to the European Convention, its well developed human rights jurisprudence is helpful to assist our understanding of the scope of religious freedom and its relationship with equality. Article 9 of the European Convention of Human Rights states:

> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

The European Court of Human Rights ('ECHR') has recognised that religious organisations have distinct legal rights. 'The importance of the collective dimension to religious freedom has emerged as an important theme in Convention jurisprudence'.[79] Harrison notes that the autonomy of these groups is linked with their ability to privately maintain their traditions and publicly express their beliefs. There is a 'distinct line of jurisprudence that emphasises the importance of religious associations to a vital civil society'.[80] For example, in the foundational case of *Kokkinakis v Greece,* the Court states:

> As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a democratic society… it is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conceptions of life… The pluralism indissociable from a democratic society… depends on it.[81]

The collective dimension of Article 9, the freedom to manifest in community with others, contributes to the common good and pluralism in a democratic society. Protecting 'the autonomy of the religious institution' in this way is essential for preserving 'the pluralism indissociable from a democratic society'.[82] As McCrudden emphasises, '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 by Article 9... all other aspects of...

[79] Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State,* 2nd edn (Oxford University Press, 2013) 138.
[80] Joel Harrison, *Post-Liberal Religious Liberty: Forming Communities of Charity* (Cambridge University Press, 2020) 174-175.
[81] *Kokkinakis v Greece* (1993) 17 EHRR397 [31].
[82] Christopher McCrudden, *Litigating Religions: An Essay on Human Rights, Courts, and Beliefs* (Oxford University Press, 2018) 68-70.

freedom of religion would become vulnerable.'[83] The most powerful cases demonstrate this principle through protecting the autonomy of religious organisations in selecting their leaders.[84] In addition, Article 9 has limited horizontal effect in disputes between members of a religious organisation and the organisation itself, for 'religious group autonomy requires clear limits to the freedom of individuals. The freedom that an individual has to leave a religious organisation in the event of a dispute is fatal to bringing a religious liberty claim against it under the Convention.'[85] Manifesting religious belief through joining with others in a corporate or associational aspect involves a 'necessary exclusion of people of a different or no religion'; if such exclusion is not legally protected 'the perverse effect will be to undermine religious liberty'.[86]

Hence religious communities have the right to determine their own structure, membership, policy, objectives and so on. 'Selection of leaders is one of the very core aspects of religious association autonomy... religious bodies have the right to reject candidates for ministry or discipline or expel an existing pastoral minister even if the grounds for doing so appear to liberals (and others) to be archaic, illiberal or bigoted. The grounds for selection and dismissal are matters within the province of the religious community, and it alone, to decide'.[87] Any state remedies would be invasive and destructive to religious freedom and, indeed, the separation of church and state and democracy itself; state-determined appointment or dismissal of religious leaders, and/or penalties for non-compliance, are hallmarks of authoritarian and religiously repressive regimes.[88] In short, 'the right of religious communities to select their own religious leaders is borne out by the European Convention case law. The European Court of Human Rights has made it abundantly clear that attempts by a state to interfere in the selection of leaders will not be tolerated.'[89]

As Rivers explains:

> A religious group cannot sustain its distinctive identity unless it [discriminates]. Such distinctions may be unjust in a public context but entirely necessary in a religious context. To reject a potential employee on account of their theological heterodoxy would be intolerable behaviour on the part of a public administrator but an essential part of the role of a church ministerial selection board. This is simply social pluralism in practice, and equality law recognises it in exemplary form when it excludes 'single characteristic associations' (i.e. those whose main purpose is to bring together people who share a certain characteristic) from the non-discrimination obligations applying to membership in associations generally.[90]

[83] Ibid 139; Ahdar and Leigh, *Religious Freedom in the Liberal State* (n 79) 376-377.
[84] McCrudden, *Litigating Religions* (n 79) 68-70.
[85] Ahdar and Leigh, *Religious Freedom in the Liberal State* (n 79) 138-139.
[86] Ibid 350.
[87] Ibid 395.
[88] Ibid.
[89] Ibid 396-399.
[90] Julian Rivers, 'Is Religious Freedom under Threat from British Equality Laws?' (2020) 33 *Studies in Christian Ethics* 179, 182-183.

And similarly, Ahdar and Leigh:

> Freedom to associate with others of like mind necessarily involves freedom to exclude people who do not share the beliefs in question… those so excluded are free to join other religious groups (or form their own group) and so this should not be seen as harmful. On the contrary: if the state were to prevent exclusivity through its non-discrimination laws, this would amount to denial of a basic aspect of religious liberty. Paradoxically, perhaps, exclusive societies add to the diversity of society.[91]

As noted above, Hilkemeijer and Maguire argue that the ability of religious schools to discriminate is inconsistent with European human rights law because the law does not take into account whether the person is engaged in secular or religious activities and the grounds of dismissal could be unrelated to religion.[92] They propose a better option for reform is either a law requiring the school to demonstrate that it is necessary to employ staff who adhere to the school's religious faith (the narrowest option), or a law allowing schools to discriminate if they can demonstrate that the discriminatory action is a genuine occupational requirement and it satisfies a reasonableness test.[93]

However, this misreads ECHR jurisprudence, which supports robust institutional autonomy. In one seminal case, the ECHR observed that religious communities exist in organised structures and the 'autonomous existence of religious communities is indispensable for pluralism in a democratic society and is an issue at the very heart of the protection which Article 9 affords'.[94] The EU Directive acknowledges the right of religious organisations to require employees to adhere to the ethos of the organisation.[95] Thus, Aroney and Taylor note that in a number of cases the ECHR has found in favour of the religious institution when an employee has breached the institution's ethos, 'even when the ethos requirements of the employer organisation impinge on the employee's fundamental human rights'.[96] For example, dismissals of teachers of religious doctrine and educators in religious educational facilities were not found to breach the ECHR:

> In some, perhaps most, religious schools loyalty might not be expected from those employees who are not engaged in representing the ethos of the organisation by functions such as chaplaincy or religious education. In some other schools, however a wider range of employees (perhaps even all of them) may be commissioned to promote the religious calling of the school. Their terms and conditions of employment

[91] Ahdar and Leigh, *Religious Freedom in the Liberal State* (n 79) 360.
[92] 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, 756-761.
[93] Ibid 763-765.
[94] *Sindicatul "Pastorul Cel Bun" v Romania*, App.No. 2330/09, Judgment of 9 July 2013 [136].
[95] *European Council Directive* 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation.
[96] Nicholas Aroney and Paul Taylor, 'The Politics of Freedom of Religion in Australia: Can International Human Rights Standards point the way forward?' (2020) 47(1) *University of Western Australia Law Review* 42, 56-58.

> would presumably reflect this in some way. The faith-based calling of a school, and the degree to which there is an expectation that the staff in question share that faith and will be actively engaged in promoting its mission, become the distinguishing features justifying them being contractually bound to remain loyal to the ethos of the organisation. This is not that far removed from the political allegiance expected of those employed by political parties and lobbyists.[97]

In addition, the assumption that there is a relevant distinction between 'religious' and 'secular' activities is incorrect. For many religious communities, all activities are religious. There are no purely secular activities and for many religious schools the provision of educational services in accordance with the ethos of the religion is a core activity of the religion. The mathematics teacher can be a religious mentoring and guidance position which acknowledges the beauty and precision in the understanding of God's creation, and the groundsman can be a religious mentoring and guidance position in the cultivation and care of God's creation, just as much as the religious studies teacher is a mentor and guide in understanding religion.[98] Religion 'embraces a broad number of activities including freedom to choose leaders, establish seminaries and schools, prepare and distribute religious texts, and serve the community through daycare centres and soup kitchens'.[99] As Ahdar and Leigh observe, 'opponents in the debates about the application of equality norms to religious ethos employers have been to a very large degree talking past each other because of their fundamentally incompatible starting points about the nature of employment'; in particular, the secular or 'instrumental' view that is about outcomes and functions, as opposed to the religious 'organic' approach which sees work as a vocation in the context of service to God and fulfilling the religious mission of an organisation; 'A liberal, pluralist, society can only flourish by permitting diverse groups within civil society, and that includes, we suggest, organisations that are religiously exclusive'.[100]

Third, and following from this, an exemption or right which places the decision in the hands of a secular tribunal to decide whether an activity is 'religious', an occupational requirement is 'genuine', or a discriminatory action is 'reasonable', runs significant risk of imposing a secular perspective on a theological question, which would severely undermine the autonomy of religious communities.[101] It is a question of fact in any given situation and courts should accept the testimony of the religious communities on this rather than acting as a secular arbiter of a theological dispute, which would damage religious freedom by imposing the views of a secular state on a religious community.

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[97] Ibid 58-60.
[98] See eg Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State*, 2nd edn (Oxford University Press, 2013) 157; Nicholas Aroney, 'Freedom of Religion as an Associational Right' (2014) 33(1) *University of Queensland Law Journal* 153, 161 fn 46.
[99] Ahdar and Leigh, *Religious Freedom in the Liberal State* (n 79) 375-377.
[100] Ibid 374.
[101] Neil Foster, 'Respecting the Dignity of Religious Organisations: When Is It Appropriate for Courts to Decide Religious Doctrine?' (2020) 47(1) *University of Western Australia Law Review* 175; Alex Deagon, 'The "Religious Questions" Doctrine': Addressing (Secular) Judicial Incompetence' (2021) 47(1) *Monash University Law Review* 60-87.

Religion is a communal and social matter which ought to be passed on to future generations through institutions which shield religion from overly regulatory states. Efforts should be made to accommodate both democratic priorities and the autonomy of religious communities.[102] Refusing accommodation of difference involves several 'dangerous' assumptions, including courts determining what are and are not 'core beliefs' of the religion (e.g. the nature of marriage), that religion should be irrelevant in the context of public services, and concordantly, that religion is irrelevant in the public sphere.[103] 'The idea that religious organisations should be wholly subject to the demand of the civil law reflects the increasing indifference of many to religion... If the institutions of any religion are, without hesitation or any weighing of the effects made, subject to the demands of the law, whatever their own doctrines, secular interests are bound to come to dominate those of a religious nature'.[104]

So Parkinson argues that implementing genuine occupational requirements grounded in secular understandings of religion would 'greatly reduce the freedom of religious organisations to have staffing policies consistent with their identity and ethos'.[105] Many schools see their religious ethos as central to the educational mission of the school and believe this requires staff to believe and act consistently with that ethos.[106] This framing emphasises the freedom of religious organisations to select and regulate their membership in the form of a positive right for manifestation of religion in a community.

Religious group autonomy is also not merely an aggregation of individual rights, which is a 'secular liberal and deficiently atomistic approach which undermines religious freedom' by allowing government interference in the group to satisfy individual rights.[107] Robust autonomy for religious communities acknowledges 'the group itself as possessing legal identity and rights' as a result of the 'intrinsically collective dimension to religious freedom and the centrally communal component of manifesting religion'.[108] Consequently, 'religious group association may [and must] sometimes trammel individual rights' because that is intrinsic to the definition of association itself; the ability to associate necessarily entails the ability to exclude, and it is up to the association to put standards in place to make these decisions in relation to leadership, membership, employment, and external activities.[109] As a reasonable accommodation, individuals have a right to leave the group if they wish and, if they like, form a new association with others of similar mind. 'As a general principle, and putting aside situations where no meaningful right of exit exists, it is not for the state to force a religious body to change its ethos to suit belligerent or disgruntled individuals'.[110] In the

[102] Roger Trigg, *Equality, Freedom and Religion* (Oxford University Press, 2012) 157.
[103] Ibid 119.
[104] Ibid.
[105] Patrick Parkinson, 'The Future of Religious Freedom' (2019) 93(9) *Australian Law Journal* 699, 702.
[106] Ibid.
[107] Ahdar and Leigh, *Religious Freedom in the Liberal State* (n 79) 375-377.
[108] Ibid.
[109] Ibid 392.
[110] Ibid 392-394.

specific context of schools, this is for religious schools to determine and parents are free to choose to send children to that school or other schools. If parents or students are uncomfortable with the position of the school, they are free to choose a different school, rather than forcing the school to change their ethos and practices to suit them. Such schools may operate in accordance with religious beliefs and behaviour which forms the ethos of that organisation. Forcing them to hire persons who do not adhere to the ethos will undermine the religious nature of the organisation, effectively destroying it. Freedom of association therefore necessarily entails freedom to exclude, and this does not impinge on any rights of disadvantaged individuals as long as a genuine right of exit exists.

Given the important role of religion in human life and community, legislatures and courts should be ready and willing to respect religion by considering exemptions or positive rights.[111] Of course, all parties affirm the importance of religious liberty; what matters are the perceived limits of religious liberty. It has always been the case that religious liberty is limited by what is conducive to public good, but today notions of the public good are strongly informed by equality, inclusion and mental health, especially applied to the LGBT community. As Chavura, Gascoigne and Tregenza observe:

> These ideals are operating to constrict religious liberty, particularly as it applies to religious associations and institutions, whose historic right to discriminate in order to preserve institutional authenticity conflicts with the demands of individualistic authenticity that animates so much moral discourse today.[112]

However, 'interfering with the beliefs and practices' of religious communities 'carries its own dangers'.[113] Though secular liberalism is focused on individuals, religion is strongly communal. Religious associations and institutions (communities) have an existence and distinctive character apart from their members; 'without criteria of membership, and distinctive activities, they would cease to exist'.[114] This character matters because they not only reflect the beliefs of members, but help to mould them for the good of the broader community.[115] Though some challenge the autonomy of religious communities to set their own standards as undermining individual rights, 'it is usually recognised that religious freedom is safeguarded as long as any individual has a right of exit'.[116] Evans and Gaze also warn that 'individuals are entitled to develop and live out their own conceptions of the good life and that this entitlement is an important bulwark against deadening social conformity and, at the extreme, totalitarianism'.[117] Similarly, Trigg observes that the 'liberal ideal of... equality' can itself 'take on the status of an orthodoxy, which can be potentially

[111] Ibid 151.
[112] Stephen Chavura, John Gascoigne and Ian Tregenza, *Reason, Religion and the Australian Polity: A Secular State?* (Routledge, 2019) 48.
[113] Trigg (n 98) 39.
[114] Ibid 43.
[115] Ibid 44.
[116] Ibid 99.
[117] Carolyn Evans and Beth Gaze, 'Between Religious Freedom and Equality: Complexity and Context' (2008) 49 *Harvard International Law Journal Online* 45.

oppressive'.[118] In effect, 'a concern for equality can visibly diminish religious freedom'.[119] Rather than simply restricting religious freedom because it may undermine equality norms, the autonomy of religious communities should be accommodated to protect Australian democracy and freedom.[120]

It is not unreasonable or disproportionate to expect a particular community with certain ethical commitments to not engage with or provide services to persons or groups which contradict those commitments. Rather, the religious body should be provided with autonomy to define their own doctrine and what that doctrine entails for their practice.[121] Completely removing the ability for religious communities to preference and select their leaders, members and method of teaching coerces uniformity (i.e. compels other communities to conform to a particular version of the good) rather than to accept that there are diverse approaches to pursuing the good.[122]

It is true that any who are discriminated against may 'suffer significant harm to their dignity, emotional well-being and in some cases their economic security'.[123] However, Walsh notes that the religious community who incidentally engages in discrimination in the process of maintaining a particular ethos consistent with their religious beliefs 'will typically suffer much greater harm' if there are no laws protecting their ability to do this, including 'severe emotional distress from the violation of their faith commitments', potentially the 'impairment of their relationship' with the rest of their faith community, and being the subject of 'protests, boycotts and complaints to anti-discrimination tribunals with the frequent result' that they will be forced to cease either their religious ethos or their activities – both fatal to the existence and nature of the community.[124] In the vast majority of cases the party discriminated against can simply choose another option at minimal cost, and given increasing support for vulnerable persons and groups (especially among the young) and potential financial incentives for the religious party to accept their requests, it is increasingly unlikely that discrimination will occur. The failure to realise that harm to the religious party from not protecting their autonomy overrides harm to the party from being discriminating against only results from simply refusing to give the religious party's beliefs and interests any significant weight.[125]

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[118] Trigg (n 102) 83.
[119] Ibid 32, 116, 119-120, 128-132.
[120] Charlotte Baines, 'A Delicate Balance: Religious Autonomy Rights and LGBTI Rights in Australia' (2015) 10(1) *Religion & Human Rights* 45, 49. See also Alex Deagon, 'Equal Voice Liberalism and Free Public Religion: Some Legal Implications' in Michael Quinlan, Iain Benson and Keith Thompson (eds), *Religious Liberty in Australia: A new* Terra Nullius*?* (Connor Court Publishing, 2019) 314-317, 325-326.
[121] See Alex Deagon, 'The "Religious Questions" Doctrine': Addressing (Secular) Judicial Incompetence' (2021) 47(1) *Monash University Law Review* 60-87.
[122] As explored in Joel Harrison, *Post-Liberal Religious Liberty* (Cambridge University Press, 2020).
[123] Greg Walsh, 'Same-Sex Marriage and Religious Liberty' (2016) 35(2) *The University of Tasmania Law Review* 106, 126.
[124] Ibid 127.
[125] Ibid 127-128. See Nicholas Aroney and Benjamin Saunders, 'Freedom of Religion in Australia' in Matthew Groves, Daniel Meagher and Janina Boughey (eds), *The Legal Protection of Rights in Australia* (Hart Publishing, 2019) who also argue that there needs to be greater recognition of the wrongness and harm which results from compelling religious parties to act contrary to their conscience.

Finally, it is important to note the incidental ability to 'discriminate' in this context actually preserves equality between religious and non-religious communities. An example to illustrate this principle is political parties. Political parties, by their nature, discriminate on the basis of political opinion. It would be absurd for the law to compel a particular political party to hire someone who repudiates the ethos of the party in thought or conduct, and the law has long recognised this ability for political parties to 'discriminate'.[126] The same notion applies to religious schools.[127]

So rather than framing religious freedom in a way which intuitively subordinates religious freedom to equality, Aroney advocates for positive rights to select staff who adhere to the beliefs and observe the practices of the religious group in question, as provided in this Bill.[128] He concludes:

> Given that international human rights law recognises that religious freedom extends to the establishment and maintenance of religious, charitable, humanitarian and educational institutions, and the right to establish associations with like-minded people includes the right to determine conditions of membership and participation within such organisations, consideration should be given to protecting freedom of religion in the context of anti-discrimination laws through the enactment of statutory affirmations of the positive right of religious bodies to select staff who share their religious beliefs so as to maintain the religious ethos of the organisation... that is a consequence of living in a diverse society which respects religious freedom.[129]

Protecting Associational Freedom

Professor Reid Mortensen articulates the foundational principles undergirding the balance of freedom and equality:

> [O]ne inherent paradox in *all* discrimination laws is that, although they aim to protect social pluralism, the principles of equality they usually promote also present a threat to the protection of religious pluralism in the political sphere. This occurs when, despite the traditional recognition of rights of religious liberty, the discrimination laws apply to religious groups that deny the moral imperatives of, say, racial, gender or sexual orientation equality. In this respect, Caesar has generally been prepared to render something to God through the complex exemptions granted in the discrimination laws to religious groups and religious educational or health institutions.[130]

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[126] Aroney and Saunders (n 125).
[127] See Alex Deagon, 'Defining the Interface of Freedom and Discrimination: Exercising Religion, Democracy and Same-Sex Marriage' (2017) 20 *International Trade and Business Law Review* 239, 276-278.
[128] Nicholas Aroney, 'Can Australian Law Better Protect Freedom of Religion' (2019) 93(9) *Australian Law Journal* 708, 716, 719.
[129] Ibid 720.
[130] Reid Mortensen, 'Rendering to God and Caesar: Religion in Australian Discrimination Law' (1995) 18 *University of Queensland Law Journal* 208, 231.

Mortensen therefore claims that to 'honour rights of religious liberty, religious groups are probably entitled to broad exemptions from the operation of sexual orientation discrimination laws'.[131] More emphatically, the right to free exercise in the Constitution 'does not suggest a "balance" to be struck between anti-discrimination standards and rights of religious liberty, but a constitutionally required preference for religious liberty'.[132] While accepting these contentions in principle, the current exemptions do not uphold peaceful coexistence. They are 'irrelevantly' and 'offensively' targeted at sexual minorities, and do not provide what is really needed, which is 'the ability of such organisations to maintain their religious ethos generally, in terms of both the committed beliefs and conscientious practices of their employees'.[133] As such, although the exemptions are problematic, they cannot simply be eliminated without any replacement.

So Parkinson argues that simply removing exemptions and replacing them with genuine occupational requirements grounded in secular understandings of religion would 'greatly reduce the freedom of religious organisations to have staffing policies consistent with their identity and ethos'.[134] Many schools see their religious ethos as central to the educational mission of the school and consider this requires all staff to believe and act consistently with that ethos.[135] This includes both staff who are involved in leadership and direct teaching (such as the Principal and teaching staff), and staff who are involved in administration and maintenance (such as receptionists and groundskeepers). It might be objected that schools should only be empowered to select or preference the former kind of 'core' staff, but there is no simple line between core and non-core staff when it is possible that all staff will be interacting with students and having conversations about religious matters. It is entirely possible that students may strike up a conversation with a receptionist or a groundskeeper, and if in the course of that conversation the student discovers the staff member believes or acts inconsistently with the school ethos, this could significantly undermine the consistent propagation of the school ethos. This does not mean it will always be possible for schools to hire such a staff member. The exigencies of the education industry and the particular circumstances of the school may mean it is necessary for the school to temporarily hire a person who does not fit the school ethos. This does not mean adherence to the ethos is not a genuine occupational requirement to work at the school on a permanent basis. That is why a right to preference staff in accordance with an ethos is just as important as a right to select – this recognises the realities of needing to provide a specialised service while not undermining the religious ethos which is the foundation and framework for providing that service. As such, rather than exemptions, including for genuine occupational requirements only, the law should be expressed as a positive associational right allowing schools to select and preference staff, which would also be consistent with international law.[136]

[131] Ibid 228–29.
[132] Ibid 231.
[133] Aroney and Taylor (n 10) 61-62.
[134] Parkinson, Future of Religious Freedom (n 101) 702.
[135] Ibid.
[136] Ibid; Aroney and Taylor (n 10) 56-62. This proposition is considered below.

A Human Rights Act?

A better approach than exemptions is to 'see the limits drawn around discrimination laws as an integral part of a structure designed to reflect the relevant human rights as a whole'.[137] In other words, since equality and religious freedom are both positive rights under international law, and there is no hierarchy of human rights, it is more accurate to provide positive protection for religious freedom which reflects its status as a human right alongside and not inferior to the right of equality. So rather than framing religious freedom protections as exemptions to anti-discrimination laws which intuitively subordinates religious freedom to equality, Aroney advocates for positive rights to select and preference staff who adhere to the beliefs and observe the practices of the religious group in question.[138] He concludes:

> Given that international human rights law recognises that religious freedom extends to the establishment and maintenance of religious, charitable, humanitarian and educational institutions, and the right to establish associations with like-minded people includes the right to determine conditions of membership and participation within such organisations, consideration should be given to protecting freedom of religion in the context of anti-discrimination laws through the enactment of statutory affirmations of the positive right of religious bodies to select staff who share their religious beliefs so as to maintain the religious ethos of the organisation... that is a consequence of living in a diverse society which respects religious freedom.[139]

For these reasons I propose positive associational rights as an alternative to exemptions. But the form of positive associational rights for the freedom of religious communities is contentious, particularly the issue of whether such rights should be recognised through separate legislation, or through some kind of human rights charter.[140] Hobbs and Williams argue that the solution for the weak protection of religious freedom in Australia is a Human Rights Act or Charter of Rights which places freedom of religion in the context of limitations and balances required by considering other human rights such as equality.[141] Freedom of religion should be 'positively protected' rather than conceived through exceptions.[142] They reject a Religious Discrimination Act on the basis that this is a narrow lens to view religious freedom which will provide a limited scope for religious freedom. Such a mechanism is

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[137] Neil Foster, 'Freedom of Religion and Balancing Clauses in Discrimination Legislation' (2016) 5 *Oxford Journal of Law and Religion* 385, 389.
[138] Nicholas Aroney, 'Can Australian Law Better Protect Freedom of Religion' (2019) 93(9) *Australian Law Journal* 708, 716, 719.
[139] Ibid 720.
[140] For various perspectives on a charter of rights, see generally Paul Babie and Neville Rochow (eds), *Freedom of Religion under Bills of Rights* (University of Adelaide Press, 2012).
[141] Harry Hobbs and George Williams, 'Protecting Religious Freedom in a Human Rights Act' (2019) 93(9) *Australian Law Journal* 721, 722.
[142] Ibid 731.

unable to resolve complex issues of balancing between different anti-discrimination protections (for example religious freedom and equality) as they arise.[143] A comprehensive Human Rights Act will equally protect fundamental democratic rights and freedoms and include a mechanism for balancing competing rights. This approach will best 'accommodate' the perspectives of the religious and the non-religious in a way that 'respects religious belief, while creating a space for robust and open debate about faith-based practices'.[144] Only protecting religious freedom 'tilts the balance one way' which will increase tensions and undermine peaceful coexistence.[145]

However, Nicholas Aroney critiques existing state human rights charters as offering protection that is 'limited and selective' for four reasons.[146] First, they do not adopt the strict limitations which appear in Article 18 of the *International Covenant on Civil and Political Rights* ('ICCPR'). They say religious freedom may be subject to reasonable limits that are for a legitimate purpose, which is a 'vaguer and lower' threshold than the necessary limits for the particular purposes in the ICCPR.[147] Second, the charters indicate that all aspects of freedom of religion are potentially subject to limitation, which contradicts a clear principle of international law that freedom of belief is inviolable and cannot be limited. Third, the charters contain very little protection for the liberty of parents to educate their children in conformity with their convictions as required by Article 18(4). The Australian Capital Territory charter merely protects the religious freedom of parents to educate their children in non-government schools (effectively excluding the majority of parents unable to afford the cost of private education from the international law protection), while the other charters (Victoria and Queensland) provide no protection at all.[148] Finally, the protections in the state charters are 'at a high level of generality' which fails to provide sufficient protection in the many specific ways law and religion may interact; indeed, 'there is no evidence to suggest that religious freedom has been more adequately protected [by human rights charters]... in fact, at times, religious freedom has received weaker protection in such jurisdictions'.[149] Aroney demonstrates this by comparing the outcomes in a Victorian case where religious freedom was not protected despite the presence of a human rights charter to a similar case in New South Wales where religious freedom was protected without a human rights charter.[150]

[143] Ibid 732.
[144] Ibid.
[145] Ibid.
[146] Aroney, Freedom of Religion (n 138) 715. See also Aroney and Taylor (n 10) 46-48.
[147] Aroney, Freedom of Religion (n 138) 715.
[148] Ibid.
[149] Ibid.
[150] Ibid 716-718. For further analysis, see Deagon, Religious Questions Doctrine (n 121), where I suggest the major determining factor was the extent to which the judges adhered to the golden rule and engaged in imaginative sympathy as part of their judgement process, especially in deferring to the religious parties' articulation of their own beliefs and practices. This indicates deferring to the religious organisation will better protect religious freedom and preserve peaceful coexistence.

In addition, protections for religious freedom in Victoria separate from the existing human rights charter are generally strong, apart from allowing the possibility that certain religious beliefs could be unlawful (contravening a clear principle of international law) and the fact that the protections are framed as exceptions. The existing protection seems to be due to nothing more than democratic activity and the parliamentary process.[151] The critique of state human rights charters is relevant because a federal charter would likely fail to protect freedom of religion in similar ways. 'Perversely, the charters fail to provide the guarantees required by the ICCPR, and at the same time invite an interpretation of them that fundamentally detracts from the protection they purport to afford'.[152] Since the existing charters fail to properly give effect to Australia's international obligations, 'there is a lack of confidence... that a [national] charter will do much to protect [religious] freedoms'.[153] Zimmermann further notes that bills of rights are unnecessary in a federal system with checks and balances, and may even reduce individual rights (depending on socio-political context) because many nations with bills of rights engage in significant levels of human rights abuse while paradoxically pointing to their entrenched protection of rights to deny such abuse occurs.[154] Constitutional luminaries such as Jeremy Waldron, Jeffrey Goldsworthy and James Allan also express typical concerns that a charter of rights undermines democracy by providing too much power to unelected and incompetent judges, and simultaneously politicises the judiciary - undermining the separation of powers and the rule of law.[155]

The point is that the ideological dominance of equality norms in rights discourse may well cause a charter to result in the undermining of religious freedom rather than reconciliation and peaceful coexistence. Parkinson summarises:

> The problem is when absolutist claims about the moral requirements of a charter are used to mask and provide some special authority for the policy positions of people with particular agendas. At the heart of Christian concerns about the development of a charter is that secular liberal interpretations of human rights charters will tend to

[151] Aroney, Freedom of Religion (n 138) 715-716. See also Nicholas Aroney, Joel Harrison and Paul Babie, 'Religious Freedom under the Victorian Charter of Rights' in Colin Campbell and Matthew Groves (eds), *Australian Charters of Rights a Decade On* (Federation Press, 2017) 120.
[152] Aroney and Taylor (n 7) 47-48.
[153] Patrick Parkinson, 'Christian Concerns about an Australian Charter of Rights' in Paul Babie and Neville Rochow (eds), *Freedom of Religion under Bills of Rights* (University of Adelaide Press, 2012) 132.
[154] Augusto Zimmermann, 'The Wrongs of a Bill of Rights for Australia: A Rights-Based Appraisal' in Augusto Zimmermann (ed), *A Commitment to Excellence: Essays in Honour of Emeritus Professor Gabriel A. Moens* (Connor Court, 2018) 33-34.
[155] See eg Jeremy Waldron, 'A Rights-Based Critique of Constitutional Rights' (1993) 13 *Oxford Journal of Legal Studies* 18; Jeffrey Goldsworthy, 'Legislative Sovereignty and the Rule of Law' in T Campbell, K Ewing and A Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford University Press, 2001); James Allan, 'Why Australia does not have, and does not need, a National Bill of Rights' (2012) 24 *Journal of Constitutional History* 35.

> relegate religious freedom to the lowest place in an implicit hierarchy of rights established not by international law but by the intellectual fashions of the day.[156]

Parliamentary processes are therefore a more appropriate forum for resolving competing moral claims between religious freedom and equality, because this will facilitate nuanced consideration of all perspectives, supporting peaceful coexistence.

Finally, in a similar vein, Harrison critiques the kind of proportionality and balancing analysis characteristic of what is required by human rights instruments on the basis that such processes are structured by a contestable secular narrative which fails to truly understand and engage with the claims of religious parties. Harrison criticises 'monolingual adjudication' which is 'inattentive to the actual arguments of religious groups, or else potentially fails to comprehend the seriousness of what is at stake'.[157] Rather than considering 'the diversity of arguments presented by claimants', they are subsumed into the same 'abstract language' of secular reasons.[158] This means the 'real nature of the community's argument may be lost'.[159] The very religion-based reasons why a tension is experienced by a religious claimant is eliminated at the outset, and 'there is something deeply unsatisfying or else anaemic in this framing'.[160] To resolve this Harrison suggests bypassing the courts as much as possible and having a richer debate through the democratic process with enacted changes better reflecting religious perspectives.[161] However, even if more religiously inclusive legislation is passed, it will need to be interpreted by courts, so when judicial interpretation is necessary an approach conducive to peaceful coexistence is to apply the golden rule and an imaginative sympathy which genuinely engages with the views of religious parties and defers to their own understanding of those views rather than imposing a secular perspective.[162]

Even Hobbs and Williams admit that the state Human Rights Acts 'fal[l] short of the standard required under international law' because freedom to believe (as opposed to manifesting belief) is subject to limitation under the relevant Acts, and the limitation provisions themselves are also a 'problem' because they permit 'reasonable' limitations while the international instruments permit only 'necessary' limitations.[163] Despite the enduring criticisms, Hobbs and Williams maintain that at the very least, a human rights charter will have the symbolic effect of demonstrating the value of human rights by explicitly protecting

[156] Parkinson, Christian Concerns (n 153) 120-121. See also Patrick Parkinson, 'Christian Concerns about an Australian Charter of Rights' (2010) 15 *Australian Journal of Human Rights* 83.
[157] Joel Harrison, 'Towards Re-thinking "Balancing" in the Courts and the Legislature's Role in Protecting Religious Liberty' (2019) 93(9) *Australian Law Journal* 734, 738.
[158] Ibid 738-739.
[159] Ibid 739.
[160] Ibid.
[161] Ibid 742-746.
[162] See Deagon, Religious Questions Doctrine (n 121).
[163] Hobbs and Williams (n 49) 728-729.

them, and providing a framework for resolving competing rights.[164] Perhaps it is possible to protect the freedom of religious communities with a human rights charter, but all these concerns would need to be addressed and implemented. It seems more likely that separate laws providing positive associational rights would more effectively preserve the freedom of religious communities without undermining equality.

Schools desire 'freedom to conduct their educational functions through a curriculum and in a manner which is consistent with their religious ethos, delivered by and within a community of like-minded others', and freedom to 'make suitable appointments based on the alignment of fundamental beliefs and practices'; this desire is consistent with international law under the ECHR and ICCPR.[165] Positive associational rights would enable schools to select and preference staff consistent with their religious and institutional ethos, and to enforce generally applicable procedures and rules with regard to student advocacy, conduct, dress and so forth. Such legislation would ameliorate hostility, reconciling both religious freedom (by enabling religious schools to require employees to believe and act consistently with an ethos) and equality (by removing the targeted sexuality-based religious exemptions). An example might be amending the *Fair Work Act 2009* (Cth) to provide employment rights to organisations established for a particular religious purpose or social cause, which would legally affirm the freedom of religious communities to choose or prefer members who adhere to the ethos of the organisation in their beliefs and conduct.[166] In the context of schools, Walsh also notes that a public document requirement (that a school engaging in selecting, preferencing and regulating members is required to disclose the nature of that conduct and the rationale for it) is likely to play 'a significant role in reducing the harm that can be caused by' such conduct; the school can specifically advise potential employees of 'the school's religious commitments and the relevant expectations that the school has of their staff members'.[167] This will mean individuals who disagree with those commitments and/or expectations may not apply for the position, or if they do, they are aware they may be subject to an adverse employment decision and can even prepare in advance by having back-up employment.[168] In this sense the public document requirement supports the associational freedom of religious communities while mitigating the impact of incidental discriminatory conduct.

[164] Ibid 732-733.
[165] Aroney and Taylor (n 10) 61-62.
[166] Parkinson, Future of Religious Freedom (n 50) 702-703.
[167] Walsh, 'Right to Equality' (n 52) 134-135.
[168] Ibid.