AUSTRALIAN DISCRIMINATION LAW EXPERTS GROUP

Submission of the Australian Discrimination Law Experts Group

in response to the

Australian Law Reform Commission's Inquiry into Religious Education Institutions and Anti-Discrimination Laws

17 February 2023

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1. Australian Discrimination Law Experts Group

This submission is made on behalf of the undersigned members of the Australian Discrimination Law Experts Group (**ADLEG**), a group of legal academics with significant experience and expertise in discrimination and equality law and policy.

This submission focuses on key questions raised in the *Religious Education Institutions and Anti-Discrimination Laws: Consultation Paper* released in January 2023 by the Australian Law Reform Commission. This submission may be published.

We are happy to answer any questions about the submission or other related issues, or to provide further information on any of the areas covered. Please let us know if we can be of further assistance in this inquiry, by emailing [redacted]

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2. Recommendations

As set out in further detail below, our recommendations are as follows (all 'Proposals' refer to those found in the *Religious Education Institutions and Anti-Discrimination Laws: Consultation Paper* released in January 2023 by the Australian Law Reform Commission):

Recommendation 1: That the term 'ethos' be removed from all proposed reforms.

Recommendation 2: That Proposals 1–6 and 11–14 otherwise be accepted and implemented.

Recommendation 3: That Proposal 7 (school curriculum) be rejected.

Recommendation 4: That Proposals 8 (preferencing) and 9 (termination) be rejected.

Recommendation 5: That section 40(1)(g) of the *Sex Discrimination Act 1984* (Cth) (exception for fair work instruments) should be amended to exclude religious educational institutions from its remit and, subject to a wider review, be repealed.

Recommendation 6: That a new proposal to replace Proposals 8 and 9, applying to employment, provide that:

> The *Fair Work Act 2009* (Cth) should be amended to say that a religious educational institution is not permitted to rely on a term of a modern award or enterprise agreement to discriminate directly or indirectly in employment other than where:
>
> (1) the conduct is on the ground of religion where the participation of the person in the observance or practice of a particular religion is a genuine occupational requirement in relation to the employment;
>
> (2) the conduct does not constitute discrimination, whether direct or indirect, on any other ground prohibited by sections 153(1) or 195(1), respectively;
>
> (3) the conduct is reasonable and proportionate in the circumstances.
>
> The *Fair Work Act 2009* (Cth) should be further amended such that religion is a permissible ground of termination, despite section 772(1)(f), in the circumstances set out above.

Recommendation 7: That in developing a federal law that prohibits religious discrimination, Proposal 10 be fulfilled by including the following three standard discrimination law provisions:

> (1) the prohibition on indirect discrimination not apply if the condition, requirement or practice is reasonable in the circumstances, constructed similarly to the *Sex Discrimination Act 1984* (Cth) section 7B.
>
> (2) an exception to the prohibition on discrimination in employment for genuine occupational requirements, constructed similarly to Recommendation 6;

(3) the authorisation of lawful special measures, which are not discrimination, constructed similarly to the *Sex Discrimination Act 1984* (Cth) section 7D.

A federal law that prohibits religious discrimination should also ensure that these provisions cannot be used as an alternative route to discriminate on the basis of attributes protected by other federal discrimination laws.

Recommendation 8: That Proposal 6 (family members) extend protection to associates in this suite of reforms, rather than in the 'Stage 1' reforms in Proposal 14, along the lines of the prohibition of discrimination in relation to associates found in the *Disability Discrimination Act 1992* (Cth).

Recommendation 9: That the 'Stage 2' reforms in Proposal 14 recommend that the *Fair Work Act 2009* (Cth) adopt the definitions of 'discrimination', including indirect discrimination, and 'genuine occupational requirement' found in federal discrimination laws.

3. Summary

3.1 ALRC Inquiry and Consultation Paper

ADLEG welcomes the current inquiry by the Australian Law Reform Commission (**ALRC**) into Religious Educational Institutions[1] and Anti-Discrimination Laws. The ALRC's *Religious Educational Institutions and Anti-Discrimination Laws: Consultation Paper* (**Consultation Paper**)[2] provides a clear analysis of the issues that have been the subject of multiple inquiries over a number of years in Australia and that have hampered effective law reform in this area.

The Consultation Paper sets out approaches that are generally consistent with Australia's international law obligations, sit coherently and consistently within the framework of the development of Australia's discrimination law system and within the existing *Sex Discrimination Act 1984* (Cth) (**SDA**), and are consistent with discrimination law practice in most Australian states and territories. We welcome this approach and note that it differs significantly from the approach of the formerly-proposed federal Religious Discrimination Bill, in various iterations from 2019 to 2022, which did not reflect the existing approaches and framework in Australia, undermined the co-operative approaches that have developed between federal, state and territory governments in developing and reforming discrimination laws, and sought to introduce a fragmented approach to human rights by introducing protections in discrimination law for a privileged freedom of religion for some. For these reasons, we were highly critical of key aspects of the formerly-proposed federal Religious Discrimination Bill.

The Consultation Paper presents a welcome change in approach that should allow for the development of a more coherent and respectful understanding of the interrelationship of fundamental human rights, including the right to equality, freedom from discrimination, and freedom of thought, conscience, religion and belief. As such, we are, overall, supportive of the approaches proposed in the Consultation Paper and, in general, its Propositions and Framing Principles (**Principles**), with the exception of references to 'ethos' as discussed below.[3] In this submission, drawn as it is from a group of experts with technical expertise in discrimination law, our focus is on the implementation of these Propositions and Principles through Proposals 1–14 and their technical drafting and effect.

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1 In this submission, the term 'religious educational institutions' is shorthand for 'educational institutions conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed'.

2 Australian Law Reform Commission (**ALRC**), *Religious Educational Institutions and Anti-Discrimination Laws: Consultation Paper* (January 2023) <https://www.alrc.gov.au/publication/adl-cp-2023/> (**Consultation Paper**).

3 ADLEG notes, also, that Principle 5 focuses on students while staff are added as a secondary consideration. Staff deliver the core education that is provided by religious educational institutions, and should be recognised as primary stakeholders in this inquiry. Their treatment could, and should, be separated into a new Principle 6 that recognises their importance.

3.2 ADLEG Response

ADLEG continues to strongly support the enactment of federal protections against discrimination on the basis of religion, consistently with Australia's international law obligations and with Australia's existing federal discrimination laws.[4] Such protections already exist in most state and territory discrimination laws,[5] and it is more appropriate to seek to achieve consistency with these and other aspects of Australian discrimination law than to import concepts from the United Kingdom (**UK**) or other overseas jurisdictions that have different histories, legal contexts, and conceptual development of discrimination law.

Proposals 1–6 and 11–14 in the Consultation Paper are sensible reforms that strike an appropriate balance between freedom from discrimination and freedom of thought, conscience, religion and belief. It is well overdue, in particular, that section 38 of the SDA be repealed and section 37 of the SDA be amended to ensure it does not apply to religious educational institutions.[6] These sections have long been out of step with contemporary Australian values and human rights jurisprudence.

However, there are three key concerns we have regarding the proposals in the Consultation Paper: the use of the term 'ethos' (**Part 4 of this submission**); the exempting of school curricula from the operation of the SDA (**Part 5**); and the construction of preferencing and termination provisions **(Part 6**). Enacting Proposals 7–10 in their current form would give rise to unnecessary public confusion and legal complexity, and would mean that the Terms of Reference of this inquiry – especially the second term, ensuring that a religious educational institution 'must not discriminate against a member of staff on the basis of sex, sexual orientation, gender identity, marital or relationship status or pregnancy' – would not be fulfilled. Further, it may cause difficulties with the system of harmonising and co-operation that presently allows the concurrent operation of federal, state and territory discrimination laws, and raise questions about the overriding of existing and proposed state and territory laws. Such

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4 Consistent with ADLEG's submissions on the various iterations of the proposed federal Religious Discrimination Bill: see, eg, ADLEG, *Submission to the Commonwealth Attorney-General's Department: Religious Discrimination Bill 2019 (Cth) Second Exposure Draft* (30 January 2020) <https://www.adleg.org.au/submissions/federal-religious-discrimination-bill-second-exposure-draft-jan-2020> 9.

5 *Discrimination Act 1991* (ACT) (**DA (ACT)**) s 7(1)(t) (religious conviction); *Anti-Discrimination Act 1992* (NT) (**ADA (NT)**) s 19(1)(m) (religious belief or activity); *Anti-Discrimination Act 1991* (Qld) (**ADA (Qld)**) s 7(i) (religious belief or religious activity); *Equal Opportunity Act 1984* (SA) s 85T(1)(f) (religious appearance or dress); *Anti-Discrimination Act 1998* (Tas) (**ADA (Tas)**) s 16(o), (p) (religious belief or affiliation, religious activity); *Equal Opportunity Act 2010* (Vic) (**EOA (Vic)**) s 6(n) (religious belief or activity); *Equal Opportunity Act 1984* (WA)(**EOA (WA)**) pt IV (religious conviction).

6 Consistent with ADLEG's various previous submissions on this matter: see, eg, ADLEG, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee: Inquiry into the Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018* (25 January 2019) <https://www.adleg.org.au/submissions/federal-religious-school-exceptions-jan-2019>; ADLEG, *Submission to the Senate Legal and Constitutional Affairs Committee: Religious Discrimination Bill 2021 and related bills* (22 December 2021) <https://drive.google.com/file/d/1dZilYvxj5y-LFEBesEqySn65kbrBTCF4/view> 22–23.

matters can be dealt with more appropriately through existing discrimination law and employment law provisions and definitions, and some related amendments.

As a result, we recommend below that:

- all references to 'ethos' be removed (**Part 4**);
- Proposals 7 (curriculum), 8 (preferencing) and 9 (termination) be removed (**Parts 5, 6.1 and 6.2)**;
- a new *Fair Work Act 2009* (Cth) (**FWA**) religious educational institution exception provision in regard to employment be grounded in a genuine occupational requirements test (**Part 6.3**); and
- in developing a federal law that prohibits religious discrimination, Proposal 10 be fulfilled by including standard discrimination law provisions on reasonableness in indirect discrimination, genuine occupational requirements, and special measures (**Part 6.4**).

ADLEG makes two additional recommendations in the final **Part 7** of this submission. First, Proposals 6 and 14 should be amended to extend protection against discrimination in the SDA to associates in the immediate tranche of reforms arising from this inquiry rather than deferring these for further consideration. Second, the 'Stage 2' reforms in Proposal 14 should recommend that the **FWA** adopt definitions of 'discrimination' and 'genuine occupational requirement' that align with the definitions found in federal discrimination laws (and, especially, to include practices that amount to indirect discrimination).

The Consultation Paper and its Proposals provide great promise for effective law reform on these complex matters, but the concerns noted below must be addressed to ensure compliance with international human rights law, the maintenance of robust federal, state and territory discrimination laws, and the entrenchment of consistent and coherent norms of equality and non-discrimination in Australia.

4. The use of 'ethos'

This Part applies to the Consultation Paper broadly, but especially Proposals 8, 9 and 10.

4.1 Australian discrimination laws do not use 'ethos'

The terms 'ethos', 'religious ethos' and 'institutional ethos'[7] are used throughout the Consultation Paper – some 38 times. To the extent that any organisation has an 'ethos', existing employment law provides mechanisms for ensuring that employees uphold such ethos.[8] There is no need to specifically include this term in the Proposals; its potential breadth could privilege religious educational institutions above all other employers.

There is not now and never has been a single reference to the term 'ethos' in any of Australia's 13 federal, state or territory discrimination laws. 'Ethos' has no meaning or history in Australian discrimination legislation; Australian discrimination case law has never considered its meaning or scope. The term does not appear in the international human rights treaties which provide a Constitutional basis for Commonwealth discrimination law: the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, and the *Convention on the Rights of the Child*, the *Convention on the Elimination of All Forms of Racial Discrimination*, the *Convention on the Elimination of all Forms of Discrimination Against Women* and the *Convention on the Rights of Persons with Disabilities*.

Discrimination legislation in the UK refers to 'ethos'.[9] There are, though, significant differences in the operation of the UK legislation and Australian laws. While adopting a comparative and international perspective on these issues is recommended, we caution against the use or transplantation of terminology used in foreign legislative schemes without an eye to the context in which they were originally adopted. In particular, it is worth noting with respect to the 'ethos' exception, this was incorporated to give effect to article 4(2) of the *European Union Equal Treatment Framework Directive*.[10] Consequently, at least when it was originally

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7 For the rest of this submission, the term 'ethos' is used to refer collectively to all three, and related, terms.

8 Two recent and significant cases of employers being able to limit the speech rights of employees are: *Rumble v The Partnership (T/as HWL Ebsworth Lawyers)* [2020] FCAFC 37 (13 March 2020), 275 FCR 423 (lawyer's comments adverse to the firm's clients justified his dismissal); *Comcare v Banerji* [2019] HCA 23 (7 August 2019), 267 CLR 373. But there are other examples and wider discussion of the limits employers can impose on employees (speech and action) in C Sappideen et al, *Macken's Law of Employment* (Thomson Reuters, 9th ed, 2022), [5.410] Duty to obey, [5.520] Duty of fidelity and loyalty, [5.780] Comment by an employee. The cases are usually about an employee who has spoken out or acted in a way that is seen to be adverse to the employer (or even the employer's clients). And specifically, in Sappideen et al, 254 (references omitted): 'Large organisations usually require employees to comply with media policies; these may be formally incorporated into the employment contract or may be binding as a lawful and reasonable direction. This is a very considerable restriction on the rights of an employee to comment in the public interest on the activities or policies of a particular employer.'

9 *Equality Act 2010* (UK) (**Equality Act (UK)**) c 15, sch 3, pt 1, s 11(b), (d); sch 9, pt 1, s 3; sch 11, pt 2, s 5(b); sch 12, pt 2, s 5(1)(b).

10 *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation* [2000] OJ L 303/16, art 4(2).

incorporated in the *Equality Act 2010* (UK) it was understood and interpreted with a consideration of the Court of Justice of the European Union (**CJEU**) jurisprudence on the meaning of the term 'ethos'. Additionally, the term 'ethos' within the *Equality Act 2010* (UK) needs to be considered within its legal, social and cultural context which includes the *Human Rights Act 1998* (UK) and the *European Convention on Human Rights*. In Australia, where there are no equivalent national or supra-national instruments that are applicable and with a different historical, legal, cultural and social context, the term 'ethos' lacks sufficient underpinning meaning to be useful.

We see no reason to import a concept of such nebulous nature into our laws without further definition or interrogation of its effect. Doing so runs the risk of unintended consequences, particularly the possibility of creating a much broader right to preference or terminate employment than currently exists under Australian law. Its meaning is not clear, could be inherently unchallengeable, and courts in interpreting it would have to consider evidence and decide the ethos of a religious institution – likely to be as controversial as it was in earlier state religious discrimination cases.[11] It would be confusing for all those seeking to comply with the law and those seeking to enforce it and resolve complaints, and undermine the overall clarity of the proposed reforms and, again, add to the complexity of laws that were intended to be accessible. Ethos could extend to practices beyond the scope of the right to freedom of religion and belief that is protected by article 18 of the *International Covenant on Civil and Political Rights* (**ICCPR**), and its scope is not clear in the absence of a definition of the term.

To the extent to which 'ethos' is used to refer to a student or staff member *respecting* or *adhering to* the religion of their educational institution, the language in use for half a century in Australian discrimination laws should be maintained to ensure consistency and coherency in approach. The majority of state and territory Australian discrimination laws and all federal Australian discrimination laws (that have such exceptions) define religious educational institutions or refer to their operation in terms of 'doctrines, tenets, beliefs, or teachings' or a subset of these terms.[12] These jurisdictions strike a well-worn and appropriate balance that requires at least some conformity with broader religious doctrine, and is less prone to misuse. (Of the remaining three jurisdictions: Victoria adds 'principles' to 'doctrines' and beliefs',[13] South Australia refers to 'precepts',[14] and the Northern Territory refers to 'purposes'.[15])

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[11] See, eg, *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* [2006] VSCA 284 (14 December 2006); *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155 (6 July 2010).

[12] *Sex Discrimination Act 1984* (Cth) (**SDA**) s 38 (doctrines, tenets, beliefs or teachings); *Age Discrimination Act 2004* (Cth) (**ADA**) s 35 (doctrines, tenets or beliefs); DA (ACT) (n 5) s 46(2) (doctrines, tenets, beliefs or teachings); *Anti-Discrimination Act 1977* (NSW) (**ADA (NSW)**) s 56(d) (doctrines); ADA (Qld) (n 5) ss 25(2), (3) (beliefs), 109(d)(i) (doctrines); ADA (Tas) (n 5) s 52(d) (doctrines); EOA (WA) (n 5) s 73 (doctrines, tenets, beliefs or teachings).

[13] EOA (Vic) (n 5) s 83 (doctrines, beliefs or principles).

[14] *Equal Opportunity Act 1984* (SA) (**EOA (SA)**) s 85ZE(5) (precepts).

[15] The Northern Territory defines religious bodies as being established for 'religious purposes' and applies its exception to 'religious observance or practice': ADA (NT) (n 5) s 51(d).

4.2 'Ethos' lacks sufficient definition in human rights jurisprudence

The 'Further Human Rights Analysis' contained in Appendix A of the Consultation Paper (**Appendix A**) provides an accurate and detailed consideration of the human rights basis for the protection of the rights to equality and non-discrimination, to education, and to religion. It also sets out the accepted test for how these rights ought to be protected and when these rights may be limited, and considers the role and situation of institutions in this assessment. That analysis notes concerns from the United Nations Human Rights Committee about religious institutions being permitted to 'discriminate against employees or prospective employees to protect the religious ethos of the institution'.[16]

The use of the term 'ethos' in the proposals does not appear to reflect the rigour or nuance of the human rights analysis set out in Appendix A. 'Ethos' lacks sufficient definition in existing jurisprudence – both discrimination law and international human rights law – and, without further grounding in human rights considerations, its protection may result in the limitation of human rights rather than serving to support their protection. Consistent with the analysis provided in Appendix A, any proposed protections of religious freedom should recognise that this is limited to what is necessary to ensure the protection of the right to freedom of religion and belief of individuals (including when practising in community), and only to the extent that such protection does not result in direct or indirect discrimination against anyone on the basis of other protected attributes under Australian discrimination laws. References to 'ethos' do not satisfy this.

4.3 Human rights protections do not attach directly to institutions

Beyond the uncertainty of the term 'ethos' and its lack of grounding in discrimination law or international human rights law, the Consultation Paper envisions that such ethos is attached to a particular religious educational institution.[17] This is in distinction to, for instance, how the SDA currently defines religious educational institutions as educational institutions 'conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed'.[18] The SDA construction, broadly adopted throughout Australia, attaches the doctrines, tenets, beliefs or teachings to a religion or creed, not an individual school or other education provider. Shifting this belief construction to that of the particular religious educational institution in question is a significant departure from existing Australian discrimination laws that will create inconsistency.

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16 ALRC, Consultation Paper (n 2) Appendix A [A.24]–[A.25].

17 See, eg, 'the religious ethos of the institution' in Proposition C1 and Proposition D of the ALRC, Consultation Paper (n 2) 22, 25.

18 SDA (n 12) s 38.

As stated in Appendix A, institutions themselves have no claim to human rights protections under international human rights treaties, but their actions may be protected to the extent that is necessary to support the protection of individual human rights. In the case of the right to freedom of religion and belief, which is often exercised in communion with others, it has been considered that institutional autonomy may support the protection of individual religious freedom, particularly in the context of minority religious communities. However, as noted in Appendix A, 'the autonomy of religious institutions "falls within the *forum externum* dimension of freedom of religion or belief which, if the need arises, can be restricted in conformity with [article 18(3) of the ICCPR]".'[19] Further, this autonomy can only be justified on a human rights basis to the extent that it supports the right to freedom of religion and belief of individuals.

This means that institutional autonomy can be validly restricted in order to fulfil a legitimate government purpose and, particularly, to protect the rights of individuals – such as the rights to equality and non-discrimination, and to education. Additionally, the human rights basis of the protection of institutional autonomy would be compromised or even directly contradicted when it serves to limit an individual's right to freedom of religion and belief. This may occur, for example, where the protection of institutional autonomy acts to limit 'the religious freedom of dissidents within a religion "to come up with alternative views, provide new readings of religious sources and try to exercise influence on a community's religious self-understanding, which may change over time"; forces women, girls and LGBT+ persons to choose between their religion and equality,[20] or limits the right of parents to have their child educated at a school consistent with their beliefs.

The use of 'ethos' and, especially, 'institutional ethos' throughout the Consultation Paper places far too much emphasis on religious educational authorities as individual institutions, with a lack of certainty about who would determine the 'ethos' of such authorities, and how. The question arises: what rights would parents, teachers and students have – each with their own individual right to freedom of religion and belief – to determine the ever-evolving religious ethos of their educational institution? These communities may – and often do[21] – disagree as to the ethos they attach to the religion, or religious educational institution, in question. How are such disagreements to be conveyed, discussed or resolved when ultimate deference appears, through this Consultation Paper, to be given to the governing bodies of such institutions?

While the (qualified) right to manifest one's religious belief is likely to support a limited right of religious educational authorities to preference employees and, in narrower circumstances,

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19 ALRC, Consultation Paper (n 2) 40, citing Heiner Bielefeldt, *Elimination of All Forms of Religious Intolerance*, UN Doc A/68/290 (7 August 2013) [60].

20 ALRC, Consultation Paper (n 2) 40–41, citing Heiner Bielefeldt, *Elimination of All Forms of Religious Intolerance*, UN Doc A/68/290 (7 August 2013) [60], and Ahmed Shaheed, *Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/HRC/43/48 (24 August 2020) [48], [51].

21 Susan Chenery and Kristian Murray, 'How Citipointe Christian College's "sexuality contract" brought queer students out of the shadows and onto the national stage', *ABC News* (online), 31 October 2022) <https://www.abc.net.au/news/2022-10-31/faith-versus-freedom-consequences-of-a-clash-of-values/101293004>.

terminate employment, international human rights law requires that this be done by reference to higher principles of the right to freedom of religion and belief, which is then facilitated by the existence of such educational authorities, not directly through the particular ethos of such institutions. While religious educational institutions undoubtedly adhere to particular values, cultures, and beliefs, these can be protected through other means.

Recommendation 1: That the term 'ethos' be removed from all proposed reforms.

Recommendation 2: That Proposals 1–6 and 11–14 otherwise be accepted and implemented.

5. Exempting school curricula from the *Sex Discrimination Act*

This Part applies to Proposal 7.

In general, religious educational institutions should be permitted to teach religious doctrine in a way that accords with their duty of care to students and the requirements of the curriculum, as reflected in Proposition A3. In such circumstances, religious educational institutions are unlikely to breach the SDA. Many, if not all, religious educational institutions are able to teach school curricula without discriminating against students or staff on the basis of sex, sexual orientation, gender identity, or other protected attributes.

However, accepting Proposition A3 does not lead to the conclusion that the content of the curriculum should be explicitly excluded from the purview of the SDA. Proposal 7 is too wide in scope and likely to lead to unintended negative consequences.

If curriculum content with respect to sex, sexual orientation, or gender roles would be in breach of a school's duty of care to their students or in contravention of state and territory curriculum requirements, then it is likely that the content is harmful *because* the content is discriminatory on grounds protected in the SDA (such as sex and/or sexual orientation). In that context, it would seem counter-intuitive and contrary to Principle 4 that such content could be exempted under the SDA despite it being in breach of the school's duty of care and of the curriculum standards *because it is harmful on the basis of sex*. Implementing this proposal would undermine the overall rationale of the other proposed reforms and has no logical basis. If this inquiry is to remove discrimination against staff and students on the basis of attributes protected in the SDA, then it cannot allow such discrimination in the content taught by those staff and learnt by those students.

In considering the broader purposes of discrimination law, there is no principled reason that the content of the curriculum should be entirely excluded from the SDA. Amongst other harms, discrimination law is understood to protect people from expressive harms. Expressive harms can be understood as societal indications that some persons are less worthy of respect and dignity because of traits that they hold.[22]

This underlying purpose of discrimination law can be found in the 50-year history of Australian policymakers choosing particular protected attributes on which discrimination should be prohibited. These include characteristics such as sex and sexual orientation, which have had long histories of marginalisation and exclusion. Such a history of marginalisation and exclusion

[22] See, eg, Deborah Hellman, *When is Discrimination Wrong?* (Harvard University Press, 2008); Elizabeth Anderson and Richard Pildes, 'Expressive Theories of Law: A General Restatement' (2000) 148(5) *University of Pennsylvania Law Review* 1503; Sophia Moreau, *Faces of Inequality: A Theory of Wrongful Discrimination* (Oxford University Press, 2020) ch 2. See also the discussion of expressive harms in a schooling context in *HM Chief Inspector of Education, Children's Services and Skills v The Interim Executive Board of Al Hijrah* [2017] EWCA Civ 1426 [134]–[156] (Gloster LJ).

includes the ways in which women and LGBTIQ+ individuals have been considered fundamentally different and inferior in ways modern pluralistic societies generally consider unjustified and unacceptable. However, such views continue to be held and expressed by some, and long histories of marginalisation continue to have implications particularly with respect to stereotyped attitudes and views about girls and women, their role in the family and society, and their entitlement to equal opportunities in society more broadly. Similarly, stereotyped views of and attitudes towards members of the LGBTIQ+ community continue to negatively affect members of that community both through behaviour (including words) directed to them and through (consequential) internalised negative views.

Protecting young people from such expressive harms is particularly important in the context of schooling. School is where students learn formative lessons with respect to gendered and sexual expectations and their individual worth and the worth of their peers, often grounded in the attributes that they each hold. Such formative lessons are, in significant part, learnt from messaging contained within the content of the school curriculum or in extra-curricular aspects of school life. Such content could be discriminatory on the basis of sex, gender and sexual orientation without that conduct necessarily being considered 'haranguing, harassing or berating' of a particular student or group of students.[23] This has direct negative impacts on those students who have the particular trait or attribute but can also affect, in negative ways, the conduct of other students towards them. If, in particular, people in positions of authority within educational institutions speak in terms that are discriminatory towards groups protected under the SDA, this may tacitly authorise others at the institution – including students – to further harm those groups through harassment, bullying, vilification, or discrimination. Students who are 'different' to the norm are the very groups who are intended to be protected by, not excluded from, the SDA.

The harms done to students – children – in being exposed to such teachings cannot be consistent with religious educational institutions fulfilling their duty of care. However, there remains a range of barriers to bringing tort law claims for breaches of duties of care in Australia. Discrimination laws are intended to create a more accessible and less costly legal route through which to challenge actions based in prejudice and stereotyping that cause harm, especially through conciliation processes. Excluding them from the remit of claims regarding school curricula merely because tort law provides an alternative route to legal recourse (only in *some* instances) undermines access to justice for claimants who ordinarily do not have the time, resources and support required for a lengthy and complex tort claim. This would also artificially remove from the scope of discrimination law those actions which are, otherwise, discriminatory; this could only further complicate Australia's framework for protection against discrimination. Considering the SDA does not currently prohibit vilification on the basis of any of its protected attributes, it is even more important that prohibitions on discrimination are not undermined and continue to apply.

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[23] As per the Equality Act (UK) (n 9) c 15, ss 89(2), 94(2); ALRC, Consultation Paper (n 2) 32.

As Proposal 7 purports to exclude school curricula from the *entirety* of the SDA rather than particular prohibitions or exceptions on which this inquiry is focused, there may also be broader unintended consequences of which we are not yet aware. The relationship of discrimination law with national curriculum standards and state and territory curriculum content regulations raises further concerns as to what significant changes to the former might do to the latter.[24]

As noted in Principle 5 of the Consultation Paper, students should be at the centre of this inquiry; '[t]he design of policy that impacts students must place at its heart the best interests of those students.'[25] Excluding school curricula from the remit of the SDA only serves to undermine this. Religious educational institutions can, and often do, teach religious doctrine in ways that accord with their duty of care to students and the requirements of the curriculum by not discriminating against their staff or students on the basis of sex, sexual orientation or gender identity. Proposal 7 is a solution in search of a problem.

Recommendation 3: That Proposal 7 (school curriculum) be rejected.

24 On this, see further *Australian Curriculum, Assessment and Reporting Authority Act 2008* (Cth) s 6(a).
25 ALRC, Consultation Paper (n 2) 9.

6. Allowing religious schools to preference and terminate staff

This Part applies to Proposals 8, 9 and 10.

6.1 The status quo

Australian law currently allows a wide scope for religious educational institutions to preference and terminate staff.

Under the *Fair Work Act 2009* (Cth) (**FWA**), the starting point is that discriminatory terms in modern awards and enterprise agreements are prohibited on the basis of attributes including sex, sexual orientation, and religion.[26] However, gaping holes are carved into this prohibition. Namely, as noted in the Consultation Paper, this prohibition might not encompass indirect discrimination.[27] The question is still unresolved after 12 years of the law in operation, but the best indications are that the Fair Work Commission and the courts regard sections 153 and 195 as encompassing only direct discrimination. Further, even for direct discrimination, religious bodies are exempted from this prohibition when the discrimination is in good faith and is to avoid injury to the religious susceptibilities of adherents of the religion.[28] These exceptions are found in sections 153(2)(b) and 195(2)(b), amongst others.[29] This privileges the religious susceptibilities of adherents of the religion (not necessarily based in its doctrines and tenets) above the non-discrimination rights of employees.

This means that *hardly any* terms in modern awards or enterprise agreements that may be discriminatory will be caught by the FWA prohibition: either they will not be prohibited (as they fall within indirect discrimination) or they will be permitted by an exception (if they fall within direct discrimination). This is especially the case in considering the type of terms that fall within the scope of this inquiry.

For instance, consider a term in an enterprise agreement that requires all employees of a religious educational institution to limit their familial relations to those permitted by the institution's religious views, where the institution's views recognise that only a married man and woman should bear and raise children. Various staff members could run afoul of this term: a single mother, a single mother who accesses a sperm donor so that she can raise a child on her own; a lesbian couple who undergo IVF; or a gay male couple who are fostering children. In such a situation, a general policy is applied across the board which has a disadvantageous effect on certain groups with protected attributes (sexual orientation, pregnancy, and marital or

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26 *Fair Work Act 2009* (Cth) (**FWA**) ss 153(1), 195(1).

27 ALRC, Consultation Paper (n 2) 15; *Minister for Industrial Relations v Metropolitan Fire and Emergency Services Board* [2019] IR 1, [68]–[73].

28 FWA (n 26) ss 153(2)(b), 195(2)(b). This is also the case for the FWA prohibition on discrimination under s 351(1) by operation of the exception in s 351(2)(c).

29 The same exception is found in individual claims provisions: FWA (n 26) s 351(2)(b) relating to adverse action and s 772(2)(b) relating to unlawful termination.

relationship status). This falls squarely within indirect discrimination – which, as noted, the FWA prohibitions in sections 153 and 195 likely do not encompass (or, if they do, would likely be caught by the religious body exception). For these workers, their inability to comply with this term would expose them to disciplinary action in their employment, even dismissal, without this being subjected to a test of reasonableness (as it would be under discrimination laws). Similarly, enterprise agreement terms such as 'staff must live by the ethos of this religion as a condition of employment', or requiring staff to sign annual 'statements of faith',[30] would likely be lawful no matter their interpretation or application.

Currently, the SDA is largely consistent with the FWA approach. Nothing done by a religious educational institution in relation to employment is unlawful discrimination if they are acting in good faith in order to avoid injury to the religious susceptibilities of adherents of their religion.[31] As such, the status quo is the same under both laws: religious educational institutions can, largely, discriminate in employment on the basis of sex, sexual orientation, gender identity, and other related attributes.

This is important because section 40(1)(g) of the SDA provides an exception to discrimination where a person is acting in direct compliance with a 'fair work instrument', within the meaning of the FWA. Under the FWA, fair work instruments include modern awards and enterprise agreements.[32] This allows enterprise agreements in part, to override the SDA in such circumstances. The legislative note to section 40(1)(g) suggests that any discriminatory terms in fair work instruments have 'no effect'[33] (and therefore cannot be relied upon for the purposes of this exception). However, as noted above, this is likely limited to directly discriminatory terms, since the prohibition on discriminatory terms in the FWA probably does not prohibit indirect discrimination.

Under the status quo arrangement, section 40(1)(g) is not of great significance as regards the scope of this inquiry because the SDA and FWA largely permit identical conduct by religious educational institutions in relation to employment. While both laws provide only minimal restriction on the conduct of religious educational institutions, it is not obvious or significant how the FWA overrides the SDA. Changing one law, however, requires us to reconsider this override.

6.2 The ALRC proposals

Were the 14 ALRC Proposals to be implemented in law, the status quo would change. These changes would mean that the SDA would prohibit indirect discrimination by religious

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30 See, eg, Ben Smee, 'Brisbane's Citipointe Christian College withdraws anti-gay contract but defends "statement of faith"', *The Guardian* (online) 3 February 2022 <https://www.theguardian.com/australia-news/2022/feb/03/brisbanes-citipointe-christian-college-withdraws-anti-gay-contract-but-defends-statement-of-faith>.

31 SDA (n 12) s 38(1).

32 SDA (n 12) s 40(1)(g)(i); FWA (n 26) s 12.

33 Mirroring FWA (n 26) s 253(1)(b), which provides that unlawful terms (including discriminatory terms) of enterprise agreements have 'no effect'.

educational institutions on the basis of sex, sexual orientation, gender identity and other related grounds, while the FWA would likely allow such indirect discrimination by religious educational institutions. This would occur both generally (through not clearly including indirect discrimination in its definition of discrimination) and in the terms and application of enterprise agreements (through focusing only on directly discriminatory terms). It would also likely lead to the FWA overriding the SDA.

Through the ALRC Proposals 2 and 3, section 38 of the SDA would be repealed, and section 37(1)(d) amended accordingly, which means that religious educational institutions would be entirely prohibited from discriminating in employment against staff on the basis of sex, sexual orientation, gender identity and related grounds (with the exception of the school curricula exception in Proposal 7, which we oppose: see **Part 5**, above). The religious body exceptions to discrimination on these grounds found in sections 153(2)(b) and 195(2)(b) of the FWA, amongst others, would also be removed via Proposal 5. Were these to be the only proposals, the two laws would align at least as regards direct discrimination.

However the proposed FWA amendments go further. Proposals 8 and 9 would insert new exceptions into the FWA, in relation to the definition of discrimination in sections 153 and 195, if certain requirements are met. These are narrower exceptions than the existing FWA exceptions in sections 153(2)(b) and 195(2)(b). The proposals would:

- limit the exceptions to apply only to discrimination on the basis of religion;
- require that the treatment must not constitute discrimination on any other protected ground;
- require that the treatment must be proportionate in the circumstances; and
- include a genuine occupational requirement (for preferencing) or consideration (for termination).

We are concerned that these proposed limitations both include the nebulous concept of 'ethos', which as above in **Part 4** we oppose, and appear to encompass a pre-emptive right to terminate to 'prevent' active undermining of their ethos, for instance where a school 'discovers' that a staff member is transgender or gender diverse, or pregnant, or married in contradiction to particular religious views. Permitting preferencing or termination on the expectation of conduct that may breach the 'ethos' is quite unusual and would normally be dealt with through general provisions for seeking interlocutory relief. Aside from these concerns, the proposing of additional limitations on the religious educational institution exceptions in the FWA is largely positive in principle – especially when considering the undue breadth of the existing FWA exceptions.

However, Proposals 8 and 9 run into significant practical difficulties. Namely, the requirement that the preferencing or termination should not constitute discrimination on any other ground prohibited by sections 153(1) or 195(1) is limited by the fact that the FWA has been interpreted to deal only with *direct* discrimination, as above. This means that this requirement probably

does *not* prohibit preferencing or termination where it is *indirectly* discriminatory on the basis of sex, sexual orientation, gender identity or related grounds. The reasons for this are:

1. The FWA currently provides that discriminatory terms in modern awards and enterprise agreements, subject to wide exceptions, are of no effect.[34]
2. The new Proposal 8 and 9 exceptions would entrench this for terms which *directly* discriminate on the basis of all grounds other than religion (ie, they cannot rely on the new exceptions and, therefore, are of no effect).
3. However, these new exceptions would not apply to terms which *indirectly* discriminate on the basis of these other grounds, including sex, sexual orientation and gender identity; the FWA would still approve and give effect to these terms.
4. Even if these proposed new religious educational institution exceptions were amended to apply to terms which indirectly discriminate, the FWA would still approve and give effect to indirectly discriminatory terms in the first place because indirect discrimination is permitted (ie, there is no prohibition on such terms, and therefore no scope for the exception to be relevant).
5. Without further amendments, terms in enterprise agreements will therefore be permitted to indirectly discriminate *on any ground*: both because they are not within the scope of the new FWA exceptions, and would not be considered discriminatory at all by the FWA.

Proposals 8 and 9, as they are currently drafted, would therefore provide an alternative route in the FWA to discriminate on the basis of the attributes protected by the SDA. If Proposals 8 and 9 were implemented in these terms, the second Term of Reference of this inquiry – that amendments should be made to ensure that a religious educational institution 'must not discriminate against a member of staff on the basis of sex, sexual orientation, gender identity, marital or relationship status or pregnancy' – would not be fulfilled.

As such, while the ALRC notes in the Proposition D examples that this should have the effect of ensuring a school cannot terminate the employment of a lesbian teacher merely by her entering into a marriage with a woman, our interpretation is that it could.

This is especially critical because of the operation of section 40(1)(g) of the SDA. When the SDA and FWA are consistent, this provision has little effect. But were the ALRC Proposals to be implemented, the two laws would be inconsistent:

- the SDA would prohibit indirect discrimination by religious educational institutions on the basis of sex, sexual orientation, gender identity and other related grounds,
- while the FWA would likely allow such indirect discrimination by religious educational institutions through enterprise agreements,
- and, if section 40(1)(g) of the SDA is retained, the enterprise agreements provisions would prevail over the SDA protections.

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[34] FWA (n 26) ss 153, 195, 253.

The vast majority of employment terms considered by this inquiry would likely fall within indirect discrimination. For example, there are, within existing enterprise agreements at religious educational institutions, 'live the faith' provisions applied at a broad level, that may disadvantage certain groups on the basis of a protected ground.[35]

Were such provisions to be included in enterprise agreements, the law would apparently be taking away these exceptions with one hand (SDA sections 37 and 38), but leaving them intact on the other hand (SDA section 40(1)(g) and the FWA). More precisely: enterprise agreements under the FWA would override the SDA protections. In relation to those agreements, this would undermine the repeal of section 38 and, indeed, the purpose and Terms of Reference of this inquiry.

Recommendation 4: That Proposals 8 (preferencing) and 9 (termination) be rejected.

Relatedly, there are two additional concerns that warrant further examination.

First, enterprise agreement terms may also override state and territory discrimination laws through a section 109 *Australian Constitution* inconsistency. Were this to occur, it would significantly undermine the operation of discrimination laws in Australia and throw the entire system into confusion.[36] Sections 26 and 27 of the FWA indicate that the FWA is not intended to override the state and territory discrimination law schemes and the same would likely apply to enterprise agreements, which are legislative instruments made under the FWA. This could, and should, be reviewed further to ensure the effect of these sections is that there is no 'real conflict' between the FWA and state and territory discrimination laws that would enliven section 109 of the *Australian Constitution* and thereby override existing state and territory protections.

Second, a valid term of a FWA enterprise agreement might limit protections against discrimination afforded by section 351 of the FWA because section 342(3) exempts 'adverse action' that is 'authorised by or under' the FWA.

This provides a further reason, beyond the SDA override, to carefully consider the definition and effect of discriminatory terms in awards and agreements.

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35 See, eg, *Christian Schools Tasmania Enterprise Agreement (Teachers) 2019* (AG2018/6729) [2019] FWCA 410; *Christian Community Ministries Schools Enterprise Agreement 2020* (AG2019/5112) [2020] FWCA 507.

36 See, similarly, ADLEG's arguments against the 'statement of belief' override provision in the formerly-proposed federal Religious Discrimination Bill: ADLEG, *Submission to the Commonwealth Attorney-General's Department: Religious Discrimination Bill 2019 (Cth) Second Exposure Draft* (30 January 2020) <https://www.adleg.org.au/submissions/federal-religious-discrimination-bill-second-exposure-draft-jan-2020> 10–15.

6.3 A better path forward

If the status quo position permits discrimination by religious educational institutions against staff on the basis of sex, sexual orientation, gender identity and related grounds, and the ALRC proposals would continue this situation as regards indirect discrimination *and* likely lead to a FWA override of the SDA, then a different path is required to fulfil the Terms of Reference of this inquiry.

As a starting point, section 40(1)(g) remains a key roadblock to the reforms proposed in this inquiry, because it allows employers to use FWA enterprise agreements to override the SDA. Its removal would unlock the Proposals, and ensure that repealing section 38 of the SDA will enshrine a prohibition on religious educational institutions of discrimination on the basis of sex, sexual orientation, gender identity and related grounds.

We are unaware of any reason section 40(1)(g) should remain. However, in the absence of further research and rigorous consideration of whether section 40(1)(g) can be repealed in its entirety – which should be subject to further review – the best solution to ensure the FWA does not override the SDA as regards indirectly discriminatory 'fair work instruments' is to exclude religious educational institutions from its remit.

Recommendation 5: That section 40(1)(g) of the *Sex Discrimination Act 1984* (Cth) (exception for 'fair work instruments') should be amended to exclude religious educational institutions from its remit and, subject to a wider review, be repealed.

Armed with the implementation of Recommendation 5, a new FWA provision can replace Proposals 8 and 9 to ensure Propositions C and D are implemented: namely, that religious educational institutions should be able to have some rights to preference and terminate staff.

We see no principled basis for distinguishing between 'preferencing' and 'termination' in an exception to discrimination for religious educational institutions. Both fall within the broader remit of 'employment', an area of activity in which discrimination is prohibited under all Australian discrimination laws, and under which exceptions rarely distinguish between 'preferencing' and 'termination'.[37] As such, we recommend that a new proposal, to replace Proposals 8 and 9, use the term 'employment' to encompass both preferencing and termination together (and similarly be adopted in a future federal law prohibiting religious discrimination). To the extent to which it is argued that an employee has greater rights, and therefore protections from termination, than a prospective employee, in relation to preferencing, the inclusion of an objective requirement such as 'reasonableness' can allow this to be taken into account. More specifically, this could allow a court to determine that a higher standard be required to establish that a termination is 'reasonable' than required to establish that a 'preferencing' is reasonable.

[37] One main exception is the DA (ACT) (n 5) ss 44, 46.

We argue in **Part 6.4**, below, that a separate religious educational institution exception is not required in a future federal law prohibiting religious discrimination, were it to contain standard discrimination law provisions on genuine occupational requirements, special measures, and reasonableness as regards indirect discrimination. However, the FWA does not contain provisions on genuine occupational requirements, and likely does not prohibit indirect discrimination. Further, the Fair Work Commission oversees the approval of enterprise agreements in advance of their operation and clarity should be provided, where possible, as to whether terms in those agreements would be discriminatory. For these reasons, the FWA should include a separate religious educational institution exception, to replace the operation of the existing religious body exceptions in sections 153(2) and 193(2).

6.3.1 Existing religious exceptions in Australia

Turning to the construction of such a provision, existing religious educational institution exceptions found in federal, state and territory discrimination laws in Australia can assist. Through a thorough review of these, a range of options arise. These can broadly be categorised into narrow exceptions (ie, more difficult to satisfy), moderate exceptions, and broad exceptions (ie, less difficult to satisfy). These are summarised in Tables 1, 2 and 3 below.

Table 1: Narrow exceptions

Jurisdiction	**Requirements**
Victoria[38] and Western Australia (newly proposed)[39]	• conformity with the doctrines, beliefs or principles of the religious body's religion is an inherent requirement of the position; • the other person cannot meet that inherent requirement because of their religious belief or activity; and • the discrimination is reasonable and proportionate in the circumstances.

Table 2: Moderate exceptions

Jurisdiction	**Requirements**
ALRC proposal[40]	• participation of the employee in the teaching, observance or practice of religion is a genuine occupational requirement; • the treatment is not discrimination on any other ground; and • the treatment is proportionate in all the circumstances.
Tasmania (religious bodies)[41]	• participation of the person in the observance or practice of the religion is a genuine occupational qualification or requirement

38 EOA (Vic) (n 5) s 82A.
39 Law Reform Commission of Western Australia, *Report on Project 111: Review of the Equal Opportunity Act 1984* (WA) (August 2022) Recommendation 79.
40 ALRC, Consultation Paper (n 2) Proposal 8.
41 ADA (Tas) (n 5) s 51(1).

Jurisdiction	Requirements
Queensland (newly proposed)[42]	• participation in the teaching, observance or practice of the religion is a genuine occupational requirement; and • the conduct is reasonable and proportionate in the circumstances
Queensland (existing)[43]	• religion is a genuine occupational requirement of the employment; or • the discrimination is not unreasonable, where the employee openly acts in a way that they know or ought reasonably to know is contrary to the employer's religious beliefs, in the course of the person's work (or in connection with the work), where it is a genuine occupational requirement that the person act consistently with the employer's religious beliefs
Australian Capital Territory[44]	• for selection and appointment: the duties of their employment involve, or would involve, the participation by the employee in the teaching, observance or practice of the religion; or • in general: the discrimination is intended to enable, or better enable, the institution to be conducted in accordance with its doctrines, tenets, beliefs or teachings, as long as there is a published policy accessible to current and prospective employees

Table 3: Broad exceptions

Jurisdiction	Requirements
Federal (SDA)[45]	• acts in good faith in order to avoid injury to the religious susceptibilities of adherents of the same religion or creed
Tasmania (religious schools)[46]	• the discrimination is in order to enable, or better enable, the educational institution to be conducted in accordance with its tenets, beliefs, teachings, principles or practices
Western Australia (existing)[47]	• the duties of the employment are connected with the participation of the employee in any religious observance or practice

42 Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (July 2022) Recommendation 39.
43 ADA (Qld) (n 5) s 25.
44 DA (ACT) (n 5) ss 44, 46.
45 SDA (n 12) s 38(1).
46 ADA (Tas) (n 5) s 51(2).
47 EOA (WA) (n 5) s 66(1).

6.3.2 ADLEG proposal

An appropriate path forward for the FWA, reflecting the balanced human rights basis of this submission, lies in a combination of the moderate exceptions; namely through bringing together the most effective parts of the ALRC approach, the Tasmanian approach for religious bodies, and the newly proposed Queensland approach, found in Recommendation 6 below.

Our proposal is grounded in several key principles:

1. The proposal should **extend beyond a mere exception to the prohibitions on discrimination**, as indirect discrimination is likely not prohibited by the FWA and would therefore remain permitted no matter the construction of the exception.
    - The amendment should therefore avoid the language 'does not discriminate', used in both sections 153(2) and 195(3) and Proposals 8 and 9, because this has the effect of being only an exception to the existing FWA prohibitions on discrimination. Instead, the amendment could provide that religious educational institutions cannot rely on a term of a modern award or enterprise agreement to directly or indirectly discriminate in employment, other than where certain requirements are met. This, in effect, flips the operation of the provision from a negative construction to a positive construction, and would address the problems identified in **Part 6.2**, above.
2. The proposal should **frame the act in question as 'conduct' rather than 'discrimination'**; if the provision is satisfied the conduct should not be deemed to be unlawful discrimination.
3. The proposal should be **anchored in the concept of genuine occupational requirements**, which is not as difficult to establish or as narrow as inherent requirements but which still ensures that there is a verifiable and principled basis for the exception.
4. The proposal should **ensure that the conduct not be discrimination (direct or indirect) on any other grounds**, to cut off the alternative route to discrimination that this inquiry is intended to prohibit.
5. The proposal **should include objective measurements to ensure the test is not vulnerable to misuse**, and to allow flexibility in approach by the court depending on whether the conduct pertains to preferencing, to termination, or to some other conduct.
    - The terms 'reasonable and proportionate', in particular, help achieve this and are now becoming standard practice through recent state and territory law reform processes on this very issue. Such tests often include a list of factors that must be considered in making the assessment.
    - In determining what is 'reasonable and proportionate', consideration should be given to whether permitting discrimination would exclude a prospective employee from any employment in the religious educational institution and what other non-discriminatory employment opportunities would be available within the geographic area. The impact of permitting discrimination on the basis of religion in religious educational institutions has the potential to negatively

impact on employment opportunities in regional and remote areas in particular, and could have a substantial impact on qualified primary school teachers across Australia,[48] of whom a significant percentage would be in regional and remote areas[49] where alternative employment opportunities are more limited.

6. The proposal **should apply to both employees and prospective employees**, reflecting Proposition B1.

ADLEG's Recommendation 6, below, implements these key principles in reforming the FWA.

Recommendation 6: That a new proposal to replace Proposals 8 and 9, applying to employment, provide that:

> The *Fair Work Act 2009* (Cth) should be amended to say that a religious educational institution is not permitted to rely on a term of a modern award or enterprise agreement to discriminate directly or indirectly in employment other than where:
>
> (1) the conduct is on the ground of religion where the participation of the person in the observance or practice of a particular religion is a genuine occupational requirement in relation to the employment;
>
> (2) the conduct does not constitute discrimination, whether direct or indirect, on any other ground prohibited by sections 153(1) or 195(1), respectively;
>
> (3) the conduct is reasonable and proportionate in the circumstances.
>
> The *Fair Work Act 2009* (Cth) should be further amended such that religion is a permissible ground of termination, despite section 772(1)(f), in the circumstances set out above.

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48 Because primary school classroom teachers are often teaching the same cohort of students across a range of subjects, including religion, it would be possible for the proposed 'genuine occupational requirement' approach to result in the exclusion of any teachers not of that religion. In respect of Catholic Primary Schools, for example, this would affect approximately 50,000 staff members: National Catholic Education Commission, *Australian Catholic Education Statistics 2021: Report*, 3, Statistical Snapshot 2021, Table: Staff <https://www ncec.catholic.edu.au/schools/catholic-education-statistics/file>. According to the Australian Bureau of Statistics, in 2021, Catholic school staff represented 19% of all school staff in Australia, while staff at other independent schools represented 18% of all school staff: Australian Bureau of Statistics, *Schools, Australia 2021: Table 50a: Number of In-School Staff by Function, Sex and Affiliation, States and Territories, 2006–2021*. This means, almost 40% of roles in primary and secondary education in Australia could, under a preferencing provision, be affected by religious requirements.

49 National Catholic Education Commission, *School Funding in Australia: Factsheet*, 1, Snapshot of Australian Catholic Education, which indicates 38% of all Catholic schools are in regional and remote areas <https://www ncec.catholic.edu.au/resources/publications/615-catholic-education-school-funding-factsheet-2022/file>. The available data does not indicate the percentage for Primary Schools, but it is likely to be higher than 38%.

6.4 A future federal prohibition on religious discrimination

ADLEG continues to strongly support the enactment of federal protections against discrimination on the basis of religion, consistent with Australia's international law obligations and with Australia's existing federal discrimination laws. We welcome the proposal in Stage 1 to enact such protections at the federal level. The development of such protections must, and we expect would, include opportunity for further consultation, especially when a draft Bill is available. It is important to ensure such a Bill is carefully examined and scrutinised, including its relationship with the FWA and other laws, following the failed three-year process of the previously proposed federal Religious Discrimination Bill and its numerous concerning provisions. We will engage fully and thoroughly with such a future process.

However, in the meantime it is important to respond to the proposed construction of preferencing and termination exceptions for religious educational institutions (in Proposal 10) in such future provisions, while noting that the intricacies of this depend on the construction and drafting of such legislative provisions, which are not yet available for consideration.

For the reasons noted in **Parts 6.1, 6.2** and **6.3**, above, there should be consistency between federal discrimination laws and the FWA. However, we do not consider that consistency between these various pieces of legislation requires that any federal law prohibiting religious discrimination needs to include specific provisions on preferencing or termination. The reason for this is that common, long-standing provisions in federal discrimination laws, some of which are not found in the FWA, already have the capacity to allow for preferencing and termination in the manner envisaged by the Consultation Paper. Consequently, if any federal law prohibiting religious discrimination was enacted with similar provisions to those contained in other federal discrimination laws, there would be no need for special exceptions for religious educational institutions.

6.4.1 Protected attribute

As a starting point, the attribute/s protected by a future federal law prohibiting religious discrimination should be carefully considered. The FWA constructs the relevant protected attribute as 'religion'; future federal religious discrimination protections may adopt the previous Bill's construction of 'religious belief or activity'. It would be preferable to specify that discrimination should be expressly limited to *religion* rather than individual religious beliefs or activities. This limits the capacity for such a provision to be used as an alternative route to discriminate on the basis of other protected attributes, such as sex, sexual orientation, or gender identity, since granular and individual interpretations of religious beliefs are often what leads to this alternative route. Further, it is important to recognise, within reason, the plurality of beliefs within particular religions.

6.4.2 Prohibitions on discrimination

As with other federal discrimination laws, both direct and indirect discrimination on the basis of religion should be prohibited in this future law. Discrimination laws in Australia define

direct discrimination as less favourable,[50] or unfavourable[51] treatment on the basis of an attribute that an individual holds. Thus a federal law prohibiting religious discrimination would, more specifically, prohibit less favourable or unfavourable treatment on the basis of a person's religion. Proposal 10 notes the need to allow religious educational institutions to take action to prevent a staff member from actively undermining the culture and values of the organisation. However, under a future federal law prohibiting religious discrimination, such action is unlikely to be direct discrimination on the basis of religion but instead to fall within indirect discrimination, since it is likely to relate to situations in which an employee has failed to comply with a condition, requirement or practice of the religious educational institution, such as 'employees cannot undermine our values.'

All federal discrimination laws prohibit indirect discrimination.[52] This is where a condition, requirement or practice disadvantages a person because of an attribute that they hold *and* is not reasonable in the circumstances. Consistently across each of the federal discrimination laws, such conditions, requirements and practices are lawful if they are found to be reasonable based on the circumstances of the case.[53] Reasonableness can be assessed by balancing the needs of, and impact on, both the duty-bearer and the complainant, whether the outcome can be achieved while reducing or removing the disadvantage,[54] and considering whether the disadvantage to a complainant is proportionate to the outcome or result sought by the duty-bearer imposing the requirement.[55] Religious educational institutions which require staff to support the institution's culture or values, or alternatively to 'live by the faith' would have the capacity to argue that such requirements are reasonable notwithstanding any disadvantage caused on the basis of religion. Consequently, utilising ordinary provisions in Australian discrimination law, religious educational institutions would be able to require that staff not actively undermine the faith of the school so long as the requirement is reasonable in the circumstances. In addition, doctrines of employment law noted at **footnote 8** above and in **Part 6.5** below will be applicable to support a religious educational authority in these situations.

6.4.3 Exceptions to the prohibitions

Even if they were unable to do this, or if direct discrimination were established in the circumstances, there are two key exceptions incorporated into federal discrimination laws which may still render lawful the conduct of a religious educational institution in such circumstances: genuine occupational requirements, and special measures.

The exception relating to genuine occupational requirements allows duty-bearers (including religious educational institutions) to discriminate on the basis of an attribute when hiring or engaging a worker to fulfil a role where there is a genuine occupational requirement for the

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50 See, eg, SDA (n 12) s 5(1); *Disability Discrimination Act 1992* (Cth) (**DDA**) s 5(1); ADA (n 12) s 14.
51 DA (ACT) (n 5) s 8(2); EOA (Vic) (n 5) s 8.
52 See, eg, *Racial Discrimination Act 1975* (Cth) (**RDA**) s 9(1A); SDA (n 12) s 5(2); DDA (n 50) s 6(1), ADA (n 12) s 15.
53 RDA (n 52) s 9(1A); SDA (n 12) s 7B; DDA (n 50) s 6(1), ADA (n 12) s 15.
54 SDA (n 12) s 7B(2)(b).
55 SDA (n 12) s 7B(2)(c).

person to have the attribute.[56] In the SDA, the exception also includes a non-exhaustive list of roles in which a person's sex would be considered a genuine occupational requirement.[57] If any proposed federal law that prohibits religious discrimination utilised an exception for genuine occupational requirements, the law could also include a list of examples (including those related to religious educational institutions) to assist in determining which roles require religion as a genuine occupational requirement. Religious educational institutions, like all other duty-bearers, could rely on this exception for certain roles within the institution.

The second provision common to discrimination laws which could be utilised, at least in some situations, is that which allows for special measures.[58] Special measures are measures taken for the sole purpose of achieving advancement for certain groups which, due to historical and continuing disadvantage, require such measures to be taken. Overseas they are sometimes referred to as 'affirmative action'. In some circumstances, one could envisage that certain types of employment by religious educational institutions could be intended to achieve this purpose: for instance, an Islamic school prioritising the hiring of teachers who are Muslim, or a Christian school preferencing underrepresented denominations in selection and promotion.

6.4.4 Utilising existing discrimination law concepts and provisions

The benefit of utilising concepts and provisions which have been contained in Australian discrimination laws for 40 years is that there is legal authority that has already considered the meaning and operation of these provisions and there is existing understanding of what such protections and exceptions involve by legal practitioners and duty-bearers. Discrimination law is often described as complex. In drafting any proposed federal law prohibiting religious discrimination, adding to such complexity should be minimised. Including unnecessary exceptions for specific duty-bearers, such as religious educational institutions, would not achieve this goal and would not add any additional clarity or certainty which general clauses would not otherwise provide. While we support the goal of consistency between federal discrimination law and the FWA, corresponding provisions relating to religious educational institutions in any proposed federal law prohibiting discrimination on the ground of religion are unnecessary. They remain important in the FWA because it does not have a general exception for genuine occupational requirements, and it likely does not prohibit indirect discrimination; together, this particular exception for religious educational institutions in the FWA and reliance on the general provisions in discrimination law in a new federal law prohibiting religious discrimination will achieve the same aim and ensure consistency and coherency.

Discrimination law already has all the tools to deal with these problems - they just need to be used.

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56 See, eg, SDA (n 12) s 30.

57 SDA (n 12)(Cth) s 30(2).

58 RDA (n 52) s 8; SDA (n 12) s 7D; DDA (n 50) s 45; ADA (n 12) s 33 (though called 'positive discrimination').

Recommendation 7: That, in developing a federal law that prohibits religious discrimination, Proposal 10 be fulfilled by including the following three standard discrimination law provisions:

(1) the prohibition on indirect discrimination not apply if the condition, requirement or practice is reasonable in the circumstances, constructed similarly to the *Sex Discrimination Act 1984* (Cth) section 7B.

(2) an exception to the prohibition on discrimination in employment for genuine occupational requirements, constructed similarly to Recommendation 6;

(3) the authorisation of lawful special measures, which are not discrimination, constructed similarly to the *Sex Discrimination Act 1984* (Cth) section 7D.

A federal law that prohibits religious discrimination should also ensure that these provisions cannot be used as an alternative route to discriminate on the basis of attributes protected by other federal discrimination laws.

6.5 Active undermining of an employer's values

One final point is worth making. There seems to be some agitation amongst some religious educational institutions in recent years that reforms may limit their right to discipline or terminate staff who 'actively undermine' their values. This agitation extends to other, non-religious organisations: the Essendon Football Club raised similar concerns in relation to Andrew Thorburn's appointment, and then resignation, as its CEO.[59]

However, the prospect of this is overblown for four reasons.

First, there is currently no federal prohibition on religious discrimination. An employee's only recourse at the federal level would be to the FWA, while most state and territory discrimination laws contain exceptions for religious bodies which likely cover this sort of conduct.[60]

Second, employment law and contract law already provide rights to employers to terminate the employment of their employees in such circumstances. All businesses and undertakings can impose reasonable codes of conduct and behaviour on their employees as part of their employment contracts. This is a common practice, at least in large organisations, in respect of, for example, media comment and social media use. Even without a code expressly prohibiting specific conduct, employees are still subject to the implied duty to obey reasonable and lawful direction and the implied contractual duty of fidelity and loyalty that prohibits an employee from doing acts (even outside the workplace) that are inconsistent with continuation of their

[59] See Stan Grant, 'Essendon, Andrew Thorburn and Christianity: The battle of values that cost a man his job', *ABC News* (online) 9 October 2022 <https://www.abc.net.au/news/2022-10-09/stan-grant-andrew-thorburn-essendon-christian-resignation/101511194>.

[60] See generally Australian Law Reform Commission, *Cross-Jurisdictional Summary of Exceptions for Religious Educational Institutions* <https://www.alrc.gov.au/adl-cross-jurisdictional-summary/>.

employment.[61] This gives employers power to protect the culture and values of their organisation, including religious values and culture; a breach of any contractual condition is a breach of contract that may justify termination. If a worker conducts themselves in a way that actively undermines the culture and values of their employer's business or undertaking, in a way that is inconsistent with their ongoing employment, the employer could be justified in terminating the employment. Further, the FWA provides a separate legislative exception to the discrimination protections, allowing termination if the reason is based on the inherent requirements of the particular position concerned.[62] These standard employment law protections bind all employers and employees in Australia in relation to termination, subject to unfair dismissal requirements.

Third, while contractual and employment rights to terminate are subject to discrimination laws to ensure that the real reason for the dismissal was not an act of discrimination on a protected attribute, it may not even be unlawful religious discrimination in the first instance for an employer to terminate the employee's employment. That is: whether under the FWA, state and territory religious discrimination protections or future federal religious discrimination protections, terminating an employee for 'actively undermining' the organisation's values or culture might not meet the definition of direct or indirect discrimination and an exception might therefore not even be needed.

This is because a court seems more likely to assess that the 'real reason' for the termination, in instances where direct discrimination is raised, is the employee 'actively undermining' their institution or its values rather than the employee's own religious beliefs. Were indirect discrimination to be raised, the reasonableness test within the definition of indirect discrimination could apply: courts are very likely to find it reasonable for an employer to terminate the employment of an employee who is actively undermining their values and culture.

Fourth, even if the third point above were incorrect and the prohibition on either direct or indirect discrimination was made out, exceptions would likely shield religious educational institutions in such instances. As noted in **Part 6.1**, above, the existing FWA and SDA provide wide exceptions that would seem to cover an employer terminating an employee for actively undermining its values or culture. If our recommended amendments to the FWA and SDA are implemented, employers would be able to terminate employees for actively undermining their values or culture if participation of an employee in the observance or practice of a particular religion is a genuine occupational requirement in relation to their employment, and where such termination is 'reasonable' and 'proportionate' and not discrimination on other grounds. For employees who do not fall within the 'genuine occupational requirement' test – perhaps gardeners, to use the well-worn example – the religious educational institution could still argue

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61 For discussion, see Sappideen et al (n 8) [5.410] Duty to obey, [5.520] Duty of fidelity and loyalty, [5.780] Comment by an employee.

62 FWA (n 26) ss 351(2)(b), 772(2)(a).

the termination was not for the 'reason' of the employee's religion (direct discrimination) or was reasonable (indirect discrimination).

We consider that, in all the circumstances, employees whose employment is terminated for 'actively undermining' the values and culture of their employer are unlikely to succeed in proving their employer has unlawfully discriminated against them.

As has often been the case with various proposals on this broader issue in recent years, existing discrimination and employment laws contain mechanisms that can already resolve such disputes.[63] Reasonable rules and conditions can already be in place and binding on employees, whether by religious educational institutions or other organisations.

[63] For example, as with the so-called 'Israel Folau' clause in the formerly-proposed Religious Discrimination Bill: see ADLEG, *Submission to the Commonwealth Attorney-General's Department: Religious Discrimination Bill 2019 (Cth) Second Exposure Draft* (30 January 2020) <https://www.adleg.org.au/submissions/federal-religious-discrimination-bill-second-exposure-draft-jan-2020> 16–18.

7. Other proposed amendments

This section applies to Proposals 6 and 14.

7.1 Extending protections in the *Sex Discrimination Act* to associates

ADLEG strongly supports Proposal 6, extending discrimination protections in the SDA to prohibit discrimination against students and prospective students on the grounds that a family member or carer of the student has a protected attribute. However, this proposal should be extended to associates, both to protect a student or employee where discrimination is because of their association with a person with a protected attribute, and to protect any other person who experiences discrimination because of their association with a student or employee who has a protected attribute under the SDA.

ADLEG does not agree with the ALRC's contention that this reform should be delayed to the Stage 1 or Stage 2 reforms in Proposal 14 because of the 'complexity of introducing such a change more broadly within the existing architecture of the *Sex Discrimination Act*'.[64] There is widespread precedent in Australia of associate protections operating effectively. Discrimination in relation to associates is already prohibited in the *Disability Discrimination Act* (**DDA**),[65] the *Racial Discrimination Act*,[66] and some state discrimination laws.[67] Such prohibitions are well-established and operate without controversy. There is no complexity in introducing this change, and no reason to delay plugging this gap in the SDA.

This is especially important in the context of this inquiry's scope. Imagine, for instance, a teacher at a religious educational institution who provides ongoing mentoring and support for a gay student who is being bullied by other students. Assuming the teacher is not themselves gay, they would not have protection under the SDA in relation to work were their employer to subject them to a detriment because of their mentoring and support for the gay student.[68] While it is hoped that no religious educational institution would seek to impose a detriment in such circumstances, the SDA needs to make this clear in law.

The DDA provides a clear path forward and an effective and coherent prohibition of discrimination in relation to associates. The DDA definition of 'associate' includes family members and carers, amongst other relationships. It should be imported into the SDA; in doing so, this would implement Proposal 6 and extend it to other direct rights-holders (eg, employees) and their associates. To do so would ensure that the students, staff and contract workers at religious educational institutions who are considered in this inquiry are not discriminated

64 ALRC, Consultation Paper (n 2) 31–32.
65 DDA (n 50) s 7; see the definition of 'associate' in s 4.
66 RDA (n 52) s 5.
67 See, eg, ADA (NSW) (n 12) ss 4, 7; EOA (SA) (n 14) s 29(2)(d); ADA (Tas) (n 5) s 16(s); EOA (Vic) (n 5) s 6(1)(q); EOA (WA) (n 5) s 35O(2).
68 See SDA (n 12) s 14.

against because of 'who they know'. In defining this right, if the term 'family member' is used, it must be defined broadly enough to take account of different types of family care structures present in Australia. For this reason, a more general reference to associates is preferable.

Recommendation 8: That Proposal 6 (family members) extend protection to associates in this suite of reforms, rather than in the 'Stage 1' reforms in Proposal 14, along the lines of the prohibition of discrimination in relation to associates found in the *Disability Discrimination Act 1992* (Cth).

7.2 Aligning *Fair Work Act* definitions with federal discrimination law

Broadly, ADLEG supports the proposed reforms in Stage 1 and Stage 2, notwithstanding some differences in perspective, noted above, of when these reforms should occur. Further, the Stage 2 reforms are significant, wide-reaching proposals that require much thought over the medium term, in particular the proposed enactment of comprehensive human rights protecting legislation.

In implementing these proposed reforms, careful consideration should be given to how the various relevant Acts operate together to ensure equality rights and obligations in existing discrimination laws and the FWA are not undermined. Through this process, policymakers should strive for consistency in providing maximal protection against discrimination. To the extent to which further harmonisation occurs between the various Acts, this should be done through 'levelling up' to the Act which provides the greatest protection from discrimination, not through 'levelling down' to the lowest common denominator.[69]

The 'review of the interactions between the *Fair Work Act* and the *Anti-Discrimination Acts*' in Stage 2, should ensure a consistent understanding of 'discrimination' and 'genuine occupational requirement', amongst other terms. More specifically, the FWA should adopt the definition of 'discrimination' in the federal discrimination laws, such that it expressly includes indirect discrimination – a glaring point of inconsistency at present. This change would resolve many of the issues identified in this submission; we appreciate it is likely to require a bigger reform project. It would also be beneficial for the FWA to align its definition of 'genuine occupational requirement' with that found in federal discrimination laws.

Recommendation 9: That the 'Stage 2' reforms in Proposal 14 recommend that the *Fair Work Act 2009* (Cth) adopt the definitions of 'discrimination', including indirect discrimination, and 'genuine occupational requirement' found in federal discrimination laws.

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69 Sandra Fredman, *Discrimination Law* (Oxford University Press, 2011) 227; Elisa Holmes, 'Anti-Discrimination Rights Without Equality' (2005) 68(2) *Modern Law Review* 175, 186–7.