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INTRODUCTION

This special issue of the journal ‘Reform’ arises out of the work of law students who conducted research on issues relating to the ALRC’s inquiry into religious exemptions in anti-discrimination legislation during 2020 under the supervision of ALRC staff. Students have long made important contributions to the ALRC’s work in a number of different ways, and the ALRC values the opportunity to engage emerging Australian lawyers in the field of law reform.

The students who have contributed to this issue offered their services through collaborative partnerships the ALRC has established with the University of Queensland and the University of Melbourne, and the ALRC thanks and acknowledges those institutions for their ongoing support. Through these arrangements, students receive academic credit towards their qualifications in recognition of the effort they put in, and of the valuable learning that occurs when students apply their legal skills in the context of complex real-world challenges.

Students generally have the opportunity to choose between a number of research topics relevant to various aspects of the ALRC’s work. In 2020, the topic of religious exemptions in anti-discrimination law, and of religious freedom more generally, was a popular topic with students keen to engage with the difficult issues raised.

The Australian Law Reform Commission received Terms of Reference from the

Attorney-General in April 2019 to inquire into the framework of religious exemptions in Commonwealth, state and territory anti-discrimination legislation. This Inquiry was referred to the ALRC as part of the Government’s response to the Religious Freedom Review conducted by the Expert Panel led by the Hon Philip Ruddock.

The ALRC was asked to inquire into, and report on, what reforms to relevant anti-discrimination laws, the *Fair Work Act 2009* (Cth) and any other Australian law should be made in order to:

- limit or remove altogether (if practicable) religious exemptions to prohibitions on discrimination, while also guaranteeing the right of religious institutions to reasonably conduct their affairs in a way consistent with their religious ethos; and
- remove any legal impediments to the expression of a view of marriage as it was defined in the *Marriage Act 1961* (Cth) before it was amended by the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth).

In mid-2019, the ALRC conducted preliminary consultations with a range of stakeholders, including representatives from academia, religious institutions, schools and human rights organisations. In August 2019, the Attorney-General amended the original Terms of Reference, requiring the ALRC to take into account the intended passage of the Government’s Religious Discrimination Bill, and the public consultation conducted by government as part of that process.

The amended Terms of Reference ask the ALRC to confine its Inquiry to issues not resolved by that bill, and to confine any recommendations to legislation other than the Religious Discrimination Bill.

As a result of multiple rounds of public consultation on exposure draft legislation, and then the outbreak of COVID-19 in Australia, at the time of publication the Religious Discrimination Bill has not been introduced into Parliament. In March 2020, the Attorney-General amended the ALRC's reporting deadline to be '12 months from the date the Religious Discrimination Bill is passed by Parliament'. This extension enables the ALRC to take into account the public consultation processes accompanying the Religious Discrimination Bill, and any amendments to the bill resulting from those consultation processes. The ALRC therefore continues to monitor public discussion regarding the bill, in anticipation of resuming work on the inquiry in earnest in due course.

The students' work represented in this special issue reflects the breadth of considerations relevant to the Inquiry.

Marli Mathewson's thoughtful piece interrogates a key word contained in the Inquiry Terms of Reference, namely 'ethos', and explores ways the word has been used and interpreted in various contexts. This work will inform the ALRC's understanding of the nature of the conduct that is sought to be protected in accordance with the Terms of Reference.

Greta Sweeney chose to tackle the complexities that arise from the intersection of different Commonwealth, state, and territory laws relating to discrimination. The ALRC will need to be mindful of the resulting 'patchwork' of legislation she describes in developing its recommendations for reform.

Ryan Thomson focuses on the context of employment law, and analyses religious exemptions contained in the *Fair Work Act 2009* (Cth) and their interaction with other relevant statutes. He proposes some thought-provoking specific reform options to

limit religious exemptions while permitting the proportionate manifestation of religious beliefs in an employment context.

Phoebe Kenafake broadens the horizon by examining international jurisprudence on human rights to freedom of religion and protection from discrimination. She includes in her analysis materials from the United Nations Human Rights Committee and the European Court of Human Rights, and considers how these might provide guidance for Australian law reform in seeking to manage the intersection of different rights.

The ALRC congratulates and thanks the students for their significant work on these papers under the careful supervision of ALRC staff including Micheil Paton, Phoebe Tapley, Sophie Ryan and Alison Lee. The views expressed in each paper are those of the named authors, and not of the ALRC or its staff.

CODES, CULTURES AND WORLD VIEWS: CONCEPTUALISING ‘ETHOS’ IN THE CONTEXT OF RELIGIOUS EXEMPTIONS FROM ANTI-DISCRIMINATION LEGISLATION

MARLI MATHEWSON

I. INTRODUCTION

The scope and operation of religious exemptions to anti-discrimination law in Australia has been the subject of longstanding debate about how best to balance freedom from discrimination with freedom of religious expression. This debate has re-entered the forefront of public discussion amidst proposals to reform existing anti-discrimination laws and introduce new legal protections against religious discrimination.

The existing parameters of anti-discrimination law in Australia are prescribed primarily by statute making it unlawful to discriminate on the basis of protected attributes such as race, disability, age, sex, sexual orientation, and gender identity.¹ Religious organisations and institutions, however, benefit from a variety of statutory exemptions with respect to anti-discrimination provisions. Although religion itself is not protected under anti-discrimination law, the courts have taken a broad and inclusive approach to conceptualising ‘religion’ for the purposes

of determining the scope of religious exemptions to anti-discrimination law.²

In November 2017, following the enactment of the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth), the then Prime Minister Malcolm Turnbull announced the appointment of an Expert Panel to consider whether the law adequately protects the right to freedom of religion in Australia.³ The Panel composed a report known as the Ruddock Review, which details twenty recommendations encouraging the promotion of the protection of religious freedom under Australian law. These recommendations concern issues such as the absence of a positive right to freedom of religion and the limitations of preserving religious freedom through exceptions to anti-discrimination law, and propose widespread reform and legislative alternatives such as a Commonwealth Religious Freedom Act.⁴

In response, in early 2019 the Attorney-General issued Terms of Reference requesting the Australian Law Reform Commission (‘ALRC’) to conduct an Inquiry into the Framework of

1 See, eg, *Racial Discrimination Act 1975* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth); *Sex Discrimination Act 1984* (Cth).

2 *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 131, 76, 136, cited in Expert Panel, *Religious Freedom Review* (Report of the Expert Panel, 18 May 2018) 34 (‘*Religious Freedom Review*’).

3 See generally *Religious Freedom Review* (n 2); *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth).

4 *Religious Freedom Review* (n 2) 39.

Religious Exemptions in Anti-discrimination Legislation.⁵ The Commission was asked to review recommendations that all jurisdictions in Australia re-examine those exemptions to anti-discrimination provisions that allow for discrimination on the basis of personal attributes such as race, sex, disability, or pregnancy. The Commission was also instructed to consider the possibility of legislative reforms that, in the context of the impending release and anticipated effect of the Religious Discrimination Bill 2019 (Cth), should be made to limit or remove religious exemptions to anti-discrimination law while also guaranteeing the right of religious institutions to 'reasonably conduct their affairs in a way consistent with their religious ethos'.⁶

The following paper will endeavour to provide an understanding of what it means for a religious institution to conduct themselves in a manner consistent with their religious ethos for the purposes of the ALRC's Review into the Framework of Religious Exemptions in Anti-discrimination Legislation.⁷ Understanding the concept of 'ethos' is significant in determining whether religious exemptions could be removed from anti-discrimination laws while also guaranteeing the rights of religious institutions to conduct their affairs in accordance with their ethos and, by further extension, the implications of current reform proposals for legislative frameworks currently in place across Australia more generally.⁸ To do so, it is necessary to consider what actually comprises an ethos and, by further extension, how adherence to an ethos might be assessed.

The structure of this paper will rely on Dr Caitlin Donnelly's distinction between the positivistic and antipositivistic views of ethos as a framework through which to understand the various — and at times competing — conceptualisations of ethos.⁹ This paper

will begin by outlining formulations of an antipositivistic perceptions of ethos, followed by a discussion of the positivistic view point. It will then proceed to discuss the difficulties associated with constructing a rigid criterion to assess compliance on the basis of a notion susceptible to such a wide variety of uses and meanings. This will be followed by discussion of a number of methods devised by various commentators and statutory schemes to ascertain whether an institution or organisation has complied with its ethos. The paper will ultimately conclude that any attempt to formulate a method of ascertaining an ethos and, more specifically, assessing adherence to an ethos, must account for aspects of both antipositivistic and positivistic ethos.

II. CONCEPTUALISATIONS OF ETHOS

The concept of ethos is notoriously nebulous, but nonetheless important for the purposes of understanding the implications of current reform proposals for different legislative frameworks governing religious exemptions to anti-discrimination law currently in place across Australia. However, as Donnelly quite rightly suggests, the considerable academic debate stressing the significance of ethos in developing an understanding of 'social process, activity and structure' has failed to yield a consistent or satisfactory definition.¹⁰ A particularly pertinent attempt to conceptualise ethos, however, is provided by Donnelly, whose work has generally focused on governance in faith-based schools and on the role of education in conflict. In her attempt to define ethos in the context of education, Donnelly draws a distinction between 'the officially prescribed school ethos and that which emerges from social interaction'.¹¹ These respective definitions reflect what Donnelly terms a positivistic and an antipositivistic

5 Attorney-General, *Review into the Framework of Religious Exemptions in Anti-discrimination Legislation* (Terms of Reference to the Australian Law Reform Commission issued 29 August 2019) ('ALRC Terms of Reference').

6 Religious Discrimination Bill 2019 (Cth); ALRC Terms of Reference (n 5).

7 ALRC Terms of Reference (n 5).

8 Ibid.

9 Caitlin Donnelly, 'In pursuit of school ethos' (2000) 48(2) *British Journal of Educational Studies* 134.

10 Ibid 135.

11 Ibid 134-135.

view of ethos. While the 'official ethos of an institution might be discerned by analyzing its policies, regulations, mission statements, or constitution, its unofficial ethos might be revealed by observing people's actual conduct'.¹² This distinction provides a useful framework against which to explore the various conceptualisations of ethos for the purposes of the ALRC's Review.

A. Antipositivistic ethos

For Donnelly, an antipositivistic approach to ethos is linked intrinsically with the concept of culture, emanating from a process of organisational and social interaction over time.¹³ While this paper will use Donnelly's general construct of antipositivistic ethos as an antithetical category to a positivistic perception, it will treat Donnelly's use of 'culture' instead as a subset of the antipositivistic school of thought, rather than a distinguishing characteristic. Not all conceptualisations of ethos that fall within the general ambit of Donnelly's antipositivistic ethos necessarily rely on the relationship between ethos and culture. Rather, the common characteristic which unites the various conceptualisations of ethos which this paper categorises as antipositivistic is that ethos is a product of the 'views and interactions of individual organisational members' and, as a consequence, often tends to manifest or represent aspects of an institution's or organisation's values, beliefs and cultural affiliations.¹⁴

Whether ethos is seen as a manifestation of values, beliefs and cultural affiliations of an institution and its members in and of itself, or whether ethos is being made

manifest as a result of these values, beliefs and cultural affiliations, depends on the subset of the antipositivistic school of thought in question. Generally, discussions of ethos that subscribe to this perspective are largely theoretical, and vary in degrees of abstraction.

i. *Ethos as synonymous with 'culture'*

One of the more prominent uses of the antipositivistic conceptualisation of ethos is as synonymous with culture; a manifestation of the 'norms, values, or attitudes' associated with a particular institution or organisation.¹⁵ Accordingly, an institution's ethos is largely contextual in nature, and is contingent on the particular culture and attitudes to which an institution subscribes.¹⁶ Although it has been contended that in keeping with this perspective, ethos is in fact a *product* of culture, rather than a manifestation, this distinction is immaterial for the purposes of this discussion.¹⁷ Rather, the importance of the 'cultural' perception of ethos for the purposes of this paper lies in the strength of the relationship between ethos and culture. Whether ethos is a product of culture or a manifestation of it is not always readily determined, and is a discussion beyond the scope of this paper.

Interpreted in this way, ethos can be described as an 'underlying attitude ... comprised of the moral and aesthetic aspects of culture that reflect and set the tone, character, and quality of institutional life'.¹⁸ As such, the ethos of an institution can generally be ascertained by reference to its distinguishing characteristics, such as the purpose for which the institution was established or the philosophy under

12 Andrew Shorten, 'Are There Rights to Institutional Exemptions?' (2015) 46(2) *Journal of Social Philosophy* 242, 245.

13 Donnelly (n 9) 136.

14 Margaret Allder, 'The meaning of school ethos' (1993) 16(1) *Westminster Studies in Education* 59, 69, cited in Donnelly (n 9) 136.

15 Shorten, 'Are There Rights to Institutional Exemptions?' (n 12) 244; see also Gerry McNamara and James Norman, 'Conflicts of Ethos: Issues of Equity and Diversity in Faith-based Schools' (2010) 38(5) *Educational Management Administration & Leadership* 534, 539; Michelle Striepe, Simon Clarke and Thomas O'Donoghue, 'Spirituality, values and the school's ethos: Factors shaping leadership in a faith-based school' (2014) 24(1) *Issues in Educational Research* 85, 87; J. Prosser, *School Culture* (Paul Chapman, 1999) 2, 13, cited in Carla Solvason, 'Investigating specialist school ethos ... or do you mean culture?' (2005) 31(1) *Educational Studies* 85, 86-87.

16 G. D. Kuh and E. J. Whitt, *The Invisible Tapestry: Culture in American Colleges and Universities* (ASHE-ERIC Higher Education, Report No. 1, 1988) 47, cited in Charles F. Ziglar, 'The Formation and Promulgation of Institutional Ethos by New University Presidents' (Ed.D. Dissertation, Georgia Southern University, 2018) 49.

17 Solvason (n 15) 86.

18 Ziglar (n 16) 52.

which it operates. Although this bears some semblance to the positivistic or ‘officially prescribed’ ethos, for the purposes of an antipositivistic discussion, an institution’s purpose can be discerned from those characteristics of which an institution’s culture is comprised — the attitudes, values, and actions of its members.

A majority of antipositivistic discussions of ethos in the context of education typically refer to the ‘core shared values, beliefs and practices of an educational community’ in the context of schools and higher education institutions of a religious character.¹⁹ In a practical sense, ‘faith-based’ schools — when compared to secular institutions — offer a pertinent framework through which to consider the ‘cultural’ take on an antipositivistic perception of ethos principally because of their values-based approach to education, under which promoting faith and religious knowledge amongst students is of equal importance to teaching the prescribed curriculum.²⁰ The prevailing ethos of a Catholic or other Christian school, for example, can be seen to comprise those aspects of its theological position enshrined in the school’s governance, teachings, and daily practices.²¹ To offer an alternative example, in the Sikh community, schools have been said to operate under an ethos of ‘military discipline and powerful kinship structures with respect emanating from a shared spirituality’.²²

Conceptualising ethos in this way reveals that despite the substantive differences between what actually comprises the ethos of a particular school, the cultural

disposition or ethos of faith-based schools is strongly linked with a sense of shared identity cultivated amongst faculty members and students.²³ In this sense, ethos can be described as ‘the fundamental character of spirit of a culture that emotionally connects individuals to the group’s values and ideology’; a product of a kind of ‘symbiotic’ relationship between an institution and its members.²⁴ This relationship resides in the ‘emotional dynamics’ of an institution ensuing from the shared experiences of its members and the prevailing cultural norms, assumptions and beliefs that arise as a result of these experiences.²⁵

ii. *Ethos in persuasive communication*

Much of the discussion pertaining to ethos in jurisprudence and legal philosophy is centred around the work of classical rhetoricians on notions of ethos in persuasive communication. Classical theories of ethos draw principally on the conceptualisation of ethos as one of three modes of rhetorical appeal catalysed in Aristotle’s *Rhetoric*: ethos, pathos and logos.²⁶ For Aristotle, to have ethos is to ‘manifest the virtues most valued by the culture to and for which one speaks-in’.²⁷ Primarily focused on individual manifestations of ethos, implicit in Aristotle’s work and its subsequent interpretations is the use of rhetorical action as a kind of moral pedagogy which encourages the ‘habituation’ of broader cultural virtues. The consequent internalisation of perceived ethical habits and virtuous actions valued by the culture in question informs the moral education, or character development, of the

19 Peter J. Hemming, ‘The Place of Religion in Public Life: School Ethos as a Lens on Society’ (2011) 45(6) *Sociology* 1061, 1064-1065.

20 Rebecca A. Proehl, Heather Starnes, and Shirley Everett, ‘Catalyst Schools: The Catholic Ethos and Public Charter Schools’ (2015) 18(2) *Journal of Catholic Education* 125, 126, 129; McNamara and Norman (n 15) 545.

21 Hemming (n 19) 1064, 1067.

22 William I. Ozanne, ‘Religious identity and governmental education policies: the case of the Sikh community’ (2010) 46(3) *Comparative Education* 339, 342.

23 See, for example, Daryl York, ‘In what ways do primary and secondary schools act to internationalize their institutional ethos?’ (EDD Thesis, University of Bath, 2016) 16, 24; Ziglar (n 16) 49-50.

24 A. Kezar, ‘Creating and sustaining a campus ethos: Encouraging student engagement’ (2007) 11(6) *About Campus* 13, cited in Ziglar (n 16) 49-50.

25 M. Voronov and K. Weber, ‘The heart of institutions: Emotional competence and institutional actorhood’ (2016) 41(3) *Academy of Management Review* 1, cited in Ziglar (n 16) 52.

26 See, for example, S. Michael Halloran, ‘Aristotle’s Concept of Ethos, or If Not His Somebody Else’s’ (1982) 1(1) *Rhetoric Review* 58; Melissa H. Weresh, ‘Ethos at the Intersection: Classical Insights for Contemporary Application’ (2020) 20(3) *Nevada Law Journal* 877; Anne E. Mullins, ‘Source-relational Ethos in Judicial Opinions’ (2019) 54 *Wake Forest Law Review* 1089.

27 Halloran (n 26) 60.

individual.²⁸ The use of ethos as a concept denotes 'good character' and, in the context of rhetorical pedagogy, provides the speaker or writer with a degree of authority and credibility.²⁹ What constitutes ethos and the necessary requisites for good character, then, at least according to Aristotelian theory, is largely contingent on those virtues and standards of behaviour most esteemed by a particular institution, culture, or society.³⁰

iii. *Ethos in legal philosophy*

In addition to classical theories of ethos dedicated to a discussion of rhetorical pedagogy, discussions of ethos in law tend to congregate under the ambit of legal philosophy. The concept of ethos in legal philosophy focuses more on the debate surrounding the historically volatile relationship between law and morality. While still utilising aspects of Aristotle's work and classical theories of ethos, the use of ethos by legal philosophers diverges from that of classical rhetoricians by focusing more on an ethos of the Rule of Law. One of the most enduring formulations of the Rule of Law was devised by Aristotle in *Politics*. The Aristotelian Rule of Law propounds the idea that to secure fundamental rights and freedoms and to curb the arbitrary exercise of power by authorities, all members and institutions of a particular state or community must be held equally accountable under the law.³¹

Contemporary understandings of the Rule of Law also focus primarily on notions of legal equality and accountability.³² A Rule of Law ethos, then, is generally associated

with an 'ethos of accountability'.³³ Effectively embodying an ethos of accountability, both as individual agents and institutions, involves both a community-wide reciprocal accountability and a 'normative performance' which presupposes 'standards and behaviour that can and must be assessed in light of these standards'.³⁴ The law's failure to hold those who wield power to account according to standards set by law 'can be traced directly to the corruption of law's fundamental ethos', not dissimilarly from the way in which the Hippocratic ethos may be undermined by the ethos of regulatory capitalism discussed in the following paragraph.³⁵ As such, an understanding of the Rule of Law — at least in so far as it is understood as a kind of legal accountability — as a manifestation of the law's ethos provides a useful framework through which to understand how ethos might be seen as an indicator of institutional integrity and moral responsibility.

iv. *The 'Hippocratic ethos'*

In a similar manner to discussions of ethos in legal philosophy, the 'Hippocratic ethos' is grounded in notions of beneficence and altruism.³⁶ Used in the context of healthcare, the Hippocratic ethos predisposed the prioritisation of the interests of the patient. The patient-first approach is one of the original tenets of medical ethics and is underpinned by a commitment to high standards of social and ethical responsibilities.³⁷ Although much of the discussions pertaining to the Hippocratic ethos concern the tensions arising with the increasing prioritisation of economic

28 Celeste M. Condit, 'Public Health Experts, Expertise, and Ebola: A Relational Theory of Ethos' (2019) 22(2) *Rhetoric & Public Affairs* 177, 181; Halloran (n 25) 60-61.

29 Weresh (n 26) 880, 883.

30 Halloran (n 26) 60.

31 Julian Sempill, 'The Rule of Law and the Rule of Men: History, Legacy, Obscurity' (2020) 12(3) *Hague Journal on the Rule of Law* 511, 515.

32 See generally AV Dicey, *Introduction to the Study of the Law of the Constitution* (McMillan and Co., 1982 [1885]); Tom Bingham, *The Rule of Law* (Allen Lane, 2010); Mirko Canevaro, 'The Rule of Law as the Measure of Political Legitimacy in Greek City States' (2017) 9(2) *Hague Journal on the Rule of Law* 211, 224.

33 Gerald J. Postema, 'Law's Ethos: Reflections on a Public Practice of Illegality' (2010) 90(4) *Boston University Law Review* 1847, 1863.

34 Ibid 1863.

35 Ibid 1855, 1858.

36 David C. Thomasma, 'Promisekeeping: An Institutional Ethos for Healthcare Today' (1996) 13(2) *Frontiers of Health Services Management* 5, 7.

37 Charles K. Francis, 'Medical Ethos and Social Responsibility in Clinical Medicine' (2001) 78(1) *Journal of Urban Health: Bulletin of the New York Academy of Medicine* 29, 30.

considerations in healthcare, the Hippocratic ethos nonetheless provides an illustration of a version of the antipositivistic perspective which conceptualises ethos as embodying a commitment to social utility and a common morality.³⁸ Furthermore, commentators have suggested that the Hippocratic ethos is vulnerable to the threats accompanying the commoditisation of healthcare, which forsakes the principles of beneficence and altruism for those of nonmaleficence and the 'greater good of the economy'.³⁹ As a consequence, it appears that the Hippocratic ethos is susceptible to the rise of the ethos of what a number of commentators have dubbed as 'regulatory capitalism'.⁴⁰ This is relevant for the purposes of the ALRC's Review as an example of the seemingly temperamental nature of those formulations of the antipositivistic ethos which assume some universal standard of public morality or virtue.

v. The 'world view' perspective

An alternative use of the concept of ethos draws heavily on the work of the anthropologist Clifford Geertz. For Geertz, the ethos of an institution is closely related to the concept of 'world view'.⁴¹ World view, at least for the purposes of this paper, can be seen to consist of a totality of opinions and 'systematic ideas about an allegedly structured order in nature, history and society', as opposed to some kind of ethical standard by which an institution should strive to abide.⁴² According to this view, ethos is comprised of the 'genius of an institution or system', which in turn consists of an 'existing, identifiable system or institution that unites, or at least applies

to, a population'.⁴³ In a similar manner to the other formulations of the antipositivistic perceptions of ethos discussed earlier in this paper, then, the 'world view' perspective has implications about the formation of a collective identity.⁴⁴ In this respect, the world view perspective defines ethos as 'the sum of the characteristic usages, ideas, standards and codes by which a group was differentiated and individualised in character from other groups'.⁴⁵

Effectively, a world view approach to understanding ethos denotes the 'consistency and pattern of behaviour of a people in a particular cultural milieu'.⁴⁶ As opposed to cultivating a shared identity merely by virtue of the existence of a common culture, the world view approach endeavours to construct and impose an ethos which embodies those ideas about an 'approved style of life'.⁴⁷ For Geertz, the ethos 'is shown to represent a way of life implied by the actual state of affairs which the world-view describes'.⁴⁸ He speaks of ethos as a 'cultural pattern' which 'explains the reasons behind any particular behaviour' and 'the underlying values and interests that contribute to the fundamental motivating forces of a people'.⁴⁹

As a consequence, the ethos upon which particular institutions are based is susceptible to 'distortion and subversion by social or political forces'.⁵⁰ In an analysis of the medical ethos and social responsibility, for example, Charles K. Frances illustrates this point in his discussion of Nazi Germany's use of state intervention to subvert traditionally ethical medical practices to allow for genetic engineering to promote 'racial

38 Thomasma (n 36) 20; Francis (n 37) 30; Arthur J. Visellear, 'The Ethos of Public Health' (1990) 11(2) *Journal of Public Health Policy* 146, 149.
 39 Francis (n 37) 31; Thomasma (n 36) 16.
 40 Iris H-Y Chiu, 'An Institutional Theory of Corporate Regulation' (2019) 39(2) *Northwestern Journal of International Law & Business* 85, 97, 104.
 41 See, eg, Clifford Geertz, 'Ethos, World-view and the Analysis of Sacred Symbols' (1957), 17(4) *Antioch Review* 421.
 42 Anton C. Zijderveld, 'The Ethos of the Welfare State' (1986) 1(4) *International Sociology* 443, 444.
 43 Sune Lægaard, 'A Multicultural Social Ethos: Tolerance, Respect, or Civility?' in Gideon Calder and Emanuela Ceva (eds), *Diversity in Europe: dilemmas of differential treatment in theory and practice* (Routledge, 2011) 81, 82.
 44 See, for example, Zijderveld (n 42) 444.
 45 W. S. Sumner, *Folkways* (Mentor, 1960) 48, cited in Zijderveld (n 42) 444.
 46 Jose Vidamor B. Yu, *Inculturation of Filipino-Chinese Culture Mentality* (Gregorian Biblical Book Shop, 2000) vol 3, 18.
 47 Zijderveld (n 42) 444.
 48 Clifford Geertz, 'Ethos, World-View and the Analysis of Sacred Symbols' (1957) 17(4) *The Antioch Review* 421, 422.
 49 Vidamor B. Yu (n 46) 18.
 50 Francis (n 37) 31.

integrity'.⁵¹ A more contemporary example of the susceptibility of ethos to 'politically determined priorities' lies in the economic dimensions of the modern medical ethos arising as a result of the consequences ensuing from the commoditisation of health care discussed above.⁵² The influence of corporate regulation in a liberal market economy on traditional conceptualisations of medical ethos can be seen in a shift away from the conventional 'Hippocratic ethos' outlined above and towards a 'mixture of public interest and economic efficiency thinking'.⁵³ An alternative example of the influence of sociocultural and political factors on ethos can be seen in Sune Lægaard's discussion of a multicultural social ethos, which according to Lægaard should be characterised by a commitment to promoting social unity under conditions of multicultural diversity by recognising, tolerating and respecting social and cultural difference.⁵⁴

B. *Positivistic ethos*

A positivistic approach to ethos is described by Donnelly as something 'which prescribes social reality'.⁵⁵ For Donnelly, a positivistic ethos is a formal expression of the aims and objectives of an organisation, the 'expressed wishes of those who command authority within an organisation' and the means by which members of an institution are conditioned to act in a way that is deemed 'natural, proper and right'.⁵⁶ That is, a positivistic view of ethos is concerned primarily with the formal principles governing institutions and procedures that are in some way officially

declared or prescribed by the institution itself or by a related body or organisation.

These principles are commonly prescribed by way of ethics codes, which represent 'the desire to formulate an organisation's shared responsibilities in a reflective way and express publicly the criteria, values and aims which identify it'.⁵⁷ Codes of ethics in the context of corporate regulation, for example, reveal the 'efforts to publicise the guidelines with which a company wishes to be identified and to direct the behaviour of the members of the organisation'.⁵⁸ Even implicitly, an institution's structure describes the ways in which its roles are defined, assigned and regulated by formal or informal rules, and is as a result related intrinsically with an institution's ethos.⁵⁹ The implementation of particular corporate governance techniques which '[infuse] corporate objectives and culture with social and ethical underpinnings' can be seen to influence the existing tenets of the regulatory ethos on the basis of which a particular corporation operates.⁶⁰

In the domain of education, a prescriptive ethos is predominantly manifest in the publication of mission or ethos statements outlining the social and cultural entrepreneurial goals of the school.⁶¹ The school ethos is, according to a study by Deakin University and the Victorian Department of Education, Employment and Training, 'a web of interconnecting components, including school policies and procedures, cultural values and the social and physical environments'.⁶² By way of example, an ethos statement might outline the school's endeavour to 'encourage personal, moral and spiritual development

51 Ibid.

52 Ibid.

53 Chiu (n 40) 104; see also Thomasma (n 36) 7, 15-16.

54 Lægaard (n 43).

55 Donnelly (n 9) 135.

56 D. Torrington and J. Weightman, *The Reality of School Management* (Basil Blackwell, 1989) cited in Donnelly (n 9) 136.

57 J. Félix, Lozano, Alejandra Boni, and Carola Calabuig, 'Addressing the Institutional Ethos: The Process of Developing the Ethical Code for the Faculty of Industrial Engineering at the Universidad Politécnica, Valencia' (Conference Paper, Values and Ethics: Management Challenges and Realities in Higher Education, General Conference, 11-13 September 2006) 3.

58 Ibid 2-3.

59 Andrew Shorten, 'Accommodating religious institutions: Freedom versus domination?' (2017) 17(2) *Ethnicities* 242, 245.

60 Chiu (n 40) 97, 133, 168.

61 See, for example, Anglican Schools Office, 'An Ethos Statement for Anglican Schools in the Province of Queensland' (2013).

62 Education and Training Committee, Parliament of Victoria, *Inquiry into the Potential for Developing Opportunities for Schools to Become a Focus for Promoting Healthy Community Living* (Final Report, September 2010) 43.

within a Christian framework', such as requiring its staff to attend daily mass.⁶³ Somewhat similarly, the term 'ethos' has been used in the context of military statements.⁶⁴ According to the Catholic Institute of Education, ethos 'defines and displays the core beliefs of the school and is closely linked to its value system. This ethos should be reflected in the school's mission statement, which is the beacon for all school activities. It is the school's way of "being in the world"'.⁶⁵ Although this statement at least nominally describes the operation of ethos prescription by way of mission statements, it also illustrates the somewhat paradoxical relationship between positivistic and antipositivistic ethos. Declaring that ethos *should* be reflected in mission statements appears to imply that the ethos itself is separate from the prescription in the mission statement and, as a consequence, falls more within the ambit of the antipositivistic perspective.

Arguably, it is 'by such a mechanism of ethos prescription that schools may, nominally at least, be given a religious identity, or an identity that sets store by high academic standards, or by creativity, and so on'.⁶⁶ It is in this respect that a prescriptive ethos is less readily distinguished from the antipositivistic conceptualisations of ethos discussed above.⁶⁷ Whether an ethos is prescribed or the result of social interaction, it is nonetheless intrinsically linked with the identity of those members of the institution or organisation which subscribes to the ethos in question, notwithstanding whether this identity is merely aspirational.

III. PROBLEMS WITH THE POSITIVISTIC-ANTIPOSITIVISTIC DISTINCTION

A particularly significant consideration arising from the use of the distinction

between the positivistic and antipositivistic perspectives of ethos is the potential for a disjuncture between the prescribed ethos of an institution and one that arises as a result of the social and organisational interaction of its members, particularly when assessing an institution's adherence to its ethos. Conceptualising ethos and construing its constituents varies largely in accordance with the particular approach or perspective used. Notwithstanding the difficulties faced in comprehensively evaluating such abstract and philosophical concepts to begin with, constructing a rigid criterion to assess compliance on the basis of a notion susceptible to such a wide variety of uses and meanings is evidently problematic. Keeping in mind the variants associated with the use of the positivistic-antipositivistic distinction encourages an understanding of the factors that need to be considered to comprehensively assess an institution's adherence to its ethos.

In an endeavour to promote the moral education of law students, for example, Daniel S. Kleinberger claims that ethics codes — as a kind of ethos prescription — are often seen as tantamount to mere rules of conduct and, consequently, are 'largely ineffective in stimulating moral sensitivity' and the internalised 'ethos of personal responsibility' necessary to produce ethical lawyers.⁶⁸ Kleinberger goes on to argue that ethics, at least in the context of the legal profession, are

ultimately a matter of personal virtue. ... Instead, the rules are seen primarily as a set of malum prohibitum commands to be parsed, analysed, interpreted, and distinguished just like any

63 Elizabeth Green, 'Corporate features and faith-based Academies' (2009) 23(3) *Management in Education* 135, 137; Angela Evangelinou-Yiannakis, 'Challenges faced by faith-based schools in a rural, predominantly secular setting: Implications' (2016) 26(4) *Issues in Educational Research* 561, 572.

64 See, eg, 'Warrior Ethos', *U.S. ARMY* (Web Page, 5 January 2011) <https://www.army.mil/article/50082/warrior_ethos>.

65 Proehl, Starnes, and Everett (n 20) 128.

66 York (n 23) 23.

67 Ibid 33.

68 Daniel S. Kleinberger, 'Ethos and Conscience – A Rejoinder' (1989) 21(2) *Connecticut Law Review* 397, 400.

set of regulations applicable to any other trade or business.⁶⁹

In effect, Kleinberger's discussion reflects the tension between the positivistic and antipositivistic views of ethos and, by extension, the difficulties encountered in ascertaining whether an ethos is adhered to more broadly: although an institution might appear to comply with its prescriptive ethos, it may fall short of realising the antipositivistic conceptualisations of ethos discussed earlier in this paper, and vice versa.

In his study on the exemptions and immunities afforded to religious institutions, Andrew Shorten aptly illustrates the possibility of the positivistic-antipositivistic disjuncture by way of example:

[f]or instance, a police force might have a pervasive culture of 'looking after one's own' that is at odds with its official ethos of 'protecting the public'. ... [T]he unofficial ethos of an institution may be dispersed to varying degrees, and may be strongly contested by some of its members.⁷⁰

Evidently, the fact that an institution has officially prescribed its ethos does not eliminate the possibility that there exists a disjuncture between its stated ethos and its ethos as determined by the various antipositivistic conceptualisations of ethos discussed throughout this paper.

Furthermore, assessing adherence to an ethos on the basis of whether an institution has complied with the components of its prescriptive ethos necessarily assumes that a correct or complete version of a particular institution's ethos actually exists. This is particularly problematic in relation to antipositivistic perceptions of ethos, particularly in regard to the seemingly temperamental nature of those formulations of the antipositivistic ethos which assume some universal standard of public morality or virtue. Relying on

abstractions such as the Rule of Law, the Hippocratic ethos or Geertz's world view as a benchmark for an institution's ethos – concepts which themselves are subject to divergent and at times competing interpretations – is, particularly for the purposes of the ALRC's Review, a tenuous method of determining an ethos.

While it has been suggested that a religious institution should be allowed to operate within its self-imposed ethos so long as that ethos is made available to the public, consideration of the various conceptualisations of both antipositivistic and positivistic ethos discussed throughout this paper lead to the conclusion that the publication or establishment of an explicit ethos framework within which an institution declares to operate must also be accompanied by sufficient mechanisms of scrutiny and accountability.⁷¹ Otherwise, freely allowing an institution to determine the boundaries of its own ethos would provide institutions with the opportunity to exercise an effectively unfettered discretion to eschew anti-discrimination law and policy under the guise of operating within the confines of its self-imposed ethos.

As such, the positivistic-antipositivistic distinction should not be treated as an 'either-or' dichotomy. Rather, the distinction should be used to contribute to an understanding of ethos which encompasses a consideration of both antipositivistic and positivistic variants.

IV. ASSESSING ADHERENCE TO AN ETHOS

While a wealth of literature addresses the varying and at times competing conceptualisations of ethos, few studies have endeavoured to ascertain adherence to an ethos once the scope and constituents of the ethos in question have been identified. However, a number

69 Daniel S. Kleinberger, 'Wanted: an ethos of personal responsibility – why codes of ethos and schools of law don't make for ethical lawyers' (1989) 21(2) *Connecticut Law Review* 365, 370; see also Lozano, Boni, and Calabuig (n 57) 2.

70 Shorten, 'Are There Rights to Institutional Exemptions?' (n 12) 254.

71 Renae Barker, 'Religions should be required to be transparent in their use of exemptions in anti-discrimination laws' (2019) 44(3) *Alternative Law Journal* 191, 191-192.

of attempts have been made to devise a method of discovering a particular institution's ethos and to prescribe a means for assessing observance of its ethos.

Analysis of qualitative data is the most common methodology for identifying an institution's ethos, as a qualitative case study approach provides the advantage of 'intensely probing and analysing the variety of characteristics and features' of an institution and its members.⁷² Zimmerman, Rosenblum and Hillman, for example, attempted to develop a measure of the impact of a school's ethos on its students.⁷³ Zimmerman, Rosenblum and Hillman constructed a series of student traits on the basis of questions designed to measure characteristics such as religiosity, cultural and intellectual interest, drive and political affiliation.⁷⁴ For example, in ascertaining religiosity, students were asked the frequency of their attendance to church services.⁷⁵ These traits were then used to group various institutions together on the basis of their 'peer ethos'.⁷⁶ Although the study was designed to classify the ethos of groups of institutions on the basis of student traits and characteristics, the study's method of surveying students could be adapted to measure whether an institution has operated in accordance with the various components of its ethos.⁷⁷

The use of qualitative data analysis can also be seen somewhat ubiquitously as part of an attempt to ascertain and quantify the content and implications of a particular institution's ethos. A Georgian study on the role of ethos and student learning, for example, postulated that a college's ethos is determined by 'the type of institution, educational mission, location, student and

faculty cultures, and sources of support'.⁷⁸

A similar approach was undertaken in a report prepared for the Victorian Government regarding the impact of the Respectful Relationships Education initiative on broader school culture and ethos. The report outlined areas of impact such as student attitudes, knowledge and skills, cultural inclusion, gender equality, and teacher-student relationships.⁷⁹ Similar studies devised to assess the relationship between students and their school ethos have drawn on qualitative data from surveys, interviews, and semi-structured focus groups.⁸⁰ Although the use of qualitative data is useful to the extent that it reveals the attitudes, beliefs, virtues and practices of the members of an institution, this approach is still subject to the aforementioned problems encountered in conceptualising ethos in accordance with the antipositivistic-positivistic distinction, and relies heavily on the assumption that these characteristics accurately reflect the ethos of the institution as a whole.

Other approaches focus more on devising a statutory framework for a specific criterion governing how institutions should construct and communicate its ethos. This can be seen in Article 4(2) of the European Council 'Framework Directive', which offers a pertinent example of the legislative consideration of ethos in the operation of religious exemptions, particularly when compared with the statutory exemptions in Australia. Section 8 of the *Racial Discrimination Act*, for example, prescribes exemptions to its provisions for registered charities, including those entities with a purpose of advancing religion.⁸¹ The Framework Directive, by comparison, prescribes a specific test for determining

72 Donnelly (n 9) 138.

73 David J. Zimmerman, David Rosenblum, and Preston Hillman, 'Institutional Ethos, Peers and Individual Outcomes' (Discussion Paper No. 68, Williams Project on the Economics of Higher Education, 2004) 5-6.

74 Ibid 16.

75 Ibid.

76 Ibid 5.

77 Ibid 15.

78 Ziglar (n 16) 49.

79 Sarah Kearney, Cara Gleeson, and Loksee Leung, *Respectful Relationships Education In Schools: The Beginnings of Change* (Final Evaluation Report, 2016) 7.

80 See, for example, Hemming (n 19) 1065; Proehl, Starnes, and Everett (n 20) 16; and Ann Casson and Trevor Cooling, 'Religious education for spiritual bricoleurs? The perceptions of students in ten Christian-ethos secondary schools in England and Wales' (2020) 41(1) *Journal of Beliefs & Values* 20, 25.

81 *Racial Discrimination Act 1975* (Cth) s 8; *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 25-5(5).

whether a church or other organisation with an ethos based on religion or belief is exempt from anti-discrimination law.⁸² To paraphrase, only differential treatment related to occupational activities within a church or an organization with an ethos based on religion or belief can be exempt from the ban on discrimination, when the potentially discriminatory rule in question constitutes a 'genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos'.⁸³ The potential problems of interpretation are alleviated at least to an extent by constraints on the breadth of Article 4(2), such as the requirement that a lawful difference in treatment must generally accord with the different constitutional traditions of Member States and Union law, and it cannot be justified on the basis of sexual orientation, age, or gender.⁸⁴ Although the test stipulated under the Directive does not explicitly formulate a method of ascertaining ethos or assessing an institution's compliance with their ethos, the European Commission has provided some useful commentary about to what extent the ethos of an institution should influence the test set down by the Directive. According to the Commission, 'although the ethos of an organization plays a great part in determining what could be considered a genuine occupational requirement for that organization in question, it cannot be the 'only' criterion for such a determination'.⁸⁵

As Donnelly suggests, however, the formulation of a 'truly distinct and uniform ethos' requires a prescribed or positivistic ethos to 'reflect and reinforce' the ethos arising as a result of the 'intentions, interactions and behaviour' of the members of an institution or organisation.⁸⁶ As such, any attempt to formulate a method of ascertaining an ethos and, more specifically, assessing adherence to an ethos, must account for both the 'official'

and 'unofficial' components of an institution's ethos or, in other words, aspects of both antipositivistic and positivistic ethos.⁸⁷ How one might remedy any disjuncture between these two approaches, however, is beyond the scope of this paper.

V. CONCLUSION

This paper has analysed the various conceptualisations of ethos proposed by related studies and literature in congruence with Donnelly's distinction between the positivistic and antipositivistic perceptions of ethos. In particular, the paper has attempted to provide an insight into various manifestations and formulations of ethos from the viewpoint of both positivistic and antipositivistic conceptualisations of ethos, addressing the questions of what an ethos might consist of or involve, and how adherence to an ethos might be ascertained. The paper also attempted to demonstrate the difficulties accompanying an attempt to construct a rigid criterion to assess adherence to an ethos on the basis of a concept susceptible to such a wide variety of uses and interpretations.

As a consequence of both the problems associated with positivistic and antipositivistic ethos discussed throughout this paper, together with the potential disjuncture between the prescribed ethos of an institution and one which arises as a result of the social and organisational interaction of its members, relying solely on either the positivistic or antipositivistic variants of an ethos is problematic. As such, for the purposes of the ALRC's Review, the Commission will need to be mindful of the different conceptualisations of ethos in developing their recommendation and determining whether religious exemptions could be removed from anti-discrimination laws while also guaranteeing the rights of

⁸² Council Directive 2000/78/EC of 27 November 2000 on establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16, art 4(2).

⁸³ Emma Svensson, 'Religious Ethos, Bond of Loyalty, and Proportionality—Translating the 'Ministerial Exception' into 'European'' (2015) 4 *Oxford Journal of Law and Religion* 224, 233.

⁸⁴ Ibid 233, 237.

⁸⁵ Ibid 240.

⁸⁶ Donnelly (n 9) 137.

⁸⁷ Shorten, 'Are There Rights to Institutional Exemptions?' (n 12) 245.

religious institutions to conduct their affairs in accordance with their ethos.⁸⁸ Any attempt to formulate a method of ascertaining an ethos and, more specifically, assessing adherence to an ethos, must account for both the positivistic and antipositivistic variants of an institution's ethos.

⁸⁸ 'ALRC Terms of Reference' (n 5).

A PATCHWORK FULL OF HOLES: RELIGIOUS EXEMPTIONS IN AUSTRALIA'S COMMONWEALTH, STATE AND TERRITORY ANTI- DISCRIMINATION LEGISLATION

GRETA SWEENEY

I. INTRODUCTION AND AIMS

Australia is obliged under international law to afford people in Australian territory legally enforceable rights to religious freedom¹ and freedom from discrimination.²

'Religious freedom' is often used as a shorthand for the multi-faceted human right that encompasses freedom of thought, conscience, religion and belief.³ Australian case law and the United Nations Human Rights Committee have broadly defined 'religion' to include both traditional and emerging faith systems, though no unanimously agreed upon or exhaustive definition exists under Australian law.⁴ The primary source of Australia's international obligations to afford people

within its territory religious freedom is the *International Covenant on Civil and Political Rights* ('ICCPR').⁵ The ICCPR provides for an absolute freedom to *have* or to *adopt* religious beliefs,⁶ however the freedom to *manifest* religious beliefs may be limited in certain circumstances.⁷

Gaudron J gave a widely accepted definition of 'discrimination' under Australian law in *Street v Queensland Bar Association*.⁸ Her Honour defined discrimination as 'the process by which different treatment is accorded to persons or things by reference to considerations which are irrelevant to the object to be attained'.⁹ Therefore, an example of discrimination would be an employer refusing to interview job applicants of a certain race even though

1 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976 generally, and for Australia, 13 November 1980) ('ICCPR') arts 2, 18, 20(2), 26, 27; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('ICESCR') art 13; *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990 generally, and for Australia, 16 January 1991) ('CRC') art 14; *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969 generally, and for Australia, 30 October 1975) ('ICERD') art 5(d) (vii).

2 ICCPR (n 1) 2, 16, 26; ICESCR (n 1) art 2.2; CRC (n 1) art 2; ICERD (n 1) arts 1, 2, 4, 5.

3 Expert Panel, *Religious Freedom Review* (Report, 18 May 2018) 24–5 [1.32]–[1.36] ('*Ruddock Review*').

4 Ibid 25 [1.36]–[1.38], citing Human Rights Committee, *CCPR General Comment 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 48th sess, UN Doc. CCPR/C/21/Rev.1/Add.4 (30 July 1993) [1], [2], [5]; *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120, 131–2 (Mason ACJ and Brennan J), citing *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth* (1943) 67 CLR 116, 123 (Latham CJ).

5 ICCPR (n 1) arts 2, 18, 26, 27.

6 Ibid art 18(1) (emphasis added).

7 Ibid art 18(3) (emphasis added). See also Patrick Parkinson, 'Christian concerns about an Australian Charter of Rights' (2010) 15(2) *Australian Journal of Human Rights* 83, 98.

8 (1989) 168 CLR 461; Amelia Simpson, 'The High Court's conception of discrimination: origins, applications, and implications' (2007) 29(2) *Sydney Law Review* 263, 267.

9 *Street v Queensland Bar Association* (1989) 168 CLR 461, 570–71.

the applicants' race would not bear on their suitability for the job in question. Gaudron J stated that discrimination included

acts or decisions having a discriminatory effect or disparate impact (indirect discrimination) as well as ... acts or decisions based on discriminatory considerations (direct discrimination).¹⁰

Religious freedom has been judicially described in Australia as the cornerstone of a free society,¹¹ and the *Australian Constitution* ('*Constitution*') prohibits the Commonwealth from legislating in a way that prohibits the free exercise of religion.¹² Some religious bodies and individuals wish to differentially treat people with certain attributes, a well-known example being homosexuality.¹³ Such differential treatment may be a legitimate exercise of religious freedom, and will not constitute unlawful 'discrimination' according to Gaudron J's definition quoted above, provided the differential treatment is 'relevant' to attaining the object sought to be attained.¹⁴ However, determining whether this requisite relevance exists in a given scenario can be difficult, so conflicts between religious freedom and freedom from discrimination can arise.¹⁵

Resolving these conflicts in Australian law is an ongoing challenge.¹⁶ To date, state, territory and Commonwealth parliaments have sought to do so, among other means, by including religious exemptions in their respective anti-discrimination statutes.¹⁷ Australia has two layers of anti-discrimination legislation. The first layer contains various Commonwealth statutes, and the second contains state/territory

statutes. These statutes prohibit direct and indirect discrimination against individuals on the basis of several attributes such as sex and race, in various areas of activity such as work and education.¹⁸ Religious exemptions effectively allow religious bodies, and in Victoria and Tasmania, religious individuals,¹⁹ to discriminate in ways that are otherwise prohibited under the statutes in which the exemptions are contained. For example, s 14(1) of the *Sex Discrimination Act 1984* (Cth) ('*SDA*') prohibits discrimination against a person in employment on the ground of, *inter alia*, the person's sex, but a church's refusal to appoint female priests would not contravene s 14(1) because this refusal would fall within the ambit of the exemption for religious bodies contained in s 37(1) of the *SDA*. Together, the various religious exemptions form a 'patchwork' of protections for religious freedom.

Australia's religious exemptions almost always protect only the 'religion' aspect of the multidimensional right to 'religious freedom',²⁰ so this paper will relate only to freedom of 'religion', rather than freedom of thought, conscience or belief. Some state and territory statutes offer broader religious exemptions than others, with some offering religious bodies very limited scope to discriminate in a given area of life and others offering these bodies unfettered rights to discriminate in that same area. This means that when a complainant alleges that a religious body has unlawfully discriminated against him or her under a state or territory statute, the level of protection offered to the religious body can vary widely depending on the statute concerned.

¹⁰ Ibid 566.

¹¹ *Church of the New Faith v Commissioner of Payroll Tax (Vic)* (1983) 154 CLR 120, 132 (Mason ACJ and Brennan J).

¹² *Australian Constitution* s 116 ('*Constitution*').

¹³ Robert Mężyk, 'Discrimination against Employees of Religious Schools in Australia, US and the EU — A Comparison in Light of Human Rights and Deliberative Democracy' (2020) 94(5) *Australian Law Journal* 367, 373.

¹⁴ *Street v Queensland Bar Association* (1989) 168 CLR 461, 571 (Gaudron J).

¹⁵ Carolyn Evans and Leilani Ujvari, 'Non-Discrimination Laws and Religious Schools in Australia' (2009) 30(1) *Adelaide Law Review* 31, 33, 35, 39; Bobbi Murphy, 'Balancing Religious Freedom and Anti-Discrimination: *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd*' (2016) 40(2) *Melbourne University Law Review* 594, 601–2.

¹⁶ See, eg, Nicholas Aroney and Benjamin B Saunders, 'Freedom of Religion' in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia* (Hart Publishing, 2019) 285, 309.

¹⁷ *Ruddock Review* (n 3) 43 [1.135]–[1.137]. See also Queensland, *Parliamentary Debates*, Legislative Assembly, 26 November 1991, 3195 (DM Wells, Attorney-General).

¹⁸ *Ruddock Review* (n 3) 43 [1.137].

¹⁹ *Equal Opportunity Act 2010* (Vic) s 84 ('*Victorian Act*'); *Anti-Discrimination Act 1998* (Tas) s 52 ('*Tasmanian Act*').

²⁰ But see *Fair Work Act 2009* (Cth) s 351(2)(c) ('*FWA*'); *Equal Opportunity Act 1984* (WA) s 73 ('*WA Act*').

The Australian Law Reform Commission ('ALRC') is now undertaking a Review into the Framework of Religious Exemptions in Anti-discrimination Legislation.²¹ To assist the ALRC in its inquiry, this paper will offer the ALRC some insights into material inconsistencies between the existing exemptions and then highlight potential constitutional issues arising from having Commonwealth and state/territory exemptions, as well as the impact that removing some of the exemptions would have on religious freedom for religious bodies and individuals.

In doing so, this paper will suggest that some of the state/territory exemptions that differ in scope to their Commonwealth counterparts may be latently unconstitutional and invalid. It will be argued that since consistency is a virtue in itself, Australia's patchwork of religious exemptions is full of holes and a new patchwork of nationally consistent religious exemptions should therefore be made. The squares in this patchwork should take the form of a single set of religious exemptions, which are contained either in one consolidated Commonwealth anti-discrimination statute, or in identical form in each state/territory anti-discrimination statute.

II. CONTEXT

Religious freedom attaches to individuals, however manifestation of religion has an organisational dimension;²² the *ICCPR* protects the right to manifest religion individually or communally 'in worship,

observance, practice and teaching'.²³ This associative aspect of religious freedom arguably justifies the application of Australia's religious exemptions to religious bodies. Framing religious exemptions in a way that appropriately balances religious freedom with freedom from discrimination is critical because under international law, all human rights are equally important.²⁴ The United Nations Special Rapporteur on freedom of religion or belief stated that:

States that adopt more secular or neutral governance models may ... [contravene] ... the [ICCPR] if they intervene extensively, overzealously and aggressively in the manifestation of religion or belief alleging the attempt to protect other rights, for example the right to ... sexual orientation When these rights ultimately clash, every effort must be made ... to [protect] ... all rights ... through reasonable accommodation.²⁵

Adequate legal protection for religious freedom arguably becomes more important as Australia becomes increasingly secular.²⁶ The 2017 Australian Marriage Law Postal Survey revealed that 61.6 per cent of Australians believed that same-sex marriage should be legalised under Commonwealth law, and individually all states and territories recorded majority support for same-sex marriage.²⁷ This result prompted the Commonwealth Government to legalise same-sex marriage shortly afterwards.²⁸ One Parliamentarian stated of the Bill that occasioned the legislative changes: 'Religious freedom is important, but nothing

21 Attorney-General (Commonwealth), 'Terms of Reference', *Review Into The Framework Of Religious Exemptions In Anti-Discrimination Legislation* (Web Page, 4 March 2020) <<https://www.alrc.gov.au/inquiry/review-into-the-framework-of-religious-exemptions-in-anti-discrimination-legislation/terms-of-reference/>>.

22 Alex Deagon 'Maintaining religious freedom for religious schools: options for legal protection after the Ruddock Review' (2019) 247(1) *St Mark's Review* 41, 45.

23 ICCPR (n 1) art 18(1).

24 *Ruddock Review* (n 3) 13 [1.37], citing *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights in Vienna, UN Doc A/CONF. 157/23 (25 June 1993) [5]; Aroney and Saunders (n 16) 288.

25 *Ruddock Review* (n 3) 43–4 [1.139], quoting Ahmed Shaheed, *Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/HRC/37/49 (28 February 2018) [47].

26 *Ruddock Review* (n 3) 11–12 [1.22]–[1.28]; Deagon (n 22) 43; Stephen Pickard, 'Religious freedom in a post-secular society' (2019) 247(1) *St Mark's Review* 82, 84; Jacqueline K Nelson, Alpha Possamai-Inesedy and Kevin M Dunn, 'Reinforcing substantive religious inequality: a critical analysis of submissions to the Review of Freedom of Religion and Belief in Australia Inquiry' (2012) 47(3) *Australian Journal of Social Issues* 297, 303.

27 Australian Bureau of Statistics, 'National Results', *Australian Marriage Law Postal Survey, 2017* (Web Page, 15 November 2017) 1800.00 <<https://www.abs.gov.au/ausstats/abs@.nsf/mf/1800.0>>.

28 *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) s 3; *Marriage Act 1961* (Cth) s 5(1) (definition of 'marriage').

about this bill threatens ... religious beliefs'.²⁹ However, not all Australians held this view and some raised concerns that the Bill would compromise religious freedom.³⁰

Subsequently added exemptions in the *SDA*, which effectively allow religious ministers and religious marriage celebrants to refuse to solemnise a same-sex marriage, suggest that the Commonwealth Government was astute to these concerns.³¹ Indeed, the Government responded to community division arising from the legalisation of same-sex marriage by commissioning an inquiry into religious freedom under Australian law.³² This resulted in the *Religious Freedom Review* ('*Ruddock Review*'), conducted by an Expert Panel ('the Panel') and published in 2018. There have been numerous other inquiries into religious freedom in Australia.³³ The appropriate scope of religious exemptions in anti-discrimination legislation, and indeed the desirability of their very existence, has been hotly contested in the course of these inquiries and in socio-legal commentary more generally.

III. RELIGIOUS EXEMPTIONS IN AUSTRALIAN ANTI-DISCRIMINATION LEGISLATION

A. Substantive provisions

Table 1 in Part VII quotes key religious exemptions, many of which are complex and verbose. Analysis of the exemptions in this Part therefore only purports to convey their effect, so as to avoid prolixity. State/territory anti-discrimination statutes cover several grounds of discrimination, whereas the various Commonwealth anti-discrimination statutes each target specific grounds of discrimination. The *SDA* covers discrimination on the grounds of sex,³⁴ sexual orientation,³⁵ gender identity,³⁶ intersex status,³⁷ marital or relationship status,³⁸ pregnancy or potential pregnancy,³⁹ breastfeeding,⁴⁰ and family responsibilities.⁴¹ The *Age Discrimination Act 2004* (Cth) ('*ADA*') covers discrimination on the ground of age.⁴² The *Australian Human Rights Commission Act 1986* (Cth) ('*AHRCA*'), among other things, establishes a regime for resolving complaints of unlawful discrimination under the *SDA* and *ADA*,⁴³ and exempts from the definition of 'discrimination' certain conduct done by religious institutions in employment.⁴⁴ The *Fair Work Act 2009* (Cth) ('*FWA*') contains religious exemptions in the area of employment.⁴⁵

²⁹ Commonwealth, *Parliamentary Debates*, Senate, 3 December 2018, 12775 (Susan Templeman).

³⁰ Amy Maguire, Fiona McGaughey and Georgia Monaghan 'Performance or performativity? Australia's membership of the United Nations Human Rights Council' (2019) 25(2) *Australian Journal of Human Rights* 317, 331; Frank Brennan 'Religious freedom in secular Australia' (2018) 28(24) *Eureka Street* 21, 22.

³¹ *Sex Discrimination Act 1984* (Cth) ss 40(2A), (2AA) ('*SDA*'); *Marriage Act 1961* (Cth) s 5(1) (definitions of 'minister of religion', 'religious marriage celebrant'). See also Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018* (February 2019) 24.

³² *Ruddock Review* (n 3) 76 [1.305].

³³ Ibid 8 [1.4]. See, eg, Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Legal Foundations of Religious Freedom in Australia* (Interim Report, November 2017); House of Representatives Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Freedom of Religion and Belief, the Australian Experience: Inquiry into the Status of the Human Right to Freedom of Religion or Belief* (Second Interim Report, April 2019); Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018* (Report, February 2019).

³⁴ *SDA* s 5.

³⁵ Ibid ss 4(1) (definition of 'sexual orientation'), 5A.

³⁶ Ibid ss 4(1) (definition of 'gender identity'), 5B.

³⁷ Ibid ss 4(1) (definition of 'intersex status'), 5C.

³⁸ Ibid ss 4(1) (definition of 'marital or relationship status'), 6.

³⁹ Ibid ss 4B, 7.

⁴⁰ Ibid s 7AA.

⁴¹ Ibid ss 4A, 7A.

⁴² *Age Discrimination Act 2004* (Cth) s 3 ('*ADA*').

⁴³ *Australian Human Rights Commission Act 1986* (Cth) Pt IIB, s 3(1) (definition of 'unlawful discrimination') ('*AHRCA*').

⁴⁴ Ibid s 3(1) (definition of 'discrimination' para (d)).

⁴⁵ *FWA* ss 153, 195, 351.

The various state/territory and Commonwealth exemptions potentially available to religious bodies in a given area of activity, for example, the exemptions potentially available to religious educational institutions in the area of work, will be described as 'comparable exemptions' for the purposes of this paper. This Part does not purport to offer an exhaustive analysis, contrast nor comparison of the various state/territory and Commonwealth religious exemptions. It will rather discuss some salient features of, and differences between, the various exemptions.

B. *Inconsistencies*

There is variation in the wording of comparable religious exemptions between jurisdictions, both as between the grounds of discrimination they apply to, such as sex and disability, and as between the areas of activity they operate in, such as work and education.⁴⁶ The Panel opined that this inconsistency is not of itself a deficiency, especially since it does not appear to have created many real-life problems for religious bodies or individuals alleging discrimination by religious bodies.⁴⁷ While the Panel's view reflects a practical, empirical approach to evaluating the effect of inconsistent religious exemptions across Australian jurisdictions, it somewhat ignores the fact that a law's efficacy is not solely determined by how that law practically operates. Laws also have an expressive or legitimating function in signalling a polity's values to people in that polity.⁴⁸ Consequently, consistency in religious exemptions across jurisdictions may be desirable to signal to the Australian community the importance of, and equal protection for, religious freedom across Australia.⁴⁹ The evolution of women's legal rights such as enfranchisement in many countries during the twentieth century,

and the resultant impacts on women's social liberation in these countries, demonstrates how powerful law can be in shaping societal values. Similarly, nationally consistent legal protection for religious freedom could engender stronger nationwide respect for this right.

Furthermore, the full extent of problems arising from inconsistency between comparable religious exemptions may not be reflected in submissions considered by the Panel, since those adversely impacted by anti-discrimination law may refrain from voicing this.⁵⁰ Anti-discrimination claims are rarely successfully litigated,⁵¹ which may deter potential complainants from utilising anti-discrimination law to seek relief. Indeed, Kirby J once described judicial consideration of anti-discrimination legislation as a

field ... littered with the wounded
... who, following closer judicial
analysis of the legislation,
fail to hold on to the relief
originally granted to them⁵²

There is little judicial consideration of religious exemptions, so much about their meaning and operation is uncertain.

Elphick argues that the case law analysing state religious exemptions, albeit limited, indicates actual inconsistency between state courts' interpretation of ostensibly similarly worded exemptions.⁵³ Elphick rightly regards this as a cause for concern.⁵⁴ If there was one set of religious exemptions that applied nationally, consistent interpretation of these exemptions would be more likely, particularly if the exemptions operated at Commonwealth level and appeals regarding them were heard by the Federal Court. This is because the appeals would be governed by one nationally applicable law and decided by a single court, rather than

46 *Ruddock Review* (n 3) 44 [1.140].

47 *Ibid* 15–16 [1.44], 46 [1.153].

48 Cass R Sunstein, 'On the Expressive Function of Law' (1996) 144(5) *University of Pennsylvania Law Review* 2021, 2022.

49 See *Ruddock Review* (n 3) 46 [1.154].

50 See *ibid* 116.

51 *X v Commonwealth* (1999) 200 CLR 177, 213 [120] (Kirby J).

52 *Ibid*.

53 Liam Elphick, 'Sexual Orientation and "Gay Wedding Cake" Cases under Australian Anti-Discrimination Legislation: A Fuller Approach to Religious Exemptions' (2017) 38(1) *Adelaide Law Review* 149, 166–7.

54 *Ibid*.

the current arrangement whereby different state/territory anti-discrimination laws containing different religious exemptions are interpreted and applied by state/territory appellate courts, which are not bound by each other's past decisions.

1. *Material differences between exemptions and their interpretation*

(a) *Alternative versus cumulative operation*

Many religious exemptions contain several 'limbs' or substantive elements. In some jurisdictions, these limbs operate alternatively, in the sense that religious bodies need only prove that their conduct satisfied one of the limbs, rather than all limbs contained in the relevant exemption. For example, the general religious bodies exemptions under the *Anti-Discrimination Act 1977* (NSW) ('NSW Act'), the *Equal Opportunity Act 1984* (SA) ('SA Act') and the *Equal Opportunity Act 1984* (WA) ('WA Act') are slightly differently worded but all apply, in broad terms, to conduct of religious bodies that *either* conforms to the doctrines of a religion *or* is necessary to avoid injury to the religious susceptibilities of that religion's adherents.⁵⁵ By contrast, the comparable exemptions under the *Anti-Discrimination Act 1991* (Qld) ('Queensland Act') and the *Discrimination Act 1991* (ACT) ('ACT Act') only apply to conduct that satisfies *both* of the aforesaid 'conformity' and 'necessity' limbs - in this sense, the limbs operate cumulatively.⁵⁶

Elphick asserts that this inconsistency can cause legal problems.⁵⁷ In jurisdictions with exemptions containing limbs that operate alternatively, associative religious freedom is theoretically broader than in jurisdictions with exemptions containing limbs that operate cumulatively, because imposing more requirements for religious

bodies to satisfy in order to make out an exemption logically restricts the scope of the exemption. For example, Elphick surmises that due to the divergence between the general religious bodies exemptions in the jurisdictions mentioned in the preceding paragraph, if a church were to impose a policy under which it hires only heterosexual cleaners, the church may act legally in New South Wales, Western Australia and South Australia but illegally in Queensland and the Australian Capital Territory, if the policy

was found to be necessary to avoid injury to the religious susceptibilities of ... adherents but was not necessary to adhere to the church's religious beliefs.⁵⁸

(b) *Qualifiers*

Qualifiers for the purposes of this paper are requirements contained in some religious exemptions that exist in lieu of, in addition to, or further condition the 'conformity' and 'necessity' limbs described in the preceding paragraph.

(i) *Inherent requirements*

'Inherent requirements' qualifiers exist in some religious exemptions that operate in the area of work. Such qualifiers, in various iterations, essentially allow a religious body to discriminate to enable fulfilment of the relevant occupational role and/or adherence to the body's religious ethos.⁵⁹ These qualifiers therefore reflect Gaudron J's view that differential treatment is not unlawful where it is based on considerations that are 'relevant' to attaining an object of the act or decision in question, as anti-discrimination laws are implicitly premised on the assumption that certain characteristics are irrelevant to the matters in issue.⁶⁰ Objects sought to be achieved by religious exemptions in anti-discrimination legislation ostensibly include religious freedom,

⁵⁵ *Anti-Discrimination Act 1977* (NSW) s 56(d) ('NSW Act'); *Equal Opportunity Act 1984* (SA) s 50(1)(c) ('SA Act'); *WA Act* s 72(d).

⁵⁶ *Anti-Discrimination Act 1991* (Qld) ('Queensland Act') s 109(1)(d); *Discrimination Act 1991* (ACT) ('ACT Act') s 32(1)(d); Elphick (n 53) 160, 166.

⁵⁷ Elphick (n 53) 166–7.

⁵⁸ See *ibid* 166.

⁵⁹ Mezyk (n 13) 379–80.

⁶⁰ *Street v Queensland Bar Association* (1989) 168 CLR 461, 570–71.

facilitating the effective operation of religious bodies and preventing discrimination against members of these bodies. Where a religious body undertakes an activity which, by its very nature, inherently requires that the person performing the relevant activity have certain characteristics, discriminating against persons who do not possess these characteristics is relevant to ensuring that the religious body can fulsomely perform the activity, as prescribed by the relevant religion. For example, it could be convincingly argued that a relevant ground for discrimination would be a person's religious beliefs, if a religious school refuses to give that person a job as a religious studies teacher because the person is an atheist. This is because not believing in God could conceivably prevent a religious studies teacher from effectively teaching students about religious beliefs that they personally object to.

The *Queensland Act* contains a heavily qualified exemption for religious bodies (including religious educational institutions) that wish to discriminate against (prospective) employees and contractors on the basis of various attributes (excluding age, race or impairment).⁶¹ Key qualifiers in this exemption include the following. The discrimination must:

- not be unreasonable;⁶²
- be prompted by the (prospective) employee or contractor knowingly and openly acting in a work-related setting in a way 'contrary to' the 'employer's religious beliefs';⁶³ and
- occur in a setting where acting consistently with those religious beliefs is a 'genuine occupational requirement of the employer'.⁶⁴

Under the *ACT Act* and the *Anti-Discrimination Act 1998* (Tas) ('*Tasmanian Act*'), discrimination by religious educational institutions on the basis of a (prospective) employee or contractor's religious conviction must be designed to enable or better enable the institution to be conducted in accordance with the religious beliefs to which it adheres.⁶⁵ Mężyk supports including these 'inherent requirements' qualifiers in exemptions as they allow religious bodies to fulfil their religious ethos, without necessarily singling out certain attributes as permissible grounds for discrimination, and therefore appropriately balance rights to religious freedom and non-discrimination.⁶⁶

Walsh v St Vincent de Paul Society Queensland (No. 2) ('*Walsh*')⁶⁷ suggests that the 'genuine occupational requirement' test under the *Queensland Act* is objective and narrow in ambit. In that case, the Queensland Anti-Discrimination Tribunal found that the Saint Vincent de Paul Society, a charity self-described as an 'international Catholic organisation of lay people', unlawfully discriminated when it threatened to dismiss a Christian woman from her role of president of a conference group within the Society, unless the woman became Catholic.⁶⁸ The Tribunal held that the religious employment exemption was unavailable to the Society, as being Catholic was not a genuine occupational requirement of the president's role; inculcating Catholicism 'was not the society's primary function', nor was it 'objectively necessary for a president to be Catholic' as the 'duties of a president were much more comprehensive'.⁶⁹

(ii) Written policy

The *SA Act* and the *ACT Act* impose requirements that administrators of

⁶¹ *Queensland Act* ss 25(2), (3).

⁶² *Ibid* ss 25(3), (5).

⁶³ *Ibid* ss 25(2), (3)(a), sch 1 (definition of 'work').

⁶⁴ *Ibid* ss 25(2), (3)(b), sch 1 (definition of 'work').

⁶⁵ *ACT Act* ss 46(2), (5); *Tasmanian Act* ss 3 (definition of 'employment'), 51(2).

⁶⁶ Mężyk (n 13) 380.

⁶⁷ [2008] QADT 32 ('*Walsh*').

⁶⁸ 'Religious belief or religious activity case studies', *Queensland Human Rights Commission* (Web Page, 29 June 2019) <<https://www.qhrc.qld.gov.au/resources/case-studies/religious-belief-or-religious-activity2>>, summarising *Walsh v St Vincent de Paul Society Queensland (No. 2)* [2008] QADT 32.

⁶⁹ *Ibid*.

religious educational institutions (such as schools) that wish to discriminate in work-related matters have a policy flagging the institution's position on this matter.⁷⁰ Under the *ACT Act*, the institution must make this policy 'readily accessible by prospective and current employees and contractors of the institution'.⁷¹ Under the *SA Act*, the policy must be provided not only to (prospective) staff and contractors but also, on request, to (prospective) students, their parents and guardians, and members of the public.⁷² Whether these third parties would actually request copies of a South Australian institution's work-related discrimination policy is questionable but unknown. Nonetheless 'written policy' requirements are desirable as they facilitate transparency, a virtue which exemptions without these requirements lack.⁷³ Transparency is beneficial in employment relationships as it ensures that the expectations of a particular role are clear to applicants before they decide to apply for the role. This increases the likelihood that only suitable candidates will apply for the role and lowers the likelihood that applicants will be taken by surprise when they are unsuccessful in securing a role they have applied for, thereby reducing the likelihood of these unsuccessful applicants making a complaint under anti-discrimination laws.

(iii) Reasonableness versus good faith

Some comparable exemptions import 'reasonableness', others 'good faith' and others no qualifiers. This is a notable source of inconsistency between them.

Exemptions in the area of education under the *NSW Act* apply to a 'private educational authority', which is an administrator of any 'school, college, university or other

institution at which education or training is provided' that is not 'established under the *Education Act 1990* ..., the *Technical and Further Education Commission Act 1990* or an Act of incorporation of a university', and is not an 'agricultural college'.⁷⁴ The education exemptions under the *NSW Act* therefore likely apply to administrators of religious schools.⁷⁵ Unlike the exemptions potentially available to religious schools in other jurisdictions, the comparable New South Wales ('NSW') exemptions are unfettered.⁷⁶ They permit discrimination in staff and student-related matters on several grounds with

no limiting requirement that the discrimination be reasonable, or done in good faith, or to comply with the doctrines of the particular religion.⁷⁷

By contrast, under the *Equal Opportunity Act 2010* (Vic) ('*Victorian Act*'), religious educational institutions such as schools may take action based on a person's specified attribute, that is '*reasonably* necessary to avoid injury to the religious sensitivities of adherents of the religion' to which the school adheres.⁷⁸ The comparable exemption under the *WA Act* applies to discrimination by religious educational institutions against (prospective) employees and contractors that is done *in good faith* to avoid injury to the relevant religion's adherents.⁷⁹

Jurisdictions in which exemptions require religious bodies to prove that their allegedly discriminatory conduct was done 'in good faith' impose a subjective qualifier which is theoretically easier to satisfy than an objectively-determined 'reasonableness' qualifier.⁸⁰ A body whose religious views are idiosyncratic in the eyes of wider society

⁷⁰ *ACT Act* s 46(4)(a); *SA Act* s 34(3)(b).

⁷¹ *ACT Act* s 46(4)(b).

⁷² *SA Act* s 34(3)(c), (d).

⁷³ *Ruddock Review* (n 3) 63 [1.250], 117; Moira Clarke, 'The anti-discrimination maze: The government's plan to simplify anti-discrimination legislation is leading to problems' [2013] (June) *Australian Rationalist* 24, 24.

⁷⁴ *NSW Act* s 4 (definition of 'private educational authority').

⁷⁵ CCH Australia, *Australian and NZ Equal Opportunity Commentary* (online at 13 November 2018) [¶66-990].

⁷⁶ *NSW Act* ss 25(3)(c), 31A(3)(a), 38K(3), 46A(3), 49L(3)(a), 49ZO(3), 49ZYL(3)(b).

⁷⁷ CCH Australia (n 75).

⁷⁸ *Victorian Act* s 83(2) (emphasis added).

⁷⁹ *WA Act* ss 4 (definition of 'educational institution'), 73(1), (2) (emphasis added). Cf *Anti-Discrimination Act 1996* (NT) ('*NT Act*') s 37A(b).

⁸⁰ See, eg, *Goldberg v G Korsunski Carmel School* (2000) EOC ¶93-074 ('*Goldberg*'); CCH Australia (n 75) [¶67-750].

may discriminate in 'good faith',⁸¹ if the body genuinely regards the discrimination as necessary to avoid injuring the religious susceptibilities of adherents of the relevant religion.⁸² If an exemption requires a religious body to prove that its conduct was objectively reasonable, however, religious freedom may be restricted substantially as secular views on how a religious body should have acted in the circumstances may override those of the religious adherents concerned. For example, the religious employment exemption under the *Queensland Act* considers factors like the consequences of the employer's impugned conduct and whether such conduct is 'harsh' when determining whether the conduct is unreasonable.⁸³

Some argue that 'reasonableness' qualifiers, by importing objective standards, detract from one of the purposes of religious exemptions: facilitating manifestation of *religious* beliefs.⁸⁴ Nonetheless this criticism arguably applies to any qualifier contained in religious exemptions. For example, 'inherent requirements' qualifiers are also prone to being read through a secular lens, as *Walsh* demonstrated. On the one hand, it makes logical sense to allow a religious body to determine which requirements are inherent requirements of a role it performs, given that the role probably incorporates some aspect of the body's religious beliefs. On the other hand, allowing a religious body to be the final arbiter of whether a certain characteristic is an inherent requirement for a role may render the 'inherent requirements' threshold redundant, as the religious body would be given full

discretion to declare which characteristics are permissible bases for discrimination.

An exemption containing a 'good faith' qualifier was successfully invoked by an Orthodox Jewish-run school in Perth in *Goldberg v G Korsunski Carmel School* ('*Goldberg*').⁸⁵ That exemption, which is contained in the *WA Act*, permits religious educational institutions to discriminate on several grounds against (prospective) students, if the institution discriminates in

good faith in favour of adherents of [the relevant] religion or creed generally, but not in a manner that discriminates against a particular class or group who are not adherents of that religion or creed.⁸⁶

The school had a policy that allowed enrolment of students of any religion, subject to restrictions, provided that the school's Halachic authority, the Rabbi, approved the enrolment.⁸⁷ Pursuant to this policy, the school imposed restrictions on the enrolment of a boy whose family adhered to Reform Judaism, and whose father, but not mother, was Jewish.⁸⁸ The school did so because it regarded the boy as non-Jewish; Orthodox Judaism determines Jewish identity according to matrilineal descent.⁸⁹ The complainant was the boy's father, who alleged that the conditions imposed were not justified by the Halacha, the Jewish text in question.⁹⁰ He based his argument on the premise that non-Jewish students, namely students not born to Jewish mothers, were allowed enrolment at the school under the policy,

81 Kate Offer, 'Religious Schools and Equal Opportunity: Lessons from *Goldberg v Korsunski Carmel School*' (2000) 5(1) *Australia & New Zealand Journal of Law and Education* 74, 79.

82 See, eg, *SDA* s 38(1); *FWA* ss 153(2)(b), 195(2)(b), 351(2)(c); *NT Act* s 37A(b); *WA Act* s 73.

83 *Queensland Act* s 25(5).

84 See also Aroney and Saunders (n 16) 297, quoting *Griffin v Catholic Education Office* (1998) EOC ¶92–928, contained in Human Rights and Equal Opportunity Commission, *Report of an Inquiry into a Complaint of Discrimination in Employment and Occupation: Discrimination on the Ground of Sexual Preference* (HRC Report No 6, 1998) 23 (emphasis added). See also Elphick (n 53) 190. Cf Commonwealth Attorney-General's Department, *Consolidation – Comparative Analysis – Religious Exemptions* (FOI Documents) 3.

85 (2000) EOC ¶93-074, cited in CCH Australia (n 75) [¶67-750] ('*Goldberg*').

86 *WA Act* s 73(3); CCH Equal Opportunity Law Editor, CCH Australia, '*Goldberg v G Korsunski Carmel School* (Case Digest) [74327].

87 CCH Equal Opportunity Law Editor (n 86) [74326].

88 Offer (n 81) 74.

89 CCH Equal Opportunity Law Editor (n 86).

90 *Ibid*

so the restrictions imposed on his son's enrolment were not imposed in good faith.⁹¹

The Western Australian Equal Opportunity Commission ('Commission') concluded that the exemption applied, as the school had been acting in good faith according to its own interpretation of who Orthodox Judaism regards as a Jew, in an effort to uphold and transmit Orthodox Jewish doctrine.⁹² Commentary on the decision stated that the Commission regarded the school's

true reason for allowing non-Jewish students to be admitted to the school [as its attempt to] attract to the school students born of Jewish mothers who therefore fell within the class of Orthodox Jews, although the attitudes of some such families might have been progressive.⁹³

A Rabbi, as an expert witness, gave evidence that supported this contention.⁹⁴ He stated that a child born to a Jewish mother could always become an observant Orthodox Jew by adhering to Orthodox doctrines, whereas a child not born to a Jewish mother could only become an Orthodox Jew by conversion.⁹⁵ Furthermore, the school treated equally any students who the Rabbi deemed not to be Orthodox Jews, including those with patrilineal Jewish ancestry like the complainant's son.⁹⁶ Therefore, there was no discrimination against a particular class of non-Orthodox Jews.⁹⁷

The reasoning in *Goldberg* can be contrasted with the position adopted by the Victorian Court of Appeal ('VCA') in *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* ('Cobaw').⁹⁸ The VCA in *Cobaw* was tasked with interpreting

religious exemptions that did not contain 'good faith' qualifiers. In *OV v Members of the Board of the Wesley Mission Council* ('OV'),⁹⁹ the New South Wales Court of Appeal ('NSWCA') interpreted the general religious bodies exemption under the *NSW Act*,¹⁰⁰ which was ostensibly very similar to the comparable exemption impugned in *Cobaw*.¹⁰¹ In *OV*, the NSWCA reasoned along more similar lines to the Commission in *Goldberg*, than did the VCA in *Cobaw*.

In *Cobaw*, Rowe, the manager of Christian Youth Camps Ltd (CYC), a Christian Brethren-affiliated accommodation provider, refused a request by Cobaw, a youth suicide prevention organisation, to 'hire a camping resort owned and operated by CYC, for the purposes of a weekend camp to be attended by same sex attracted young people'.¹⁰² The refusal was based on Rowe and CYC regarding homosexual sexual activity as 'contrary to God's teaching as set out in the Bible'.¹⁰³ The Victorian Civil and Administrative Tribunal ('VCAT') found that CYC's 'refusal amounted to unlawful discrimination on the basis of the sexual orientation of those who would be attending the proposed camp' under the predecessor to the *Victorian Act*.¹⁰⁴ CYC appealed VCAT's decision to the VCA, arguing, *inter alia*, that its refusal was covered by an exemption for bodies 'established for religious purposes' whose conduct was necessary to 'conform with the doctrines of the [relevant] religion' or was 'necessary to avoid injury to the religious sensitivities of people of [that] religion'.¹⁰⁵ CYC also relied on an exemption for genuinely

91 Ibid [74237].

92 Ibid.

93 Ibid.

94 Offer (n 81) 77.

95 Ibid.

96 CCH Equal Opportunity Law Editor (n 86).

97 Ibid.

98 (2014) 50 VR 256 ('Cobaw').

99 (2010) 79 NSWLR 606 ('OV').

100 Ibid 612 [17] (Basten JA and Handley AJA), citing *NSW Act* s 56.

101 Elphick (n 53) 166.

102 *Cobaw* (n 98) 260 [3]–[4] (Maxwell P).

103 Ibid 260 [4] (Maxwell P).

104 Ibid 261 [5]–[6] (Maxwell P).

105 Ibid 261 [6], 262–3 [15] (Maxwell P), citing *Equal Opportunity Act 1995* (Vic) s 75(2).

religiously-motivated acts of individuals.¹⁰⁶ The VCA refused CYC's appeal.

In *OV*, a same-sex couple applied to an organisation affiliated with the Wesley Mission, part of a Christian denomination, to become foster parents.¹⁰⁷ The organisation ('Wesley Dalmar') refused the partners' application on the basis that they were in a same-sex relationship.¹⁰⁸ The couple challenged the refusal in the New South Wales Administrative Decisions Tribunal ('NSWADT'), alleging that the refusal constituted unlawful discrimination on the ground of homosexuality.¹⁰⁹ The case was procedurally complex, but relevantly the NSWCA remitted the matter back to the NSWADT with guidance.¹¹⁰ This ultimately led the NSWADT to reverse its initial decision that the general religious bodies exemption under the *NSW Act* did not apply to Wesley Dalmar's refusal.¹¹¹ Whether Wesley Dalmar's refusal satisfied the first limb in the exemption, namely necessity 'to [conform] to the doctrines of [its] religion', was not critical in deciding the appeal.¹¹² Nonetheless unlike the approach taken by the VCA in *Cobaw*, a subjective interpretation of 'necessity' arguably underlay the NSWCA's decision.¹¹³

In *Cobaw*, the VCA found that the general religious bodies exemption was not available to CYC as it was not a 'body established for religious purposes' within the meaning of that exemption.¹¹⁴ Maxwell P stated that CYC's primary purpose was profit, as it was a 'commercial accommodation provider',¹¹⁵ the fact that CYC sought to conduct its facilities

'in accordance with the fundamental beliefs and doctrines of the Christian Brethren' did not 'convert [its] secular purpose into a religious purpose'.¹¹⁶ This was particularly so, stated the President, because CYC's religious affiliation was 'invisible to members of the public', CYC did not restrict its service provision to religious activities in any way and users conducting church camps were 'but a small part of CYC's customer base'.¹¹⁷

Some argue that the VCA's narrow interpretation of 'religious body' sensibly restricts tangentially religious bodies from discriminating in goods and services provision, and thereby promotes substantive equality via fair economic distribution.¹¹⁸ The Court's interpretation roughly accords with that of the Queensland Tribunal in *Walsh*. The Tribunal found in *Walsh* that Queensland's general religious bodies exemption¹¹⁹ was unavailable to the Society because it was not a religious body within the meaning of that exemption, as it 'was made up of "lay faithful" and only one of its objectives was spiritual'.¹²⁰

The VCA in *Cobaw* also narrowly construed what constituted an act 'necessary to conform' with a religious 'doctrine', though this finding was not crucial to CYC's liability since CYC failed to meet the threshold 'religious body' test.¹²¹ Importantly, the VCA held that the test for 'necessity' under the impugned exemptions was objective.¹²² Neave JA stated that international jurisprudence on the right to religious freedom under the *ICCPR* and *European Convention*¹²³ suggests that 'subjectively

106 Ibid, citing *Equal Opportunity Act 1995* (Vic) s 77.

107 *OV* (n 99) 612 [16] (Basten JA and Handley AJA).

108 Ibid.

109 Ibid.

110 Elphick (n 53) 165.

111 Ibid.

112 Charlotte Baines, 'A Delicate Balance: Religious Autonomy Rights and LGBTI Rights in Australia' (2015) 10(1) *Religion and Human Rights* 45, 52–3.

113 Elphick (n 53) 165–166.

114 *Cobaw* (n 98) 318 [248], 319 [254] (Maxwell P), 344 [360] (Neave JA), 368 [440] (Redlich JA).

115 Ibid 318 [250].

116 Ibid 318 [248] (Maxwell P).

117 Ibid 322 [267].

118 Murphy (n 15) 609. See also Clarke (n 73) 24–5.

119 *Queensland Act* s 109.

120 Queensland Human Rights Commission (n 68).

121 Murphy (n 15) 612.

122 *Cobaw* (n 98) 328 [292] (Maxwell P), 365 [425] (Neave JA, Redlich JA disagreeing at 392 [527]–[528]).

123 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('*European Convention*').

held religious beliefs of one individual do not always override the human rights of others'.¹²⁴ Maxwell P held that the 'necessary to conform' threshold meant that the 'relevant doctrine(s) of the religion [give] the person no alternative but to act (or refrain from acting) in the particular way'.¹²⁵ In finding CYC had failed to surmount this hurdle, an important element of VCAT's reasoning was that CYC did not make consistent enquiries about (prospective) camp attendees' sexual orientation, so it could not be said that any 'doctrine' condemning homosexual sexual activity compelled refusal of accommodation to homosexual people.¹²⁶ Maxwell P added that 'even if ... the wrongfulness of homosexual activity was a doctrine of the Christian Brethren', it was a rule of 'private morality',¹²⁷ which did not require an adherent of the religion to 'interfere with, or obstruct, or discourage, the expression by other persons of their sexual preferences'.¹²⁸ A similar construction was given to 'necessity' to avoid 'injury to religious susceptibilities'.¹²⁹

By contrast, in *OV*, the NSWCA construed 'doctrine' more broadly, favouring the following definition 'which eschewed labels': "doctrine" ... mean[s] the body of teachings and beliefs which direct the lives and beliefs of the religion's adherents, and the way they practice their religion in the Wesley Mission'.¹³⁰ Basten JA and Handley AJA found that the NSWADT had erred in regarding a religious 'doctrine' as one grounded in some 'text or oral tradition regarded as authoritative within the religion itself',¹³¹ ultimately concluding that a religious act or practice could attract the operation of the exemption even if it was only adopted by a particular Christian denomination or part

thereof, as opposed to an act or practice uniformly adopted by all denominations.¹³²

The NSWCA in *OV* set a much lower threshold for the necessity to avoid 'injury to the religious susceptibilities of adherents' limb of the exception than the VCA did in respect of the comparable exemption in *Cobaw*. The NSWCA held that not all adherents need be offended by the subject of discrimination for this limb to be satisfied, but rather a 'significant proportion' of adherents.¹³³ In so finding, the Court held that there being a "diversity of views" amongst adherents of both the Christian religion and, more specifically, of the Uniting Church, "on the issue of homosexuality" did not render the exemption unavailable to Wesley Dalmar.¹³⁴ While Allsop P regarded assessing 'the avoidance of injury to the religious susceptibilities of ... adherents of that religion' as probably an objective inquiry,¹³⁵ His Honour and the other members of the Court seemed to import a more subjective element into their analysis than did the VCA in *Cobaw*. In this sense, the NSWCA reasoned similarly to the Commission in *Goldberg* as both the NSWCA and the Commission gave considerable weight to the views of particular members of the religious denominations concerned in the disputes, when deciding whether the alleged discrimination was permissible.

While the VCA in *Cobaw* held that the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Charter*') was not yet operative at the time of the events in question and therefore was technically inapplicable,¹³⁶ the effect of the *Charter* was nonetheless considered

124 *Cobaw* (n 98) 365 [426].

125 *Ibid* 326 [287].

126 *Ibid* 327 [289] (Maxwell P), citing *Cobaw Community Health Services v Christian Youth Camps Ltd* [2010] VCAT 1613, [321]–[322].

127 *Ibid* 325 [280]–[281] (Maxwell P).

128 *Ibid* 326 [284] (Maxwell P).

129 *Ibid* 328 [291] (Maxwell P).

130 *Ibid* 621 [55] (Basten JA and Handley AJA).

131 *Ibid* 618 [44] (Basten JA and Handley AJA), quoting *OV v QZ* (No. 2) [2008] NSWADT 115, [125].

132 *OV* (n 99) 618 [41].

133 *Ibid* 611 [12] (Allsop P).

134 *Ibid* 619 [46] (Basten JA and Handley AJA), citing *OV v QZ* (No. 2) [2008] NSWADT 115, [139], [140], [142].

135 *Ibid* 611 [12] (Allsop P).

136 *Cobaw* (n 98) 301 [176], 304 [188] (Maxwell P).

in *obiter dicta*. Maxwell P stated that VCAT had reasoned correctly in

having regard to the purpose of [the impugned exemptions], namely to protect religious freedoms, and in a manner consistent with the rights to freedom of thought, conscience, religion and belief in s 14 of the *Charter*, and freedom of expression in s 15 of the *Charter* but also, so far as is possible, in a manner which is compatible with the rights to equality and freedom from discrimination in s 8 of the *Charter* ... in a way which does not privilege one right over another, but recognises their co-existence.¹³⁷

The President therefore endorsed an accommodationist approach to resolving the conflict of rights at stake.

(c) Insights from, and responses to Cobaw and OV

The semantic differences between the general religious bodies exemptions invoked in *Cobaw* and *OV* were slight, yet the two courts' reasoning and decisions substantially differed, especially regarding whether the comparable exemptions imported 'reasonableness' requirements.¹³⁸ This demonstrates that however similar in substance comparable state/territory exemptions are, the mere fact that different state/territory appellate courts interpret them may occasion inconsistent protection for religious freedom across jurisdictions.

(i) Legislative changes

The *Victorian Act* was enacted to replace its predecessor in 2010, however the exemptions invoked in *Cobaw* were contained in the earlier statute, as the

events in question occurred in 2007.¹³⁹

The individual religious exemption under the *Victorian Act*, unlike the comparable exemption in its predecessor, contains a reasonableness qualifier. Additionally, in 2011 the general religious bodies exemption in the *Victorian Act* was amended to include a reasonableness qualifier.¹⁴⁰ These legislative reforms mirror Maxwell P's and Neave JA's readiness to read 'reasonableness' qualifiers into the impugned exemptions in *Cobaw*.¹⁴¹ CYC applied to the High Court for leave to appeal the VCA's decision concerning the individual religious exemption, however the application was refused.¹⁴² Bell J implied that this refusal was significantly based on the futility of the High Court clarifying the meaning of an exemption that had been amended since the decision sought to be appealed.¹⁴³ Subsequent reforms to Victoria's general religious bodies exemption also broadened the definition of 'religious body', such that CYC may have qualified had the decision been made after the reforms.¹⁴⁴ A single definition of 'religious body' in all jurisdictions' exemptions should be considered, as the existing exemptions currently diverge in this regard.¹⁴⁵

Shortly after *OV* was decided, the NSW Parliament amended the *NSW Act* by adding an exemption for faith-based adoption services providers.¹⁴⁶ The exemption applies to 'any policy or practice of a faith-based organisation concerning the provision of adoption services under the *Adoption Act 2000* [(NSW)] or anything done to give effect to any such policy or practice'.¹⁴⁷ A note in the exemption circumscribes its application by stipulating that the *Adoption Act 2000* (NSW) requires that those making decisions regarding the adoption of a child must give paramount

137 Ibid 303–4 [187]–[188] (Maxwell P), citing *Cobaw Community Health Services v Christian Youth Camps Ltd* [2010] VCAT 1613 (8 October 2010) [225].

138 See Elphick (n 53) 165–6.

139 *Cobaw* (n 98) 265 [23] (Maxwell P).

140 Murphy (n 15) 621; *Equal Opportunity Act 2010* (Vic) s 82(2)(b) ('*Victorian Act*').

141 Murphy (n 15) 621; Baines (n 112) 58.

142 Murphy (n 15) 617.

143 Ibid 621, citing *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* [2014] HCATrans 289 (12 December 2014) [70].

144 Ibid 620; *Victorian Act* s 81(b).

145 Elphick (n 53) 160. See, eg, *NSW Act* s 56(d). Cf *NT Act* s 51(d); *SDA* s 37(1)(d).

146 *NSW Act* s 59A.

147 Ibid s 59A(1).

consideration the child's best interests.¹⁴⁸ The exemption also does not render lawful, discrimination by faith-based adoption services providers against 'any child who is or may be adopted'.¹⁴⁹ The exemption therefore places considerable weight on both religious freedom *and* children's welfare, perhaps in an effort to comply with Australia's obligations under the *CRC*.

(ii) Reliance on alternative exemptions

In *Cobaw*, the majority's finding that Victoria's individual religious exemption was unavailable to CYC, a corporate religious body, potentially clarifies the operation of specific religious exemptions, namely those that refer to particular kinds of religious bodies. The majority's reasoning was based on the logical premises that because religious bodies were expressly mentioned in an exemption, these bodies could not be regarded as 'individuals' within the meaning of the individual religious exemption.¹⁵⁰ Extending this reasoning to religious bodies named in specific exemptions (for example, religious educational institutions), suggests that such bodies may not invoke alternative or more general exemptions contained in the same statute, in an attempt to circumvent the inapplicability of the relevant specific exemption to their conduct.¹⁵¹ The *ACT Act* adopts this stance: religious educational institutions are expressly excluded from relying on the general religious bodies exemption.¹⁵² Similarly, under the *Queensland Act*, religious accommodation providers have a designated exemption,¹⁵³ so the general religious bodies exemption is unavailable to them.¹⁵⁴

(iii) The Impact of Human Rights Statutes on the Scope of Religious Exemptions

The *Charter* did not expand the scope of the invoked religious exemptions in *Cobaw*. Interestingly, NSW's general religious bodies exemption was given a broader construction in *OV* than Victoria's comparable exemption was given in *Cobaw*, despite NSW not having a human rights statute. However, this may also be due to the fact that the Victorian *Charter* was not in force at the time *Cobaw* was decided so the *Charter* only tangentially influenced the VCA's decision in *Cobaw*. This suggests that the Australian Capital Territory's ('ACT's') and Queensland's human rights statutes may not, of themselves, expand the ambit of religious exemptions under the *ACT Act* and the *Queensland Act*, respectively. This is somewhat unsurprising because the Queensland, ACT and Victorian human rights statutes offer individuals only limited positive religious freedom, insofar as all three statutes acknowledge that human rights may be limited,¹⁵⁵ and concurrently recognise the right to non-discrimination, which often conflicts with the right to religious freedom and therefore may function as a ground for limiting the right to religious freedom.

(d) Grounds of discrimination covered by exemptions

It is doubtful that permitting religious bodies to discriminate *carte blanche* promotes religious freedom, as discrimination on some grounds does not appear to manifest the beliefs of any particular religion. The Panel agreed, suggesting that discrimination by religious bodies on the grounds of race, disability, pregnancy or intersex status is unjustified because 'community expectations' do not support such discrimination.¹⁵⁶ The fact that the *Racial Discrimination Act 1975* (Cth)

148 Ibid s 59A(1) (Note).

149 Ibid s 59A(2).

150 Ibid 334–6 [319]–[323] (Maxwell P), 363–4 [421]–[422] (Neave JA).

151 See also Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018 (Cth); Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018: Labor Senators Dissenting Report* (Report, 2018) 6.

152 *ACT Act* ss 32(1)(d), (2).

153 *Queensland Act* s 90.

154 Ibid s 109(1)(d).

155 *Human Rights Act 2004* (ACT) s 28; *Human Rights Act 2019* (Qld) s 13; *Charter* s 7.

156 *Ruddock Review* (n 3) 44 [1.141].

and *Disability Discrimination Act 1992* (Cth) contain no religious exemptions partially reflects this view, however the *SDA* permits religious schools to discriminate on the basis of pregnancy.¹⁵⁷ Both sides of politics support repealing this exemption in the *SDA*.¹⁵⁸ The *NSW Act* permits administrators of religious schools to discriminate on the basis of disability.¹⁵⁹ The *SA Act* potentially permits religious associations, and religious educational institutions in employment, to discriminate on the basis of intersex status.¹⁶⁰ The *WA Act* potentially permits religious accommodation providers to discriminate on the ground of pregnancy.¹⁶¹

One could defensibly argue that the vast majority of religious and secular persons agree that discrimination on the basis of race, disability, pregnancy and intersex status is simply immoral, so religious exemptions covering these grounds are nonsensical. On the other hand, identifying *a priori* which characteristics of a person may *never* be regarded as objectionable by people of faith arguably stigmatises people with other marginalised characteristics as less deserving of equality, while also not allowing religious bodies to determine, on a case-by-case basis, when discrimination is necessary to live out their beliefs.¹⁶²

Discrimination by religious schools against LGBTI employees, contractors and students is particularly controversial,¹⁶³ not least because religious schools educate, employ and engage the services of so many people in Australia, so discrimination by these schools can have far-reaching consequences.¹⁶⁴ It may therefore be

especially desirable to impose well-considered, nationally consistent parameters within which religious schools may discriminate. A Bill seeking to repeal the *SDA* exemption which permits religious schools to discriminate against students on the basis of sexual orientation, gender identity, marital or relationship status, or pregnancy was moved but not passed in 2018.¹⁶⁵ Some Catholic and Anglican school representatives have indicated that they would not discriminate against (prospective) students and staff on the basis of LGBTI attributes, unless they openly disparage the school's religious ethos.¹⁶⁶ This attitude could inform how exemptions available to religious schools could be helpfully amended.¹⁶⁷ However, it is important to acknowledge that faith-based schools which adhere to other religions may wish to be more selective in enrolment and employment practices, and this should also be considered when framing such exemptions.

2. Constitutional issues

Some religious exemptions in state/territory anti-discrimination statutes differ in scope to the comparable exemptions in the Commonwealth statutes. Australia's two-layered legislative anti-discrimination model therefore creates 'a potential for conflict' between the various state/territory and Commonwealth religious exemptions.¹⁶⁸ There have nonetheless been no constitutional challenges to the validity of the state/territory exemptions, or at least no challenges that are well-documented.¹⁶⁹

157 *SDA* s 38(3).

158 Brennan (n 30).

159 *NSW Act* s 49L(3)(a).

160 *SA Act* ss 34(3), 35(2b).

161 *WA Act* s 21.

162 Mezyk (n 13) 367, 379.

163 Evans and Ujvari (n 15) 41. See also Tania Ferfolja, 'Institutional Silence: Experiences of Australian Lesbian Teachers Working in Catholic High Schools' (2005) 2(3) *Journal of Gay & Lesbian Issues in Education* 51. See also *Griffin v Catholic Education Office* (1998) EOC ¶92–928.

164 Evans and Ujvari (n 15) 43.

165 Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018 (Cth); Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018: Labor Senators Dissenting Report* (Report, 2018) 1.

166 Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018: Labor Senators Dissenting Report* (Report, 2018) 3–5.

167 See also Deagon (n 22) 41–2.

168 See also Chris Ronalds and Elizabeth Raper, *Discrimination Law and Practice* (Federation Press, 4th ed, 2012) 10–11.

169 See *ibid* 11.

Section 109 of the *Constitution* provides that where a state statute and a Commonwealth statute are inconsistent, the Commonwealth statute will prevail to the extent of the inconsistency. Twomey suggests that a similar principle applies under common law to inconsistent territory and Commonwealth statutes, despite section 109 not mentioning territories, as to hold otherwise would be illogical.¹⁷⁰ Ronalds and Raper state that

one manner of determining the extent of inconsistency [within the meaning of section 109] is [assessing] whether the Federal Government intended to 'cover the field' or whether there is any room for a potentially conflicting State law to operate.¹⁷¹

The *SDA*, *ADA*, *FWA* and *AHRCA* provide that they do not cover the field in the areas of discrimination that they apply to and operate concurrently with the state/territory statute applicable in a given jurisdiction, to the extent that the two statutes are compatible.¹⁷²

The critical question is therefore the extent to which semantic differences between some comparable religious exemptions in the Commonwealth and state/territory statutes render them incompatible. This varies depending on the comparable exemptions concerned. The exemptions available to religious schools wishing to discriminate against (prospective) staff and students on numerous grounds under the *NSW Act* are unqualified,¹⁷³ whereas the comparable exemption in the *SDA* imports requirements of good faith and 'necessity' to avoid injury to religious adherents.¹⁷⁴ There is therefore arguably direct incompatibility between the comparable religious schools exemptions in the *SDA* and the *NSW Act*, as the *NSW Act* confers on religious

schools an unfettered right to discriminate, whereas the *SDA* qualifies that right.¹⁷⁵ Qualification of the right of religious bodies to discriminate under the *SDA* is also purportedly imposed by the *Queensland Act* and the *ACT Act*, as the 'conformity' and 'necessity' limbs operate cumulatively under the general religious bodies exemptions in the latter two statutes, but alternatively under the *SDA*'s comparable exemption.¹⁷⁶ This means that alleged discrimination by a religious body on the ground of sexual orientation, for example, may be rendered lawful under the *SDA* but unlawful under the *Queensland Act* and the *ACT Act*.

Religious bodies cannot choose whether to rely on a Commonwealth or state/territory exemption in a given scenario. Rather, religious bodies must invoke whatever exemption is available (if any) in the statute under which the complaint against them is made. There is therefore no operational inconsistency between directly inconsistent state/territory and Commonwealth religious exemptions, unless complaints under both state/territory and Commonwealth anti-discrimination statutes are brought.¹⁷⁷ The Commonwealth statutes try to avoid operational inconsistency from arising by providing that a complainant may not allege discrimination under a state/territory statute, and then failing that, allege discrimination under a Commonwealth statute in respect of the same conduct.¹⁷⁸ However, Ronalds and Raper suggest that this

potential limitation ... has been circumvented by some practical readings of the [provisions in the Commonwealth Acts that deal with the operation of state/territory statutes]. If a person lodges a document with a State agency which is not valid under

170 Anne Twomey, 'Inconsistency between Commonwealth and Territory Laws' (2014) 42(3) *Federal Law Review* 421, 424, citing *Northern Territory v GPO* (1999) 196 CLR 553, 581–2 [57] (Gleeson CJ and Gummow J).

171 Ronalds and Raper (n 168) 11, citing *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237; *University of Wollongong v Metwally* (1984) 158 CLR 447.

172 *SDA* s 10(3); *ADA* s 12(3); *FWA* s 27(1A); *AHRCA* s 4(1). See also Ronalds and Raper (n 168) 9.

173 *NSW Act* ss 25(3)(c), 31A(3)(a), 38K(3), 46A(3), 49L(3)(a), 49ZO(3), 49ZYL(3)(b).

174 *SDA* s 38.

175 *Colvin v Bradley Bros Pty Ltd* (1943) 68 CLR 151, 160 (Latham CJ), 161 (Starke J), 163 (Williams J). See above Part IIIB(1)(b)(iii).

176 *Queensland Act* s 109(1)(d); *ACT Act* s 32(1)(d); *SDA* s 37(1)(d). See above Part IIIB(1)(a).

177 *Momcilovic v The Queen* (2011) 245 CLR 1, 112 [248] (Gummow J), citing *Victoria v Commonwealth* (1937) 58 CLR 618 ('*The Kakariki*').

178 See, eg, *ADA* s 12(4); *SDA* s 10(4). See also *AHRCA* s 46PH(f).

State law due to an exception which is not in the similar Federal law ... then the general practice is to permit the document to be lodged under the Federal law and to then become a 'complaint'.¹⁷⁹

The following example demonstrates how this 'general practice' could give rise to operational inconsistency between comparable state and Commonwealth exemptions. Consider an unsuccessful complaint of unlawful discrimination made under the *NSW Act* against the principal of a religious school who refused to admit a transgender person as a student, where the refusal was not made in good faith, and/or where adherents of the relevant religion are unperturbed by transgender identity. The transgender person (complainant) could later successfully allege unlawful discrimination by the principal under the *SDA*, as the relevant exemption therein would not be established.¹⁸⁰ The complainant could also potentially litigate to have the broader NSW exemption declared unconstitutional and struck down on this basis.

State/territory anti-discrimination statutes do not prohibit complainants from lodging a complaint regarding conduct that has already been complained of under a Commonwealth statute. However, such complaints may be rejected. For example, the *NSW Act* allows complaints to be made in multiple jurisdictions regarding the same conduct, but the relevant NSW Tribunal 'must have regard to any proceedings [in another jurisdiction and their] outcome ..., in dealing with or determining the complaint' under the *NSW Act*.¹⁸¹ Similarly, the *Queensland Act* and the *Tasmanian Act* permit complaints to be rejected if the impugned conduct is already the subject of court or tribunal proceedings, or if the conduct has already been, or could more effectively be, dealt with under another statute.¹⁸² The *NT Act* adopts a similar approach to complaints

concurrently being dealt with in other proceedings.¹⁸³ The *SA Act* prohibits the bringing of complaints regarding dismissal from employment, where proceedings in relation to that dismissal have already been brought and determined under the *FWA*.¹⁸⁴

To demonstrate how the Commonwealth-to-state/territory complaint sequence could create operational inconsistency, consider a scenario where the general religious bodies exemption under the *SDA* rendered an allegation of unlawful discrimination against a religious body under the *SDA* unsuccessful. The complainant may establish unlawful discrimination arising out of the same conduct by the religious body on their 'second attempt' under the *Queensland Act* or under the *ACT Act*, because the general religious bodies exemptions in these statutes are narrower than the comparable exemption in the *SDA*.¹⁸⁵ Similarly, a complainant who first unsuccessfully lodges a complaint against a religious accommodation provider under the *SDA*, and then lodges a complaint in respect of the same conduct under the *Queensland Act*, may establish unlawful discrimination by the provider under the *Queensland Act*, due to the narrower scope of the relevant religious exemption therein.¹⁸⁶ In such cases, the religious bodies concerned could potentially litigate to have the state and territory exemptions which rendered their conduct unlawful read down as unconstitutional and invalid, respectively.

3. Impact of removing some exemptions

If Commonwealth or state/territory religious exemptions were removed, complainants may be incentivised to lodge a complaint under the applicable statute that no longer contains exemptions, rather than its state/territory or Commonwealth counterpart, as the case may be, as they know that religious bodies will have minimal defences to such a complaint.

179 Ronalds and Raper (n 168) 11.

180 *NSW Act* ss 38K(1)(a), (3); *SDA* s 38(3).

181 *NSW Act* s 88B.

182 *Queensland Act* ss 140(1), (2); *Tasmanian Act* ss 64(1)(f), (g).

183 *NT Act* s 68(1).

184 *SA Act* ss 100(2), (3).

185 *Queensland Act* s 109(1)(d); *ACT Act* s 32(1)(d); *SDA* s 37(1)(d).

186 *SDA* s 23(3)(b); *Queensland Act* s 90.

This may in turn dissuade religious bodies from operating in particular spheres.

Specifically, if the exemptions in the *SDA* applicable to religious ministers and religious marriage celebrants¹⁸⁷ were removed, such individuals who refuse to solemnise a same-sex marriage may only avoid liability in Victoria and possibly Tasmania, if same-sex couples were to lodge complaints of unlawful discrimination against them. This is because the *Victorian Act* and the *Tasmanian Act* contain exemptions applicable to religious individuals.¹⁸⁸

The *FWA* contains an exemption for religious institutions wishing to take adverse action against (prospective) employees, provided the action is taken in 'good faith' and 'to avoid injury to the religious susceptibilities of adherents' of the relevant religion.¹⁸⁹ The *FWA* also preserves the operation of exemptions in state/territory anti-discrimination statutes,¹⁹⁰ such that any adverse action rendered lawful by an applicable state/territory statute will also be lawful under the *FWA*. This means that repealing the religious exemptions covering adverse employment decisions in the other Commonwealth anti-discrimination statutes¹⁹¹ would make *either* the *FWA*'s religious exemption *or* the applicable state/territory exemptions available to religious institutions in a given jurisdiction. This would result in 'inconsistent protections being available [for religious bodies] ... depending on where the "discrimination" occurs'.¹⁹²

IV. CONCLUSION

The preceding analysis has suggested three potential conclusions on the efficacy of the patchwork of state/territory and Commonwealth religious exemptions in Australian anti-discrimination legislation, in appropriately balancing religious freedom with freedom from discrimination.

First, those who regard consistency as 'its own virtue' automatically view inconsistent exemptions across jurisdictions as undesirable.¹⁹³ This view may presuppose that having differently worded religious exemptions in each jurisdiction signals to the Australian community that not all Australian jurisdictions equally value religious freedom. Given law's normative function,¹⁹⁴ this dissonance in turn diminishes the value placed on, and therefore meaningful protection of, religious freedom at a societal level.

Secondly, it has been argued that inconsistency between the various exemptions is not inherently undesirable,¹⁹⁵ and indeed the limited case law that analyses the exemptions may indicate few practical problems with their operation. A potential rebuttal to this argument is that the limited case law that interprets the various exemptions may itself be due to individuals rarely escalating complaints or proceeding to litigate under anti-discrimination legislation,¹⁹⁶ meaning the full extent of problems occasioned by having a two-layered patchwork of sometimes inconsistent exemptions may be unknown. Furthermore, state/territory exemptions that are broader or narrower than comparable Commonwealth exemptions may create operational

187 *SDA* ss 40(2A), (2AA).

188 See Elphick (n 53) 166; *Victorian Act* s 84; *Tasmanian Act* s 52(d).

189 *FWA* s 351(2)(c).

190 *Ibid* ss 351(2)(a), (3).

191 See, eg, *SDA* ss 38(1), (2).

192 Law Council of Australia, Submission to Senate Legal and Constitutional Affairs References Committee, *Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff* (21 November 2018) 26 [74].

193 *Ruddock Review* (n 3) 15.

194 Evans and Ujvari (n 15) 42.

195 See *Ruddock Review* (n 3) 15, 46 [1.153].

196 *X v Commonwealth* (1999) 200 CLR 177, 213 [120] (Kirby J). See also Helen Andrews, *The Limits of Australian Anti-discrimination Law* (Centre for Independent Studies, Research Report, August 2016) 8.

inconsistency in some scenarios, so may be struck down if their validity is challenged.

The third view is that the few cases that have analysed the exemptions demonstrate that merely having various state/territory courts interpreting the various exemptions effects substantive differences between them.¹⁹⁷ The contrast between *Cobaw* and *OV* seems to be the only example of inconsistent construction of similarly worded exemptions across jurisdictions, and indeed the subject of inconsistent reasoning ultimately was not determinative of the outcome in *Cobaw*.¹⁹⁸ However, more cases turning on the state/territory exemptions are likely to come before state/territory courts in the future, meaning there may be interpretive inconsistency in future decisions. Furthermore, the NSW Parliament added a religious exemption to the *NSW Act* in response to judicial interpretation of an existing exemption in *OV*. Therefore, inconsistent judicial interpretation of exemptions may result in the actual wording of state/territory exemptions becoming more disparate over time.

On balance, the first and third views are more compelling than the second. The first view is the most compelling of all as it rightly emphasises the importance of ensuring that all Australian governments provide comprehensive and meaningful protection for the fundamental human right that is religious freedom. The third view lacks empirical weight given the dearth of Australian case law concerning religious exemptions, but nonetheless correctly acknowledges, unlike the second view, that it is overly simplistic to assume that minimal evidence of practical problems created by having inconsistent exemptions, means that such problems do not exist. Therefore, Australia's current patchwork of religious exemptions is full of holes, and a new patchwork of nationally consistent religious exemptions should be made.

V. RECOMMENDATIONS

Ideally, Australian anti-discrimination legislation should be consolidated into one Commonwealth statute. If this model were adopted, the new Commonwealth statute could cover several grounds of discrimination, and the state/territory anti-discrimination statutes could be repealed. All people wishing to allege unlawful discrimination by a religious body would therefore do so under the new Commonwealth statute. Like the dispute resolution arrangements under the *SDA*, *ADA* and *AHRCA*,¹⁹⁹ the Federal Court of Australia could be given jurisdiction to determine appeals under the new Commonwealth statute.²⁰⁰ This should lead to the religious exemptions being interpreted more consistently from case to case, since the Federal Court would be bound by their own decisions regarding the exemptions.²⁰¹

Given that consolidation of Commonwealth anti-discrimination law has been unsuccessful in the past,²⁰² and that states and territories may be unwilling to repeal their respective anti-discrimination statutes, cross-jurisdictional law reform may be a more realistic option. This could involve enacting identically worded state/territory anti-discrimination statutes and religious exemptions, which would at least remove the current inconsistencies between the various state/territory exemptions.

It will probably be difficult to get all states and territories to agree on the level of protection for religious freedom that should be afforded to religious bodies, and consequently to agree on the wording of religious exemptions. However, ultimately state and territory legislatures are mouthpieces for the people within their respective polities, and the Panel found 'no meaningful differences' across states and territories in the range of views expressed in submissions, on the adequacy or otherwise of protection for

197 Elphick (n 53) 166–7.

198 Murphy (n 15) 611–12. But see Ronalds and Raper (n 168) 11.

199 See especially *AHRCA* div 26

200 Andrews (n 196) 4.

201 See also *ibid*.

202 *Ruddock Review* (n 3) 42 [1.127]; Clarke (n 72).

religious freedom under Australian law.²⁰³

Nonetheless mediating this dispersion of views by formulating a single set of religious exemptions that reflect the median view will be challenging. The formulation of exemptions that would most appropriately balance religious freedom with freedom from discrimination is difficult to determine. However, including 'good faith', 'inherent requirements' and 'written policy' qualifiers could go some way to achieving this balance.

This paper has primarily sought to point out holes in Australia's patchwork of religious exemptions in anti-discrimination legislation. In actual and statutory patchworks, the fewer squares, the lower the chance of holes forming.

203 *Ruddock Review* (n 3) 116. But see *Ruddock Review* (n 3) 44 [1.141].

VI. APPENDIX

A Table 1

| Act/ Jurisdiction | Area of activity | | | |
|--------------------------------------------------------------------|----------------------------------------------------|------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| | Religious educational institutions | | Religious bodies generally | Other |
| | (Prospective) Employment: staff and contractors | (Prospective) Students | | |
| Age Discrimination Act 2004 (Cth) ('ADA') | | | s 35 Religious bodies This Part does not affect an act or practice of a body established for religious purposes that: (a) conforms to the doctrines, tenets or beliefs of that religion; or (b) is necessary to avoid injury to the religious sensitivities of adherents of that religion. | |
| Australian Human Rights Commission Act 1986 (Cth) ('AHRCA') | | | | s 3 Interpretation (1) In this Act, unless the contrary intention appears: ... discrimination , except in Part IIB ... does not include any distinction, exclusion or preference: ... (d) in connection with employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, being a distinction, exclusion or preference made in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or that creed. |
| Fair Work Act 2009 (Cth) ('FWA') | | | | s 153 Terms that are discriminatory ... <i>Certain terms are not discriminatory</i> (2) A term of a modern award does not discriminate against an employee: ... (b) merely because it discriminates, in relation to employment of the employee as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed: (i) in good faith; and (ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed. |

| Act/ Jurisdiction | Area of activity | | | |
|------------------------------------------------|-------------------------------------------------------|------------------------|-------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| | Religious educational institutions | | Religious bodies generally | Other |
| | (Prospective) Employment: staff and contractors | (Prospective) Students | | |
| <i>Fair Work Act 2009 (Cth)</i> (‘FWA’) | | | | <p>s 195 Meaning of discriminatory term</p> <p>...</p> <p><i>Certain terms are not discriminatory terms</i></p> <p>(2) A term of an enterprise agreement does not discriminate against an employee:</p> <p>...</p> <p>(b) merely because it discriminates, in relation to employment of the employee as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed:</p> <p>(i) in good faith; and</p> <p>(ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.</p> <p>s 351 Discrimination</p> <p>(1) An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person’s race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin.</p> <p>...</p> <p>(2) However, subsection (1) does not apply to action that is:</p> <p>(a) not unlawful under any antidiscrimination law in force in the place where the action is taken; or</p> <p>...</p> <p>(c) if the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed—taken:</p> <p>(i) in good faith; and</p> <p>(ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.</p> |

| Act/ Jurisdiction | Area of activity | | | |
|--------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| | Religious educational institutions | | Religious bodies generally | Other |
| | (Prospective) Employment: staff and contractors | (Prospective) Students | | |
| Sex Discrimination Act 1984 (Cth) ('SDA') | <p>s 38 Educational institutions²⁰⁴ established for religious purposes</p> <p>(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.</p> <p>(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.</p> | <p>s 38 Educational institutions²⁰⁵ established for religious purposes</p> <p>...</p> <p>(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-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.</p> | <p>s 37 Religious bodies</p> <p>(1) Nothing in Division 1 or 2²⁰⁶ affects:</p> <p>(a) the ordination or appointment of priests, ministers of religion or members of any religious order;</p> <p>(b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order;</p> <p>(c) the selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice; or</p> <p>(d) any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.</p> <p>(2) Paragraph (1)(d) does not apply to an act or practice of a body established for religious purposes if:</p> <p>(a) the act or practice is connected with the provision, by the body, of Commonwealth-funded aged care; and</p> <p>(b) the act or practice is not connected with the employment of persons to provide that aged care.</p> | <p>s 23 Accommodation</p> <p>(1) It is unlawful for a person, whether as principal or agent, to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding:</p> <p>(a) by refusing the other person's application for accommodation;</p> <p>(b) in the terms or conditions on which accommodation is offered to the other person; or</p> <p>(c) by deferring the other person's application for accommodation or according to the other person a lower order of precedence in any list of applicants for that accommodation.</p> <p>(2) It is unlawful for a person, whether as principal or agent, to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding:</p> <p>(a) by denying the other person access, or limiting the other person's access, to any benefit associated with accommodation occupied by the other person;</p> <p>(b) by evicting the other person from accommodation occupied by the other person; or</p> <p>(c) by subjecting the other person to any other detriment in relation to accommodation occupied by the other person.</p> <p>(3) Nothing in this section applies to or in respect of:</p> <p>...</p> <p>(b) accommodation provided by a religious body;</p> <p>...</p> <p>(3A) Paragraph (3)(b) does not apply to accommodation provided by a religious body in connection with the provision, by the body, of Commonwealth-funded aged care.</p> |

²⁰⁴ SDA s 4 (definition of 'educational institution').

²⁰⁵ Ibid.

²⁰⁶ These contain the substantive anti-discrimination provisions in the areas of work; education; goods, services and facilities; accommodation; land; clubs; administration of Commonwealth laws and programs; and requests for information. Section 37 may therefore be regarded as a 'catch-all' religious exemption applicable in these areas of activity.

| Act/ Jurisdiction | Area of activity | | | |
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| | Religious educational institutions | | Religious bodies generally | Other |
| | (Prospective) Employment: staff and contractors | (Prospective) Students | | |
| Sex Discrimination Act 1984 (Cth) (‘SDA’) | | | | <p>s 40 Acts done under statutory authority</p> <p>...</p> <p>(2A) A minister of religion (as defined in subsection 5(1) of the <i>Marriage Act 1961</i>) may refuse to solemnise a marriage despite anything in Division 1 or 2, as applying by reference to section 5A, 5B, 5C or 6, if any of the circumstances mentioned in paragraph 47(3)(a), (b) or (c) of the <i>Marriage Act 1961</i> apply.</p> <p>(2AA) A religious marriage celebrant (as defined in subsection 5(1) of the <i>Marriage Act 1961</i>) may refuse to solemnise a marriage despite anything in Division 1 or 2, as applying by reference to section 5A, 5B, 5C or 6, if:</p> <p>(a) the identification of the person as a religious marriage celebrant on the register of marriage celebrants has not been removed at the time the marriage is solemnised; and</p> <p>(b) the circumstances mentioned in subsection 47A(1) of the <i>Marriage Act 1961</i> apply.</p> |
| Anti-Discrimination Act 1977 (NSW) (‘NSW Act’) | <p>s 25 Discrimination against applicants and employees</p> <p>(1) It is unlawful for an employer to discriminate against a person on the ground of sex—</p> <p>(a) in the arrangements the employer makes for the purpose of determining who should be offered employment,</p> <p>(b) in determining who should be offered employment, or</p> <p>(c) in the terms on which the employer offers employment. (1A) (Repealed)</p> <p>(2) It is unlawful for an employer to discriminate against an employee on the ground of sex—</p> <p>(a) in the terms or conditions of employment which the employer affords the employee,</p> <p>(b) by denying the employee access, or limiting the employee’s</p> | <p>s 31A Education</p> <p>(1) Nothing in this Division renders unlawful discrimination against a person on the ground of sex—</p> <p>(a) by refusing or failing to accept the person’s application for admission as a student, or</p> <p>(b) in the terms on which it is prepared to admit the person as a student.</p> <p>(2) It is unlawful for an educational authority to discriminate against a student on the ground of sex—</p> <p>(a) by denying the student access, or limiting the student’s access, to any benefit provided by the educational authority, or</p> <p>(b) by expelling the student or subjecting the student to any other detriment.</p> | <p>s 56 Religious bodies</p> <p>Nothing in this Act affects—</p> <p>(a) the ordination or appointment of priests, ministers of religion or members of any religious order,</p> <p>(b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order,</p> <p>(c) the appointment of any other person in any capacity by a body established to propagate religion, or</p> <p>(d) any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.</p> | <p>s 59A Adoption services</p> <p>(1) Nothing in Part 3A or 4C affects any policy or practice of a faith-based organisation concerning the provision of adoption services under the <i>Adoption Act 2000</i> or anything done to give effect to any such policy or practice.</p> <p>Note.</p> <p>Section 8 (1) (a) of the <i>Adoption Act 2000</i> requires decision makers to follow the principle that, in making a decision about the adoption of a child, the best interests of the child, both in childhood and in later life, must be the paramount consideration.</p> <p>(2) Subsection (1) does not apply to discrimination against any child who is or may be adopted.</p> <p>(3) In this section, faith-based organisation means an organisation that is established or controlled by a religious organisation and that is accredited under the <i>Adoption Act 2000</i> to provide adoption services.</p> |

| Act/ Jurisdiction | Area of activity | | | |
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| | Religious educational institutions | | Religious bodies generally | Other |
| | (Prospective) Employment: staff and contractors | (Prospective) Students | | |
| Anti-Discrimination Act 1977 (NSW) ('NSW Act') | access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment, or (c) by dismissing the employee or subjecting the employee to any other detriment. (2A) (Repealed) (3) Subsections (1) and (2) do not apply to employment— ... (c) by a private educational authority. ²⁰⁷ | (3) Nothing in this section applies to or in respect of— (a) a private educational authority ... s 38K Education (1) It is unlawful for an educational authority to discriminate against a person on transgender grounds— (a) by refusing or failing to accept the person's application for admission as a student, or (b) in the terms on which it is prepared to admit the person as a student. (2) It is unlawful for an educational authority to discriminate against a student on transgender grounds— (a) by denying the student access, or limiting the student's access, to any benefit provided by the educational authority, or (b) by expelling the student or subjecting the student to any other detriment. (3) Nothing in this section applies to or in respect of a private educational authority. s 46A Education (1) It is unlawful for an educational authority to discriminate against a person on the ground of marital or domestic status— (a) by refusing or failing to accept the person's application for admission as a student, or (b) in the terms on which it is prepared to admit the person as a student. (2) It is unlawful for an educational authority to discriminate against a student on the ground of marital or domestic status— | | |

207 See s 4 (definition of 'private educational authority').

| Act/ Jurisdiction | Area of activity | | | |
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| | Religious educational institutions | | Religious bodies generally | Other |
| | (Prospective) Employment: staff and contractors | (Prospective) Students | | |
| Anti-Discrimination Act 1977 (NSW) ('NSW Act') | | <p>(a) by denying the student access, or limiting the student's access, to any benefit provided by the educational authority, or</p> <p>(b) by expelling the student or subjecting the student to any other detriment.</p> <p>(3) Nothing in this section applies to or in respect of a private educational authority.</p> <p>s 49L Education</p> <p>(1) It is unlawful for an educational authority to discriminate against a person on the ground of disability—</p> <p>(a) by refusing or failing to accept his or her application for admission as a student, or</p> <p>(b) in the terms on which it is prepared to admit him or her as a student.</p> <p>(2) It is unlawful for an educational authority to discriminate against a student on the ground of disability—</p> <p>(a) by denying him or her access, or limiting his or her access, to any benefit provided by the educational authority, or</p> <p>(b) by expelling him or her, or</p> <p>(c) by subjecting him or her to any other detriment.</p> <p>(3) Nothing in this section applies to or in respect of— (a) a private educational authority ...</p> <p>s 49ZO Education</p> <p>(1) It is unlawful for an educational authority to discriminate against a person on the ground of homosexuality—</p> <p>(a) by refusing or failing to accept the person's application for admission as a student, or</p> <p>(b) in the terms on which it is prepared to admit the person as a student.</p> | | |

| Act/ Jurisdiction | Area of activity | | | |
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| | Religious educational institutions | | Religious bodies generally | Other |
| | (Prospective) Employment: staff and contractors | (Prospective) Students | | |
| Anti-Discrimination Act 1977 (NSW) ('NSW Act') | | <p>(b) in the terms on which it is prepared to admit the person as a student.</p> <p>(2) It is unlawful for an educational authority to discriminate against a student on the ground of homosexuality—</p> <p>(a) by denying the student access, or limiting the student's access, to any benefit provided by the educational authority, or</p> <p>(b) by expelling the student or subjecting the student to any other detriment.</p> <p>(3) Nothing in this section applies to or in respect of a private educational authority.</p> <p>s 49ZYL Education</p> <p>(1) It is unlawful for an educational authority to discriminate against a person on the ground of age—</p> <p>(a) by refusing or failing to accept the person's application for admission as a student, or</p> <p>(b) in the terms on which it is prepared to admit the person as a student.</p> <p>(2) It is unlawful for an educational authority to discriminate against a student on the ground of age—</p> <p>(a) by denying or limiting access to any benefit provided by the educational authority, or</p> <p>(b) by expelling the student or subjecting the student to any other detriment.</p> <p>(3) Nothing in this section applies to or in respect of—</p> <p>(a) the admission of, or the refusal of admission to, a person to a school, college, university or other institution if the level of education or training sought by the person is provided only for students above a particular age, or</p> <p>(b) a private educational authority ...</p> | | |

| Act/ Jurisdiction | Area of activity | | | |
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| | Religious educational institutions | | Religious bodies generally | Other |
| | (Prospective) Employment: staff and contractors | (Prospective) Students | | |
| Anti-Discrimination Act 1991 (Qld) ('Queensland Act') | <p>s 24 Explanatory provision (exemptions) It is not unlawful to discriminate in the work or work-related area if an exemption in sections 25 to 36 or part 5 applies.</p> <p>s 25 Genuine occupational requirements (1) A person may impose genuine occupational requirements for a position. <i>Examples of genuine requirements for a position—</i> <i>Example 1—</i> selecting an actor for a dramatic performance on the basis of age, race or sex for reasons of authenticity <i>Example 2—</i> using membership of a particular political party as a criterion for a position as an adviser to a political party or a worker in the office of a member of Parliament <i>Example 3—</i> considering only women applicants for a position involving body searches of women <i>Example 4—</i> employing persons of a particular religion to teach in a school established for students of the particular religion</p> <p>(2) Subsection (3) applies in relation to— (a) work for an educational institution (an employer) under the direction or control of a body established for religious purposes; or</p> | <p>s 41 Single sex, religion, etc. educational institution An educational authority that operates, or proposes to operate, an educational institution wholly or mainly for students of a particular sex or religion, ... may exclude— (a) applicants who are not of the particular sex or religion ...</p> <p>s 86 Explanatory provision (exemptions) It is not unlawful to discriminate in the accommodation area if an exemption in sections 87 to 92 or part 5 applies.</p> <p>s 89 Accommodation for students An educational authority that operates, or proposes to operate, an educational institution wholly or mainly for students of a particular sex or religion, or who have a general or specific impairment, may provide accommodation wholly or mainly for— (a) students of the particular sex or religion;</p> | <p>s 109 Religious bodies (1) The Act does not apply in relation to— (a) the ordination or appointment of priests, ministers of religion or members of a religious order; or (b) the training or education of people seeking ordination or appointment as priests, ministers of religion or members of a religious order; or (c) the selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice; or (d) unless section 90 (Accommodation with religious purposes) applies—an act by a body established for religious purposes if the act is— (i) in accordance with the doctrine of the religion concerned; and (ii) necessary to avoid offending the religious sensitivities of people of the religion. (2) An exemption under subsection (1)(d) does not apply in the work or work-related area or in the education area.</p> | <p>s 47 Explanatory provision (exemptions) It is not unlawful to discriminate in the goods and services area if an exemption in sections 48 to 51 or part 5 applies.</p> <p>s 48 Sites of cultural or religious significance A person may restrict access to land or a building of cultural or religious significance by people who are not of a particular sex, age, race or religion if the restriction— (a) is in accordance with the culture concerned or the doctrine of the religion concerned; and (b) is necessary to avoid offending the cultural or religious sensitivities of people of the culture or religion.</p> <p>s 78 Explanatory provision (exemptions) It is not unlawful to discriminate in the disposition of land area if an exemption in section 79 or 80 or part 5 applies.</p> <p>s 80 Sites of cultural or religious significance It is not unlawful to discriminate on the basis of sex, age, race or religion with respect to a matter that is otherwise prohibited under subdivision 1 if— (a) the relevant interest in land is an interest in land or a building of cultural or religious significance; and (b) the discrimination— (i) is in accordance with the culture concerned or the doctrine of the religion concerned; and (ii) is necessary to avoid offending the cultural or religious sensitivities of people of the culture or religion.</p> |

| Act/ Jurisdiction | Area of activity | | | |
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| | Religious educational institutions | | Religious bodies generally | Other |
| | (Prospective) Employment: staff and contractors | (Prospective) Students | | |
| Anti-Discrimination Act 1991 (Qld) (‘Queensland Act’) | <p>(b) any other work for a body established for religious purposes (also an employer) if the work genuinely and necessarily involves adhering to and communicating the body’s religious beliefs.²⁰⁸</p> <p>(3) It is not unlawful for an employer to discriminate with respect to a matter that is otherwise prohibited under section 14 or 15, in a way that is not unreasonable, against a person if—</p> <p>(a) the person openly acts in a way that the person knows or ought reasonably to know is contrary to the employer’s religious beliefs—</p> <p>(i) during a selection process; or</p> <p>(ii) in the course of the person’s work; or</p> <p>(iii) in doing something connected with the person’s work; and</p> <p><i>Example for paragraph (a)—</i></p> <p>A staff member openly acts in a way contrary to a requirement imposed by the staff member’s employer in his or her contract of employment, that the staff member abstain from acting in a way openly contrary to the employer’s religious beliefs in the course of, or in connection with the staff member’s employment.</p> <p>(b) it is a genuine occupational requirement of the employer that the person, in the course of, or in connection with, the person’s work, act in a way consistent with the employer’s religious beliefs.</p> | | | <p>s 90 Accommodation with religious purposes</p> <p>It is not unlawful to discriminate with respect to a matter that is otherwise prohibited under subdivision 1 if—</p> <p>(a) the accommodation concerned is under the direction or control of a body established for religious purposes; and</p> <p>(b) the discrimination—</p> <p>(i) is in accordance with the doctrine of the religion concerned; and</p> <p>(ii) is necessary to avoid offending the religious sensitivities of people of the religion.</p> |

208 This exemption potentially applies to all religious bodies wishing to discriminate in employment, not just religious educational institutions. However, to avoid duplication, the whole provision has been extracted in this column rather than in the ‘Other’ column.

| Act/ Jurisdiction | Area of activity | | | |
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| | Religious educational institutions | | Religious bodies generally | Other |
| | (Prospective) Employment: staff and contractors | (Prospective) Students | | |
| Anti-Discrimination Act 1991 (Qld) (‘ <i>Queensland Act</i> ’) | <p>(b) it is a genuine occupational requirement of the employer that the person, in the course of, or in connection with, the person’s work, act in a way consistent with the employer’s religious beliefs.</p> <p>(4) Subsection (3) does not authorise the seeking of information contrary to section 124.</p> <p>(5) For subsection (3), whether the discrimination is not unreasonable depends on all the circumstances of the case, including, for example, the following—</p> <p>(a) whether the action taken or proposed to be taken by the employer is harsh or unjust or disproportionate to the person’s actions;</p> <p>(b) the consequences for both the person and the employer should the discrimination happen or not happen.</p> <p>(6) Subsection (3) does not apply to discrimination on the basis of age, race or impairment.</p> <p>(7) To remove any doubt, it is declared that subsection (3) does not affect a provision of an agreement with respect to work to which subsection (3) applies, under which the employer agrees not to discriminate in a particular way.</p> <p>(8) In this section— religion includes religious affiliation, beliefs and activities. selection process means a process the purpose of which is to consider whether to offer a person work.</p> | | | |

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| | Religious educational institutions | | Religious bodies generally | Other |
| | (Prospective) Employment: staff and contractors | (Prospective) Students | | |
| Anti-Discrimination Act 1991 (Qld) (‘ <i>Queensland Act</i> ’) | s 89 Accommodation for students An educational authority that operates, or proposes to operate, an educational institution wholly or mainly for students of a particular sex or religion, ... may provide accommodation wholly or mainly for— (a) students of the particular sex or religion ... | | | |
| Anti-Discrimination Act 1996 (NT) (‘ <i>NT Act</i> ’) | s 37A Exemption – religious educational institutions An educational authority that operates or proposes to operate an educational institution in accordance with the doctrine of a particular religion may discriminate against a person in the area of work in the institution if the discrimination: (a) is on the grounds of: (i) religious belief or activity; or (ii) sexuality; and (b) is in good faith to avoid offending the religious sensitivities of people of the particular religion. | s 30 Exemptions ... (2) An educational authority that operates, or proposes to operate, an educational institution in accordance with the doctrine of a particular religion may exclude applicants who are not of that religion. s 40 Exemptions ... (2A) An educational authority that operates, or proposes to operate, an educational institution in accordance with the doctrine of a particular religion may provide accommodation wholly or mainly for students of that religion. | s 51 Religious bodies This Act does not apply to or in relation to: (a) the ordination or appointment of priests, ministers of religion or members of a religious order; or (b) the training or education of people seeking ordination or appointment as priests, ministers of religion or members of a religious order; or (c) the selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice; or (d) an act by a body established for religious purposes if the act is done as part of any religious observance or practice. | s 40 Exemptions (3) A person may discriminate against a person with respect to a matter that is otherwise prohibited under this Division if: (a) the accommodation concerned is under the direction or control of a body established for religious purposes; and (b) the discrimination: (i) is in accordance with the doctrine of the religion concerned; and (ii) is necessary to avoid offending the religious sensitivities of people of the religion. 43 Exemptions – cultural or religious sites A person may restrict access to land, a building or place of cultural or religious significance by people who are not of a particular sex, age, race or religion if the restriction: (a) is in accordance with the culture or the doctrine of the religion; and (b) is necessary to avoid offending the cultural or religious sensitivities of people of the culture or religion. |

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| | Religious educational institutions | | Religious bodies generally | Other |
| | (Prospective) Employment: staff and contractors | (Prospective) Students | | |
| Anti-Discrimination Act 1998 (Tas) (‘ <i>Tasmanian Act</i> ’) | <p>s 51 Employment based on religion</p> <p>...</p> <p>(2) A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to employment in an educational institution that is or is to be conducted in accordance with the tenets, beliefs, teachings, principles or practices of a particular religion if the discrimination is in order to enable, or better enable, the educational institution to be conducted in accordance with those tenets, beliefs, teachings, principles or practices.</p> | <p>s 51A Admission of person as student based on religion</p> <p>(1) A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to admission of that other person as a student to an educational institution that is or is to be conducted in accordance with the tenets, beliefs, teachings, principles or practices of a particular religion.</p> <p>(2) Subsection (1) does not apply to a person who is enrolled as a student at the educational institution referred to in that subsection.</p> <p>(3) Subsection (1) does not permit discrimination on any grounds referred to in section 16 other than those specified in that subsection.</p> <p>(4) A person may, on a ground specified in subsection (1), discriminate against another person in relation to the admission of the other person as a student to an educational institution, if the educational institution’s policy for the admission of students demonstrates that the criteria for admission relates to the religious belief or affiliation, or religious activity, of the other person, the other person’s parents or the other person’s grandparents.</p> | | <p>s 27 Gender</p> <p>(1) A person may discriminate against another person on the ground of gender –</p> <p>(a) in a religious institution, if it is required by the doctrines of the religion of the institution;</p> <p>s 42 Cultural and religious places</p> <p>A person may discriminate against another person on the ground of race in relation to places of cultural or religious significance if the discrimination –</p> <p>(a) is in accordance with –</p> <p>(i) the customs of the culture; or</p> <p>(ii) the doctrines of the religion; and</p> <p>(b) is necessary to avoid offending the cultural or religious sensitivities of any person of the culture or religion.</p> <p>s 51 Employment based on religion</p> <p>(1) A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to employment if the participation of the person in the observance or practice of a particular religion is a genuine occupational qualification or requirement in relation to the employment.</p> <p>...</p> <p>s 52 Participation in religious observance</p> <p>A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to –</p> <p>(a) the ordination or appointment of a priest; or</p> <p>(b) the training and education of any person seeking ordination or appointment as a priest; or</p> <p>(c) the selection or appointment of a person to participate in any religious observance or practice; or</p> <p>(d) any other act that –</p> |

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| | Religious educational institutions | | Religious bodies generally | Other |
| | (Prospective) Employment: staff and contractors | (Prospective) Students | | |
| Anti-Discrimination Act 1998 (Tas) ('Tasmanian Act') | | | | (i) is carried out in accordance with the doctrine of a particular religion; and (ii) is necessary to avoid offending the religious sensitivities of any person of that religion. |
| Discrimination Act 1991 (ACT) ('ACT Act') | <p>s 46 Religious Educational Institutions</p> <p>...</p> <p>(2) Section 10 or section 13 does not make unlawful discrimination on the ground of religious conviction in relation to staff matters at an educational institution if—</p> <p>(a) the institution is conducted in accordance with the doctrines, tenets, beliefs or teaching of a particular religion or creed; and</p> <p>(b) the discrimination is intended to enable, or better enable, the institution to be conducted in accordance with those doctrines, tenets, beliefs or teachings.</p> <p>...</p> <p>(4) Subsection (2) does not apply unless—</p> <p>(a) the educational institution has published its policy in relation to staff matters; and</p> <p>(b) the policy is readily accessible by prospective and current employees and contractors of the institution.</p> <p>...</p> <p>(5) In this section: staff matters, in relation to an educational institution, means—</p> <p>(a) the employment of a member of staff of the institution; or</p> <p>(b) the engagement of a contractor to do work in the institution.</p> | <p>s 46 Religious Educational Institutions</p> <p>(1) Section 18 does not make unlawful discrimination on the ground of religious conviction in relation to a failure to accept a person's application for admission as a student at an educational institution that is conducted solely for students having a religious conviction other than that of the applicant.</p> <p><i>Note</i> The Legislation Act, dict, pt 1 defines fail to include refuse.</p> <p>...</p> <p>(3) Subsection (1) does not apply unless—</p> <p>(a) the educational institution has published its policy in relation to student matters; and</p> <p>(b) the policy is readily accessible by prospective and current students at the institution.</p> <p>...</p> <p>(5) In this section: ... student matters, in relation to an educational institution, means the admission of a student at the institution.</p> | <p>s 32 Religious bodies</p> <p>(1) Part 3 does not apply in relation to—</p> <p>(a) the ordination or appointment of priests, ministers of religion or members of any religious order; or</p> <p>(b) the training or education of people seeking ordination or appointment as priests, ministers of religion or members of a religious order; or</p> <p>(c) the selection or appointment of people to exercise functions for the purposes of, or in connection with, any religious observance or practice; or</p> <p>(d) any other act or practice (other than a defined act) of a body established for religious purposes, if the act or practice conforms to the doctrines, tenets or beliefs of that religion and is necessary to avoid injury to the religious susceptibilities of adherents of that religion.</p> <p>(2) In this section: defined act, by a religious body, means an act or practice in relation to—</p> <p>(a) the employment or contracting of a person by the body to work in an educational institution; or</p> <p>(b) the admission, treatment or continued enrolment of a person as a student at an educational institution.</p> | <p>s 26 Domestic accommodation etc</p> <p>(1) Section 21 does not make unlawful discrimination in relation to—</p> <p>...</p> <p>(b) the provision of accommodation by a religious body for members of a relevant class of people²⁰⁹</p> <p>s 44 Religious workers</p> <p>Section 10 (1) (a) or (b), section 12 (1) (a) or (b), section 13 (b) or section 14 (1) (a) or (2) (a) does not make unlawful—</p> <p>(a) discrimination on the ground of religious conviction by an educational authority in relation to employment or work in an educational institution conducted by the authority; or</p> <p>(b) discrimination on the ground of religious conviction by a religious body in relation to employment or work in a hospital or other place conducted by the body in which health services are provided;</p> <p>if the duties of the employment or work involve, or would involve, the participation by the employee or worker in the teaching, observance or practice of the relevant religion.</p> |

209 See *Discrimination Act 1991 (ACT)* Dictionary (definition of 'relevant class of people').

| Act/ Jurisdiction | Area of activity | | | |
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| | Religious educational institutions | | Religious bodies generally | Other |
| | (Prospective) Employment: staff and contractors | (Prospective) Students | | |
| Equal Opportunity Act 1984 (SA) (‘SA Act’) | <p>s 34 Exemptions</p> <p>... (3) This Division does not apply to discrimination on the ground of sexual orientation, gender identity or intersex status in relation to employment or engagement for the purposes of an educational institution if—</p> <p>(a) the educational institution is administered in accordance with the precepts of a particular religion and the discrimination is founded on the precepts of that religion; and</p> <p>(b) the educational authority²¹⁰ administering the institution has a written policy stating its position in relation to the matter; and</p> <p>(c) a copy of the policy is given to a person who is to be interviewed for or offered employment with the authority or a teacher who is to be offered engagement as a contractor by the authority; and</p> <p>(d) a copy of the policy is provided on request, free of charge—</p> <p>(i) to employees and contractors and prospective employees and contractors of the authority to whom it relates or may relate; and</p> <p>(ii) to students, prospective students and parents and guardians of students and prospective students of the institution; and</p> <p>(iii) to other members of the public.</p> | <p>85ZE Discrimination by educational authorities</p> <p>... (5) This section does not render unlawful an act of discrimination by an educational authority administered in accordance with the precepts of a particular religion against a student or potential student because the student or potential student appears or dresses, or wishes to appear or dress, in a manner required by, or symbolic of, a different religion.</p> | <p>s 50 Religious bodies</p> <p>(1) This Part does not render unlawful discrimination in relation to—</p> <p>(a) the ordination or appointment of priests, ministers of religion or members of a religious order; or</p> <p>(b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order; or</p> <p>(ba) the administration of a body established for religious purposes in accordance with the precepts of that religion; or</p> <p>(c) any other practice of a body established for religious purposes that conforms with the precepts of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.</p> <p>s 85ZM Religious bodies</p> <p>This Part does not render unlawful discrimination on the ground of marital or domestic partnership status in relation to—</p> <p>(a) the ordination or appointment of priests, ministers of religion or members of a religious order; or</p> <p>(b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order.</p> | <p>s 35 Discrimination by associations</p> <p>(1) It is unlawful for an association to discriminate ...</p> <p>... (2b) This section does not apply to discrimination on the ground of sexual orientation, gender identity or intersex status if the association is administered in accordance with the precepts of a particular religion and the discrimination is founded on the precepts of that religion.</p> <p>s 85ZA Application of Division</p> <p>This Division applies to discrimination on the ground of marital or domestic partnership status, identity of spouse or domestic partner, pregnancy or caring responsibilities.</p> <p>s 85ZB Discrimination by associations</p> <p>(1) It is unlawful for an association to discriminate ...</p> <p>... (3) This section does not apply to discrimination against same sex domestic partners on the ground of marital or domestic partnership status if the association is administered in accordance with the precepts of a particular religion and the discrimination is founded on the precepts of that religion.</p> |

210 See SA Act s 5 (definition of ‘educational authority’).

| Act/ Jurisdiction | Area of activity | | | |
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| | Religious educational institutions | | Religious bodies generally | Other |
| | (Prospective) Employment: staff and contractors | (Prospective) Students | | |
| Equal Opportunity Act 1984 (SA) (‘SA Act’) | <p>s 85Z Exemptions</p> <p>... (2) This Division does not apply to discrimination against same sex domestic partners on the ground of marital or domestic partnership status in relation to employment or engagement for the purposes of an educational institution administered in accordance with the precepts of a particular religion if Part 3 Division 2 does not apply in relation to discrimination on the ground of sexual orientation in relation to the employment or engagement (see section 34(3)).</p> | | | |
| Equal Opportunity Act 2010 (Vic) (‘Victorian Act’) | <p>s 81 Definition of religious body</p> <p>For the purposes of sections 82 and 83, religious body means—</p> <p>(a) a body established for a religious purpose; or</p> <p>(b) an entity that establishes, or directs, controls or administers, an educational or other charitable entity that is intended to be, and is, conducted in accordance with religious doctrines, beliefs or principles.</p> <p>s 83 Religious schools</p> <p>(1) This section applies to a person or body, including a religious body, that establishes, directs, controls, administers or is an educational institution that is, or is to be, conducted in accordance with religious doctrines, beliefs or principles.</p> <p>(2) Nothing in Part 4 applies to anything done on the basis of a person's religious belief or activity, sex,</p> | <p>s 39 Exception—educational institutions for particular groups</p> <p>An educational authority that operates an educational institution or program wholly or mainly for students of a particular ... religious belief ... may exclude from that institution or program—</p> <p>(a) people who are not of the particular... religious belief ...</p> <p>...</p> <p>s 61 Exception—accommodation for students</p> <p>An educational authority that operates an educational institution wholly or mainly for students of a particular ... religious belief ... may provide accommodation wholly or mainly for—</p> <p>(a) students of that ... religious belief ...</p> <p>...</p> <p>s 83 Religious schools (extracted in the column directly to the left)</p> | <p>s 82 Religious bodies</p> <p>(1) Nothing in Part 4 applies to—</p> <p>(a) the ordination or appointment of priests, ministers of religion or members of a religious order; or</p> <p>(b) the training or education of people seeking ordination or appointment as priests, ministers of religion or members of a religious order; or</p> <p>(c) the selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice.</p> <p>(2) Nothing in Part 4 applies to anything done on the basis of a person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity by a religious body that—</p> <p>(a) conforms with the doctrines, beliefs or principles of the religion; or</p> <p>(b) is reasonably necessary to avoid</p> | <p>s 60 Exception—welfare measures</p> <p>A person may refuse to provide accommodation to another person in a hostel or similar institution established wholly or mainly for the welfare of persons of a particular ... religious belief if the other person is not of that ... religious belief.</p> <p>s 84 Religious beliefs or principles</p> <p>Nothing in Part 4 applies to discrimination by a person against another person on the basis of that person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity if the discrimination is reasonably necessary for the first person to comply with the doctrines, beliefs or principles of their religion.</p> |

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| | Religious educational institutions | | Religious bodies generally | Other |
| | (Prospective) Employment: staff and contractors | (Prospective) Students | | |
| Equal Opportunity Act 2010 (Vic) (‘Victorian Act’) | sexual orientation, lawful sexual activity, marital status, parental status or gender identity by a person or body to which this section applies in the course of establishing, directing, controlling or administering the educational institution that— (a) conforms with the doctrines, beliefs or principles of the religion; or (b) is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion. | | injury to the religious sensitivities of adherents of the religion. | |
| Equal Opportunity Act 1984 (WA) (‘WA Act’) | s 73 Educational institutions established for religious purposes (1) Nothing in this Act renders it unlawful for a person to discriminate against another person on any one or more of the grounds of discrimination referred to in this Act 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. (2) Nothing in this Act renders it unlawful for a person to discriminate against another person on any one or more of the grounds of discrimination referred to in this Act 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, | s 73 Educational institutions established for religious purposes ... (3) Nothing in this Act renders it unlawful for a person to discriminate against another person on any one or more of the grounds of discrimination referred to in this Act, other than the grounds of race, impairment or age, 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-mentioned person so discriminates in good faith in favour of adherents of that religion or creed generally, but not in a manner that discriminates against a particular class or group of persons who are not adherents of that religion or creed. | s 72 Religious bodies Nothing in this Act affects — (a) the ordination or appointment of priests, ministers of religion or members of any religious order; or (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order; or (c) the selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in any religious observance or practice; or (d) any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion. | s 21 Accommodation (1) It is unlawful for a person, whether as principal or agent, to discriminate against another person on the ground of the other person’s sex, marital status, pregnancy or breast feeding — (a) by refusing the other person’s application for accommodation; or (b) in the terms or conditions on which accommodation is offered to the other person; or (c) by deferring the other person’s application for accommodation or according to the other person a lower order of precedence in any list of applicants for that accommodation. ... (3) Nothing in this section applies to or in respect of — ... (b) accommodation provided by a religious body s 35AM Accommodation (1) It is unlawful for a person, whether as principal or agent, to discriminate against a gender reassigned person on gender history grounds — (a) by refusing the gender reassigned person’s application for accommodation; or (b) in the terms or conditions on which accommodation is offered to the gender reassigned person; or |

| Act/ Jurisdiction | Area of activity | | | |
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| | Religious educational institutions | | Religious bodies generally | Other |
| | (Prospective) Employment: staff and contractors | (Prospective) Students | | |
| Equal Opportunity Act 1984 (WA) (‘WA Act’) | 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. ... | | | <p>(c) by deferring the gender reassigned person's application for accommodation, or according to the gender reassigned person a lower order of precedence in any list of applicants for that accommodation.</p> <p>(2) It is unlawful for a person, whether as principal or agent, to discriminate against a gender reassigned person on gender history grounds —</p> <p>(a) by denying the gender reassigned person access, or limiting the gender reassigned person's access, to any benefit associated with accommodation occupied by the gender reassigned person; or</p> <p>(b) by evicting the gender reassigned person from accommodation occupied by the gender reassigned person; or</p> <p>(c) by subjecting the gender reassigned person to any other detriment in relation to accommodation occupied by the gender reassigned person.</p> <p>(3) Nothing in this section applies to or in respect of —</p> <p>...</p> <p>(b) accommodation provided by a religious body.</p> <p>s 35Z Accommodation</p> <p>(1) It is unlawful for a person, whether as principal or agent, to discriminate against another person on the ground of the other person's sexual orientation —</p> <p>(a) by refusing the other person's application for accommodation; or</p> <p>(b) in the terms or conditions on which accommodation is offered to the other person; or</p> <p>(c) by deferring the other person's application for accommodation or according to the other person a lower order of precedence in any list of applicants for that accommodation.</p> <p>(2) It is unlawful for a person, whether as principal or agent, to discriminate against another person on the ground of the other person's sexual orientation —</p> |

| Act/ Jurisdiction | Area of activity | | | |
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| | Religious educational institutions | | Religious bodies generally | Other |
| | (Prospective) Employment: staff and contractors | (Prospective) Students | | |
| <i>Equal Opportunity Act 1984 (WA)</i> (‘WA Act’) | | | | <p>(a) by denying the other person access, or limiting the other person’s access, to any benefit associated with accommodation occupied by the other person; or</p> <p>(b) by evicting the other person from accommodation occupied by the other person; or</p> <p>(c) by subjecting the other person to any other detriment in relation to accommodation occupied by the other person.</p> <p>(3) Nothing in this section applies to or in respect of —</p> <p>...</p> <p>(b) accommodation provided by a religious body.</p> <p>s 63 Accommodation</p> <p>(1) It is unlawful for a person, whether as principal or agent, to discriminate against another person on the ground of the other person’s religious or political conviction —</p> <p>(a) by refusing the other person’s application for accommodation; or</p> <p>(b) in the terms or conditions on which accommodation is offered to the other person; or</p> <p>(c) by deferring the other person’s application for accommodation or according to the other person a lower order of precedence in any list of applicants for that accommodation.</p> <p>(2) It is unlawful for a person, whether as principal or agent, to discriminate against another person on the ground of the other person’s religious or political conviction —</p> <p>(a) by denying the other person access, or limiting the other person’s access, to any benefit associated with accommodation occupied by the other person; or</p> <p>(b) by evicting the other person from accommodation occupied by the other person; or</p> <p>(c) by subjecting the other person to any other detriment in relation to accommodation occupied by the other person.</p> <p>(3) Nothing in this section applies to or in respect of —</p> <p>...</p> |

| Act/ Jurisdiction | Area of activity | | | |
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| | Religious educational institutions | | Religious bodies generally | Other |
| | (Prospective) Employment: staff and contractors | (Prospective) Students | | |
| Equal Opportunity Act 1984 (WA) (‘WA Act’) | | | | <p>(b) accommodation provided by a religious body.</p> <p>s 66ZG Accommodation</p> <p>(1) It is unlawful for a person, whether as principal or agent, to discriminate against another person on the ground of the other person’s age —</p> <p>(a) by refusing the application of the other person for accommodation; or</p> <p>(b) in the terms or conditions on which accommodation is offered to the other person; or</p> <p>(c) by deferring the application of the other person for accommodation or according to the other person a lower order of precedence in any list of applicants for that accommodation.</p> <p>(2) It is unlawful for a person, whether as principal or agent, to discriminate against another person on the ground of the other person’s age —</p> <p>(a) by denying the other person access, or limiting the other person’s access, to any benefit associated with accommodation occupied by the other person; or</p> <p>(b) by evicting the other person from accommodation occupied by the other person; or</p> <p>(c) by subjecting the other person to any other detriment in relation to accommodation occupied by the other person.</p> <p>(3) Nothing in this section applies to or in respect of —</p> <p>...</p> <p>(b) accommodation provided by a religious body.</p> <p>s 67I Accommodation</p> <p>(1) It is unlawful for a person, whether as principal or agent, to discriminate against another person on the ground of the publication of relevant details of the other person on the Fines Enforcement Registrar’s website—</p> <p>(a) by refusing the application of the other person for accommodation; or</p> <p>(b) in the terms or conditions on which accommodation is offered to the other person; or</p> |

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| | Religious educational institutions | | Religious bodies generally | Other |
| | (Prospective) Employment: staff and contractors | (Prospective) Students | | |
| Equal Opportunity Act 1984 (WA) (‘WA Act’) | | | | <p>(c) by deferring the application of the other person for accommodation or according to the other person a lower order of precedence in any list of applicants for that accommodation.</p> <p>(2) It is unlawful for a person, whether as principal or agent, to discriminate against another person on the ground of the publication of relevant details of the other person on the Fines Enforcement Registrar’s website—</p> <p>(a) by denying the other person access, or limiting the other person’s access, to any benefit associated with accommodation occupied by the other person; or</p> <p>(b) by evicting the other person from accommodation occupied by the other person; or</p> <p>(c) by subjecting the other person to any other detriment in relation to accommodation occupied by the other person.</p> <p>(3) Nothing in this section applies to or in respect of —</p> <p>...</p> <p>(b) accommodation provided by a religious body.</p> <p>s 66 Exceptions to s 54 to 56</p> <p>Nothing in section 54, 55 or 56 renders unlawful discrimination by an employer, principal or person —</p> <p>...</p> <p>(b) in the case of employment or work in a hospital or other place where a medical or other health related service is provided, where the employer or principal is a religious body, if the duties of the employment or work are for the purposes of, or in connection with, or otherwise involve or relate to the participation of the employee in any religious observance or practice.</p> |

| Act/ Jurisdiction | Area of activity | | | |
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| | Religious educational institutions | | Religious bodies generally | Other |
| | (Prospective) Employment: staff and contractors | (Prospective) Students | | |
| <i>Equal Opportunity Act 1984 (WA)</i> (‘WA Act’) | | | | <p>s 74 Establishments providing housing accommodation for aged persons</p> <p>...</p> <p>(2) Nothing in this Act affects —</p> <p>(a) any rule or practice of an institution which restricts admission thereto to applicants of any class, type, sex, race, age or religious or political conviction; or</p> <p>(b) the provision of benefits, facilities or services to such persons as are admitted to such an institution.</p> |

A LICENCE TO DISCRIMINATE OR TO PRACTISE FAITH? AN ANALYSIS OF RELIGIOUS EXEMPTIONS TO ANTI-DISCRIMINATION LAWS IN THE AUSTRALIAN EMPLOYMENT CONTEXT

RYAN THOMSON

The highly controversial exemptions to Australia's anti-discrimination laws which permit religious bodies or religious educational institutions to engage in otherwise unlawful discrimination have long attracted vehement public debate.¹ Critics of the exemptions argue that these provide religious bodies with a state-sponsored licence to discriminate,² whilst advocates believe the exemptions are an essential means to enable them to fully practise their faith.³ This issue is of such importance and immense public interest that the Attorney-General has asked the Australian Law Reform Commission ('ALRC') to review Australia's religious exemptions.⁴ In particular, the ALRC has been directed to consider what reforms should be made to anti-discrimination laws and the *Fair Work Act 2009* (Cth) ('FWA') in order to 'limit or remove altogether (if practicable) religious exemptions to prohibitions on discrimination'.⁵ Any proposed reforms however are also

required to strive to guarantee 'the right of religious institutions to reasonably conduct their affairs in a way consistent with their religious ethos'.⁶ This paper seeks to assist the ALRC with this review by examining religious exemptions that are specifically related to the employment context to determine whether these provisions should be limited or removed.

This paper argues that the religious exemptions in Australia's anti-discrimination legislation should be further limited, but not completely removed, to better strike the appropriate balance between protecting a person's right to freedom from discrimination and religious bodies' right to manifest their religious beliefs. Firstly, this paper will provide a concise overview of discrimination in the employment context generally and will note the important distinction between the right to freedom of religion and the right to manifest religious belief. Secondly, three key types of religious exemptions used

1 See Attorney-General's Department, *Religious Freedom Bills – First Exposure Drafts* (Web Page, 5 April 2020) <<https://www.ag.gov.au/Consultations/Pages/religious-freedom-bills.aspx>>; Attorney-General's Department, *Religious Freedom Bills – Second Exposure Drafts* (Web Page, 5 April 2020) <<https://www.ag.gov.au/Consultations/Pages/religious-freedom-bills-second-exposure-drafts.aspx>>.

2 Equal Opportunity Tasmania, *Religious Freedom in Australia – Submission by the Anti-Discrimination Commissioner (Tas) to expert panel on Religious Freedom Protection in Australia* (December 2017) <<https://www.pmc.gov.au/domestic-policy/religious-freedom-review/review-submissions>> 1; Maleiha Malik, 'Religious Freedom in the 21st Century' (Conference Paper, University of London, 18 April 2012) 3.

3 Joel Harrison and Patrick Parkinson, 'Freedom beyond the Commons: Managing the Tension between Faith and Equality in a Multicultural Society' (2014) 40 *Monash University Law Review* 2, 414.

4 Australian Law Reform Commission, *Terms of Reference* (Web Page, 4 March 2020) <<https://www.alrc.gov.au/inquiry/review-into-the-framework-of-religious-exemptions-in-anti-discrimination-legislation/terms-of-reference/>>.

5 Ibid.

6 Ibid.

across Australia will be analysed and the various jurisdictional differences in the form of these exemptions will be explored. Thirdly, the Government's most recent attempt at reform in this area, namely the Religious Discrimination Bill 2019 (Cth) ('RDB') and its general religious exemption, will be critiqued so that any shortcomings with this reform can be identified and addressed. Fourthly, it will be demonstrated that religious exemptions per se are not inconsistent with the aims of anti-discrimination laws and that these provisions are useful mechanisms in delineating acceptable conduct. Lastly, all of the above will be drawn upon to propose nuanced reforms which address the complexities inherent in this area.

The issues of discrimination against independent contractors or in the appointment of religious ministers will not be considered to allow for a more in-depth analysis of the religious exemptions in the employment context. The substantial variations in the range of protected attributes in each jurisdiction's anti-discrimination legislation are also beyond the scope of this paper as those differences have been sufficiently covered elsewhere.⁷

I. DISCRIMINATION IN EMPLOYMENT AND THE DIFFERENCE BETWEEN THE RIGHT TO MANIFEST RELIGIOUS BELIEF AND RELIGIOUS FREEDOM

The area of employment is especially susceptible to discrimination as the power imbalance that characterises most employment relationships makes employees vulnerable to treatment that is discriminatory, arbitrary, or unfair.⁸ In particular, the

managerial prerogative provides employers with the potential to abuse their positions by unfavourably treating an employee on the grounds of their personal attributes, either during the hiring process or the course of employment.⁹ On a practical level, this discrimination can be very damaging to individuals given the role of employment as a means for providing economic security and a purpose in life to many people.¹⁰

Australian law, in recognition of the importance of equality of opportunity and of the harm caused by discrimination,¹¹ has prohibited certain discriminatory conduct in the employment context at three levels. There have been five anti-discrimination statutes legislated at the Commonwealth level, namely the *Age Discrimination Act 2004* (Cth) ('ADA'), the *Disability Discrimination Act 1992* (Cth), the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth) ('SDA'), and the *Australian Human Rights Commission Act 1986* (Cth). Each Australian state and self-governing territory has additionally enacted its own specific anti-discrimination legislation.¹² The *FWA* also operates alongside these jurisdictions and that Act includes under its 'General Protections' a prohibition against discrimination on various grounds, subject to certain exceptions.¹³ The existence of all of this legislation means that an aggrieved employee may potentially have three different avenues available to complain about employment discrimination.

These anti-discrimination protections are subject to various exemptions in the respective statutes. A religious exemption is an exemption in an Australian anti-discrimination law which enables a

⁷ See Expert Panel, *Religious Freedom Review: Report of the Expert Panel* (May 2018) 130–4.

⁸ Andrew Stewart et al, *Labour Law* (The Federation Press, 6th ed, 2016) 646.

⁹ K L Adams, 'Indirect Discrimination and the Worker-Carer: It's Just Not Working' in Jill Murray (ed) *Work, Family and the Law* (Federation Press, 2005) 18–44; CCH Australia, *CCH Commentary: Australian Employment Law Guide* (online at 22 April 2018) [¶69-030].

¹⁰ Beth Gaze and Belinda Smith, 'Areas' in Beth Gaze and Belinda Smith (eds), *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2016) 145.

¹¹ See *Anti-Discrimination Act 1991* (Qld) s 6; *Discrimination Act 1991* (ACT) s 4; *Anti-Discrimination Act 1992* (NT) s 3; *Equal Opportunity Act 1984* (WA) s 3; *Equal Opportunity Act 2010* (Vic) s 3; *Sex Discrimination Act 1984* (Cth) s 3.

¹² *Anti-Discrimination Act 1977* (NSW); *Equal Opportunity Act 2010* (Vic); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (WA); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1998* (Tas); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1992* (NT).

¹³ *Fair Work Act 2009* (Cth) s 351.

religious body, or religious educational institution, not to be subject to liability for discriminatory conduct that would otherwise be unlawful, but for the exemption.¹⁴ The justification for incorporating these types of exemptions into Australian law was to strike the appropriate balance between upholding religious bodies' right to manifest religious belief and protecting a person's right to freedom from discrimination.¹⁵

The right to manifest religious belief is often confused with the conceptually distinct right to religious freedom. Whereas freedom of religion in the employment context grants an employer the right to hold religious beliefs,¹⁶ the right to manifest religious belief conversely permits a religious employer to act on their religious beliefs.¹⁷ The manifestation of religious belief would include where an employer, in accordance with their religious beliefs, unfavourably treats an employee or prospective employee because of their personal attributes. Such conduct, depending on the law and existence of any religious exemptions, may or may not constitute unlawful discrimination. The inclusion, or exclusion, of religious exemptions into anti-discrimination laws therefore can either infringe an employee's right to be free from discrimination or curtail a religious employer's right to manifest their religious beliefs by prohibiting discriminatory conduct founded on those beliefs.¹⁸

Although the right to manifest religious belief can be restricted as necessary to protect other fundamental rights,¹⁹ there also is an interest in respecting this right as the observance and practice of codes of conduct is a fundamental aspect of religion generally.²⁰ The legislature faces a difficult task when balancing these two competing rights and there have been

many different attempts of striking this balance across the Australian jurisdictions.

II. THE THREE DIFFERENT TYPES OF RELIGIOUS EXEMPTIONS IN AUSTRALIA'S ANTI-DISCRIMINATION LEGISLATION

While there are many different forms of religious exemptions across the different Australian jurisdictions, the majority of these can be grouped into three distinct broad categories. These are:

1. religious exemptions to avoid injury to the 'religious susceptibilities' of the adherents of that religion, or to words of similar effect (religious susceptibilities exemptions);
2. religious exemptions which apply when a person does not meet the 'genuine occupational requirements' of a position (genuine occupational requirements exemptions); and
3. specific exemptions tailored for religious educational institutions such as schools (religious educational institution exemptions).

14 Liam Elphick, 'Sexual Orientation and 'Gay Wedding Cake' cases under Australian Anti-Discrimination Legislation: A Fuller Approach to Religious Exemptions' (2017) 38 *Adelaide Law Review* 150, 158.

15 Carolyn Evans and Leilani Ujvari, 'Non-discrimination Laws and Religious Schools in Australia' (2009) 30 *Adelaide Law Review* 31, 52–6.

16 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) Art 18.

17 *Ibid.*

18 See also *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) Art 26.

19 *Ibid* Art 18.

20 *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 173–174.

The following table illustrates the use of these types of exemptions in each jurisdiction.

| Jurisdiction | Genuine Occupational Requirements Exemptions | Religious Susceptibilities Exemptions | Specific Religious Educational Institution Exemptions |
|------------------------------|----------------------------------------------|---------------------------------------|-------------------------------------------------------|
| Commonwealth | | ✓ | ✓ |
| Fair Work Act | ✓ | ✓ | ✓ |
| Queensland | ✓ | * | |
| New South Wales | | ✓ | ✓ |
| Victoria | | ✓ | ✓ |
| Western Australia | | ✓ | ✓ |
| South Australia | ✓ | ✓ | ✓ |
| Tasmania | ✓ | ✓ | ✓ |
| Australian Capital Territory | | ✓ | ✓ |
| Northern Territory | | | ✓ |

* Queensland's religious susceptibilities exemption does not apply to anti-discrimination protections related to work or education.²¹

A. General religious susceptibilities exemptions

This type of exemption typically contains two limbs and states that an act or practice of a religious body will not be discriminatory where it:

- conforms to the doctrines, tenets or beliefs of the religion; or
- is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

At the Commonwealth level, only the *SDA* and *ADA* contain religious exemptions that utilise the abovementioned two-limbed approach.²² The absence of any type of religious exemption in the *Disability Discrimination Act 1992* (Cth) and the *Racial Discrimination Act 1975* (Cth) means that a religious body in Australia

cannot discriminate against a person on the basis of their disability or race.

All states and the Australian Capital Territory (ACT) also contain some variation of a general religious susceptibilities exemption.²³ The Victorian exemption further requires that the necessity to avoid religious susceptibilities be 'reasonable', although this amendment arguably creates ambiguity by distinguishing between something that is 'necessary' and 'reasonably necessary'.²⁴ The Northern Territory's ('NT') equivalent broad exemption for religious bodies does not use 'religious susceptibilities' type wording and instead adopts the considerably wider language of exempting any act that is 'done as part of

²¹ *Anti-Discrimination Act 1991* (Qld) s 109(2).

²² *Sex Discrimination Act 1984* (Cth) s 37(1)(d); *Age Discrimination Act 2004* (Cth) s 35.

²³ *Anti-Discrimination Act 1977* (NSW) s 56; *Equal Opportunity Act 1984* (SA) s 50(1)(c); *Equal Opportunity Act 1984* (WA) s 72; *Equal Opportunity Act 2010* (Vic) s 82; *Anti-Discrimination Act 1998* (Tas) s 52; *Anti-Discrimination Act 1991* (Qld) s 109.

²⁴ *Equal Opportunity Act 2010* (Vic) s 82.

any religious observance or practice'.²⁵

The *FWA*'s prohibition against discrimination contains several exemptions, one of which uses the wording of a religious susceptibilities exemption. Section 351(1) of the *FWA* states that an employer must not take adverse action against an employee, or prospective employee, because of their protected attributes.²⁶ This does not apply to conduct that is taken against a staff member of an institution conducted in accordance with religious teachings, provided that this is done in good faith and 'to avoid injury to the religious susceptibilities of adherents of that religion'.²⁷

Whilst there are many different drafting variations of the exemptions across jurisdictions, one notable difference concerns the conjunction used between the two limbs of religious susceptibilities exemptions. The relevant exemptions in New South Wales ('NSW'), South Australia ('SA'), Western Australia ('WA') and Victoria, along with the *SDA* and *ADA*,²⁸ all stipulate that an act or practice of a religious body does not constitute unlawful discrimination where this:

- conforms to the doctrines, tenets or beliefs of that religion; *or*
- is necessary to avoid injury to the religious susceptibilities of adherents of that religion.²⁹

The ACT and Tasmania conversely replace the conjunction of 'or' between the two limbs with 'and' which has the effect of restricting the application of their religious susceptibilities exemptions.³⁰

i. *The meaning of 'religious susceptibilities'*

Despite being frequently used in anti-discrimination legislation, the phrase 'necessary to avoid injury to the religious susceptibilities [of adherents]' is not defined and its vague nature has made it difficult to interpret.³¹ Some clarity on its meaning however was provided in *OV & OW v Members of the Board of Wesley Mission Council*.³² In that case, a same-sex couple applied to become foster carers of children at a facility run by the Wesley Mission, which is part of the Uniting Church, and were denied because of their homosexuality.

The NSW Court of Appeal importantly clarified that conduct would cause injury to the religious susceptibilities of the adherents of that religion if it caused injury to a 'significant proportion of the group' rather than to every single adherent.³³ Allsop P further elucidated that it would be a mistake to identify a specific threshold number of adherents as the question is a 'factual one and [it should] be answered in an objective sense'.³⁴ The court also explained that it was not Parliament's intention to only exempt acts or practices common to all churches of a religion as opposed to different denominations under a religion.³⁵ This interpretation was relevant as this negated an argument that the Wesley Missions' views on homosexuality should be not be decisive because those views were not reflective of all branches of Christian churches. The couple's discrimination complaint ultimately failed as it was held that the conduct of the religious foster care facility fell within the relevant religious susceptibilities exemption.³⁶ In reaching this conclusion, an affidavit from the CEO of the Wesley

25 *Anti-Discrimination Act 1992* (NT) s 51(d).

26 *Fair Work Act 2009* (Cth) s 351(1).

27 *Ibid* s 351(2).

28 *Sex Discrimination Act 1984* (Cth) s 37(1)(d); *Age Discrimination Act 2004* (Cth) s 35.

29 *Anti-Discrimination Act 1977* (NSW) s 56(d); *Equal Opportunity Act 1984* (SA) s 50(1)(c); *Equal Opportunity Act 1984* (WA) s 72; *Equal Opportunity Act 2010* (Vic) s 82.

30 *Anti-Discrimination Act 1998* (Tas) s 52; *Discrimination Act 1991* (ACT) s 32.

31 *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256, [296].

32 *OV & OW v Members of the Board of Wesley Mission Council* (2010) 79 NSWLR 606.

33 *Ibid* [12].

34 *Ibid*.

35 *Ibid* [41].

36 *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293 (10 December 2010).

Mission Council was held to be sufficient to demonstrate that denying the homosexual couple the opportunity to become foster carers was necessary to avoid injuring the religious susceptibilities of adherents.³⁷

This use of a seemingly subjective test by the NSW Court of Appeal is at odds with the objective approach adopted in Victoria in *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd*.³⁸ In that case the operators of a youth camp, who were associated with a Christian Brethren church, were unable to rely upon a religious exemption to justify their refusal to permit a homosexual youth suicide prevention group to hire their campsite grounds. The operators of the youth camp argued their conduct was justified as the objects of the Christian youth camp required that the camp facilities be conducted in accordance with the Christian Brethren's fundamental beliefs.³⁹ However, the Victorian Court of Appeal held this religious motivation was insufficient to convert the secular commercial activity of hiring out the campsite into an intrinsically religious activity which would invoke the application of the religious exemption.⁴⁰

The court also held that even if the youth camp was a 'religious body', its conduct was not in conformity with the relevant religious doctrines or was reasonably necessary to avoid injury to the religious sensitivities of adherents. In finding this, the court noted that the Biblical prohibition against homosexuality was a 'rule of private morality' and did not require religious followers to 'interfere with, or obstruct, or discourage' another person's expression of their sexuality.⁴¹ On the contrary, the expert evidence was held to indicate that conforming to the New Testament would actually require adherents to show tolerance to persons they view as sinners.⁴² The court

also adopted a very strict interpretation of conformity with religious doctrines which was said to require that a religious body have 'no alternative but to act... in [that] particular way'.⁴³ The question of necessity was further said to have been 'intended to be judged objectively' because different language would have been used if Parliament intended for a subjective test to be applied as this would substantially broaden the scope of the exemption.⁴⁴ Parliament accordingly was said to have only intended to exempt a religious body's conduct where to do otherwise 'would be an affront to the reasonable expectation of adherents [that the religious body] be able to conduct itself in accordance with the doctrines to which they subscribed...'.⁴⁵

B. *Genuine occupational requirements exemptions*

The most developed example of this type of exemption is found at section 25 of the *Anti-Discrimination Act 1991* (Qld). Section 25(3) prescribes that it is not unlawful for an employer to discriminate against an employee or prospective employee in a reasonable way where that person:

- '(a) openly acts in a way that the person knows or ought reasonably to know is contrary to the employer's religious beliefs';⁴⁶ and
- '(b) it is a genuine occupational requirement of the employer that the person, in the course of, or in connection with, the person's work, act in a way consistent with the employer's religious beliefs'.⁴⁷

This exemption applies to work at religious educational institutions, such as religious schools and other religious bodies, where working there 'genuinely

37 Ibid [18], [34]–[35].

38 *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256.

39 Ibid [248].

40 Ibid [265].

41 Ibid [280] – [284].

42 Ibid [284].

43 Ibid [287] – [291].

44 Ibid [292].

45 Ibid [301].

46 *Anti-Discrimination Act 1991* (Qld) s 25(3).

47 Ibid.

and necessarily involves adhering to and communicating the body's religious belief'.⁴⁸

Tasmania and South Australia also have genuine occupational requirements exemptions, but these have a more limited application than the Queensland model as these exemptions only apply to discrimination based on specific protected attributes.⁴⁹ Both of those provisions also lack the protection that the employee must 'openly [act] in a way that the person knows or ought reasonably to know is contrary to the employer's religious beliefs'.⁵⁰ The general protection under the *FWA* against adverse action on discriminatory grounds also contains wording similar in effect to a genuine occupational requirements exemption, namely an exemption for conduct 'taken because of the inherent requirements of the particular position concerned'.⁵¹

C. Specific exemptions for religious educational institutions

The content of specific exemptions for religious educational institutions varies the most across the jurisdictions out of the three identified types of exemptions.

WA's exemption enables a religious educational institution to engage in otherwise unlawful discriminatory conduct against a staff member or prospective employee where this is undertaken 'in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion...'.⁵² The equivalent exemptions in Victoria, the NT and in the *SDA* are largely similar or identical to the WA model.⁵³

Other jurisdictions shift the focus of their exemptions from avoiding injury to adherents to ensuring that the religious educational

institution is conducted in accordance with the relevant religious doctrines. For example, the Tasmanian religious educational institution exemption permits otherwise unlawful discrimination against an employee or prospective employee provided this is in order to enable, or better enable, the educational institution to be conducted in accordance with their religious teachings.⁵⁴ The ACT's equivalent exemption effectively mirrors this, but importantly only applies where the 'educational institution has published its policy in relation to [the employment of staff]' and this policy is readily accessible to prospective and current employees.⁵⁵ This condition that a religious educational institution must have a staff employment policy is prescribed in even further detail in South Australia's equivalent exemption. Instead of the policy only being required to be 'readily accessible',⁵⁶ in South Australia a copy of the policy must be given to prospective employees during the hiring process and this policy must be provided on request, free of charge, to all employees to whom it may relate.⁵⁷

NSW conversely has adopted the widest exemption in this area by legislating an unconditional exemption for a 'private educational body' to engage in otherwise unlawful discriminatory conduct on the basis of a person's sex, transgender nature, marital status or homosexuality.⁵⁸ This exemption is not dependent on the private educational body's religious nature and it applies broadly to private schools, universities and colleges.⁵⁹

Although Queensland and the *FWA* do not contain specific religious educational institution exemptions, a religious educational institution may instead seek to rely upon the genuine occupational

48 Ibid s 25(2).

49 *Anti-Discrimination Act 1998* (Tas) s 51(1); *Equal Opportunity Act 1984* (SA) s 34(2).

50 *Anti-Discrimination Act 1991* (Qld) s 25(3).

51 *Fair Work Act 2009* (Cth) s 351(2).

52 *Equal Opportunity Act 1984* (WA) s 73.

53 *Sex Discrimination Act 1984* (Cth) s 38; *Equal Opportunity Act 2010* (Vic) s 83(2); *Anti-Discrimination Act 1992* (NT) s 37A.

54 *Anti-Discrimination Act 1998* (Tas) s 51(2).

55 *Discrimination Act 1991* (ACT) s 46.

56 Ibid.

57 *Equal Opportunity Act 1984* (SA) s 34(3).

58 *Anti-Discrimination Act 1977* (NSW) ss 4, 25(3)(c), 38C(3)(c), 40(3)(c), 49ZH(3)(c).

59 Ibid s 4.

requirements exemptions in these jurisdictions. That type of exemption however would be comparatively harder to satisfy as conformity with the relevant religion would only constitute a genuine occupational requirement where this was deemed to be actually necessary for an employee to properly undertake their work responsibilities.⁶⁰

III. THE RELIGIOUS DISCRIMINATION BILL

The 'Expert Panel Review into Religious Freedom' chaired by former Attorney-General Phillip Ruddock, also known as the 'Ruddock Review', recommended that a Federal religious discrimination Act be legislated to make a person's religious belief or activity 'a protected attribute under Federal anti-discrimination law'.⁶¹ In response to this and political pressure from within its own party, the Coalition Government took to the 2019 Australian Federal election a commitment to propose a religious discrimination Act.⁶² This eventually resulted in the Government creating two exposure drafts of the Religious Discrimination Bill.⁶³ The second exposure draft is the current form of the Bill at the date of writing and the following analysis is based on this version.

The *RDB* would make it unlawful for an employer to discriminate against a prospective or current employee on the grounds of that person's religious belief or activity (or lack thereof).⁶⁴ This prohibition however would be subject to a general religious exemption and a genuine occupational requirements exemption, although the latter would largely

reflect existing similar provisions and is not as controversial as the former.⁶⁵

The general religious exemption, located at clause 11 and titled 'Religious Bodies may act in accordance with their faith etc.', states that a religious body does not discriminate against a person under the proposed Act by engaging in good faith in conduct:

- 'that a person of the same religion as the religious body could reasonably consider to be in accordance with [the religious teachings of that religion],⁶⁶ or
- 'to avoid injury to the religious susceptibilities of adherents of the same religion as the religious body'.⁶⁷

The Explanatory Notes state that clause 11 is not framed as an exception to the Bill's anti-discrimination prohibitions, but rather as a declaration that the conduct covered by the provision 'is not, in and of itself, discrimination'.⁶⁸ However, the general effect of this provision, for all intents and purposes, is the same as a general religious exemption because clause 11 applies 'despite anything else' in the Bill and removes liability for the relevant conduct.⁶⁹

Clause 11 is stated to only cover discrimination against a person 'under this Act', meaning the clause would only exempt otherwise unlawful discriminatory conduct on the grounds of a person's religious belief or activity (or lack thereof). Therefore, nothing in clause 11 would allow a religious body to discriminate on grounds which are protected by other anti-discrimination laws, such as sex or gender related attributes protected by the *SDA*.⁷⁰ One question posed by the Bill protecting, and in some circumstances exempting,

60 See *Walsh v St Vincent de Paul Society Queensland (No. 2)* [2008] QADT 32, 89.

61 Expert Panel, *Religious Freedom Review: Report of the Expert Panel* (May 2018) [1.390] – [1.392].

62 ABC News, *Religious discrimination act to form part of Coalition election platform* (Web Page, 13 December 2018) <<https://www.abc.net.au/news/2018-12-13/religious-discrimination-act-to-form-part-of-coalition-election/10613608>>.

63 See Attorney-General's Department, *Religious Freedom Bills – First Exposure Drafts* (Web Page, 5 April 2020) <<https://www.ag.gov.au/Consultations/Pages/religious-freedom-bills.aspx>>; Attorney-General's Department, *Religious Freedom Bills – Second Exposure Drafts* (Web Page, 5 April 2020) <<https://www.ag.gov.au/Consultations/Pages/religious-freedom-bills-second-exposure-drafts.aspx>>.

64 Religious Discrimination Bill 2019 (Cth) cl 5, cl 14(1)-(2).

65 Ibid cl 32(2).

66 Ibid cl 11(1).

67 Ibid cl 11(3).

68 Explanatory Notes, Religious Discrimination Bill 2019 (Cth) 211.

69 Religious Discrimination Bill 2019 (Cth) cl 11(6).

70 Explanatory Notes, Religious Discrimination Bill 2019 (Cth) 211.

discriminatory conduct on the grounds of a person's lack of religious belief or activity is whether this could be used to sidestep other anti-discrimination laws. For example, an argument could be made that a person, by virtue of being homosexual, does not hold a religious belief (such as the Biblical or Quranic prohibition against homosexuality) and therefore can be discriminated against on this basis. Although such an argument would likely not be accepted as it goes against the legislative intention that the *RDB* not be contradictory to other anti-discrimination statutes,⁷¹ this question creates an ambiguity which may need further clarification if this Bill is to be legislated.

A. 'Reasonably consider'

Unlike existing religious exemptions in other legislation which exempt an act that, *inter alia*, 'conforms to the doctrines, tenets or beliefs of that religion', clause 11 permits otherwise unlawful discriminatory conduct where 'a person of the same religion as the religious body could *reasonably consider* [that the religious body's is] in accordance with the [relevant religious teachings]' (emphasis added).⁷² This particular wording was used to prevent courts from determining whether the religious body's conduct actually was in accordance with the relevant religious teachings.⁷³ The drafters of the Bill believe that, as a matter of general principle, courts 'are not well-placed to make decisions on matters of religious doctrine' and that religious bodies rightfully can implement their religious teachings in a variety of ways.⁷⁴ As such, clause 11 was drafted in a way that would provide religious bodies with a 'margin of appreciation about how they conduct their activities in accordance with their faith' and

would therefore prevent a court from taking a strict interpretation of the requirements of doctrine.⁷⁵ Whilst the intention of preventing a court from straying into doctrinal interpretation is sound, the solution of the 'reasonably considers' standard proposed in clause 11 is far from ideal.

The use of this subjective standard, from the reference of a person of the same religion who reasonably considers the conduct to be in accordance with the relevant religious teachings, would significantly lower the bar for satisfying a religious exemption when compared with existing provisions.⁷⁶ Unlike the position under the *SDA* and *FWA* where a court will receive expert evidence on what is required by the relevant religious doctrines,⁷⁷ a religious body could satisfy clause 11 by merely providing evidence of a single person who reasonably considers that the conduct is justified by the relevant religious teachings.⁷⁸ A religious body moreover could escape liability from otherwise unlawful discriminatory conduct on the basis of an individual's subjective evidence that has no recognised religious or doctrinal basis.⁷⁹ This is because the standard of 'reasonably considers' permits evidence to be relied upon even if the religious accuracy of this evidence is later proven to be untrue.⁸⁰

The *RDB*'s removal of the element of compulsion on a religious body to act in a particular manner would also considerably broaden the scope of this exemption when compared to the religious exemptions under the *SDA* and *FWA*.⁸¹ Clause 11 removes the key word 'necessary' from the phrase 'necessary to avoid injury to the religious susceptibilities' of adherents used

71 Ibid.

72 Religious Discrimination Bill 2019 (Cth) cl 11(1).

73 Explanatory Notes, Religious Discrimination Bill 2019 (Cth) 237.

74 Ibid 237–8

75 Ibid 238.

76 Australian Discrimination Law Experts Group, Submission to Attorney-General's Department, *Religious Discrimination Bill 2019 (Cth) Second Exposure Draft* (30 January 2020) 21–23.

77 See *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256, [280] – [284].

78 Australian Discrimination Law Experts Group, Submission to Attorney-General's Department, *Religious Discrimination Bill 2019 (Cth) Second Exposure Draft* (30 January 2020) 21–23.

79 Law Council of Australia, Submission to Attorney-General's Department, *Religious Freedom Bills* (3 October 2019) [176]; Australian Discrimination Law Experts Group, Submission to Attorney-General's Department, *Religious Discrimination Bill 2019 (Cth) Second Exposure Draft* (30 January 2020) 21–23.

80 Ibid.

81 Law Council of Australia, Submission to Attorney-General's Department, *Religious Freedom Bills* (3 October 2019) [8].

under existing anti-discrimination laws.⁸² This would have the effect of allowing a religious body to take non-proportional and superfluous actions against an employee as no element of necessity would be required, thereby tipping the scales excessively in favour of religious bodies.⁸³

Despite being modelled on the religious exemptions in the *SDA* and *FWA*,⁸⁴ clause 11 makes subtle but significant changes to the key restrictions of those existing exemptions through the removal of the word 'necessary' and the adoption of a 'reasonably considers' subjective standard. If legislated, clause 11 would create a general religious exemption which would have the broadest scope and lowest threshold of any religious exemption in Australia.⁸⁵

IV. WHY RELIGIOUS EXEMPTIONS PER SE ARE NOT INCONSISTENT WITH THE AIMS OF ANTI-DISCRIMINATION LAWS

It has been argued that the existence of religious exemptions in anti-discrimination legislation gives the impression that religious bodies or religious educational institutions, contrary to the rule of law, are provided with special treatment.⁸⁶ Furthermore, critics have argued the exemption of otherwise unlawful discrimination conveys that the law does not value the worth of the persons subjected to that conduct.⁸⁷ The exemptions consequently are claimed to be irreconcilable as a matter of principle with the aims of anti-discrimination laws, namely the promotion of equality of opportunity and the right to equality before the law.⁸⁸ Such

a view however does not appreciate that anti-discrimination laws can also recognise that the equal application of law to all groups can actually lead to unequal outcomes.⁸⁹ In particular, the blanket application of anti-discrimination laws can restrict religious bodies' ability to practise faith by preventing them from taking action against employees who openly undermine their religious ethos.

If the religious exemptions were to be entirely removed, a religious body would face liability for reasonable efforts to ensure that employees act in a manner consistent with that body's aim of promoting their religious beliefs.⁹⁰ While the genuine occupational requirements exemptions could be relied upon by religious employers to some extent, an employer would be unable to deal with employees who openly undermine their religious ethos if that employee's position is deemed by a court to not require adherence to the relevant religious beliefs.⁹¹ This is not to say that religious exemptions should be unqualified, as a *carte blanche* right to discriminate clearly would contradict the other aims of anti-discrimination laws. Rather, it is submitted that religious exemptions which contain proper safeguards against misuse can still promote equality of opportunity by proportionately restricting the application of exemptions so that these cannot be invoked on the grounds of unfounded or inexcusable conduct. Religious exemptions, qualified by appropriate conditions, therefore do not amount to protection by the State of the various truth claims of religious beliefs,⁹² but instead are a recognition that religious bodies are entitled to reasonably

82 Religious Discrimination Bill 2019 (Cth) cl 11(3).

83 Law Council of Australia, Submission to Attorney-General's Department, *Religious Freedom Bills* (3 October 2019) [8].

84 Explanatory Notes, Religious Discrimination Bill 2019 (Cth) 244.

85 Australian Discrimination Law Experts Group, Submission to Attorney-General's Department, *Religious Discrimination Bill 2019 (Cth) Second Exposure Draft* (30 January 2020) 21-23.

86 Equal Opportunity Tasmania, *Anti-Discrimination Amendment Bill 2016 Released for Consultation on 29 August 2016: Response of the Anti-Discrimination Commissioner (Tas)* (September 2016) <http://equalopportunity.tas.gov.au/_data/assets/pdf_file/0009/356382/16.09-ADC_response_to_the_AD_Amendment_Bill_2016.pdf> 24.

87 See Maleiha Malik, 'Religious Freedom in the 21st Century' (Conference Paper, University of London, 18 April 2012) 3.

88 Ibid; *Anti-Discrimination Act* 1991 (Qld) s 6; *Discrimination Act* 1991 (ACT) s 4; *Anti-Discrimination Act* 1992 (NT) s 3; *Equal Opportunity Act* 1984 (WA) s 3; *Equal Opportunity Act* 2010 (Vic) s 3; *Sex Discrimination Act* 1984 (Cth) s 3.

89 See *Discrimination Act* 1991 (ACT) s 4.

90 Senate Legal and Constitutional Affairs References Committee, *Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff* (Report, November 2018) [2.62].

91 Joel Harrison and Patrick Parkinson, 'Freedom beyond the Commons: Managing the Tension between Faith and Equality in a Multicultural Society' (2014) 40 *Monash University Law Review* 2, 430.

92 Cf. Report of the Special Rapporteur on Freedom of Religion or Belief, *Report: Elimination of all forms of religious intolerance*, UN Doc A/70/286 (5 August 2015) [6.5.2].

conduct their internal affairs in a manner consistent with their religious ethos.

The utility of religious exemptions can also be demonstrated through a comparison of these provisions with an alternative proposed reform referred to as ‘general limitation’ clauses. Such clauses provide a court with considerations that must be referred to when determining whether otherwise unlawful discriminatory conduct is permissible.⁹³ These considerations can include a requirement that otherwise unlawful discriminatory conduct needs to be taken in the pursuit of a legitimate aim (such as serving another human right) and in a way that is proportional to that legitimate aim.⁹⁴ Instead of demarcating what is and is not permissible like an exemption would, a general limitation clause encourages courts to engage in a balancing exercise which weighs up the different listed considerations in the clause. Although general limitation clauses can be beneficial when a court is faced with a novel situation,⁹⁵ these clauses create uncertainty as litigation is required to determine whether conduct is ‘legitimate’ or ‘proportional’.⁹⁶ By requiring a court to consider the proportionality or the legitimacy of an aim, general limitation clauses may also invite a court to consider whether the relevant religious beliefs actually support that aim. This is a problematic form of inquiry as it enables a court to engage with a topic that has been consistently held to be non-justiciable, namely the rationality or theological validity of religious beliefs.⁹⁷ A carefully drafted exemption would avoid the risk accompanying a balancing exercise of vague considerations by instead directing a court’s focus to simply determining whether the relevant circumstances invoke

the application of the exemption.⁹⁸

It therefore is evident that religious exemptions per se are not inherently irreconcilable with the aims of anti-discrimination laws and, as such, should not be removed as these are a useful mechanism to delineate the boundaries of acceptable conduct. Instead, reforms should be made to the substance of the existing religious exemptions so that these can better address the complexities which occur as the result of the intersection of law and religion (as will be apparent from the following paragraphs).

V. REFORMS

A. *Reforms to religious susceptibilities exemptions*

As previously discussed, the majority of jurisdictions have drafted their religious susceptibilities exemptions to require that only one of two limbs are satisfied, namely that an act or practice of a religious body:

- conform to the doctrines, tenets or beliefs of that religion; *or*
- be necessary to avoid injury to the religious susceptibilities of adherents of that religion.⁹⁹

The ACT and Tasmania on the other hand have replaced the conjunction of ‘or’ between the two limbs with ‘and’ and it is submitted that every jurisdiction should adopt this model.¹⁰⁰ By requiring both limbs of this type of exemption to be satisfied instead of merely one, this reform will assist in requiring religious employers to provide genuine reasons which justify the unfavourable treatment of an employee due to their protected attribute/s. Firstly, the requirement

93 Department of the Prime Minister and Cabinet, *Religious Freedom Review* (Report May 2018) [1.130]–[1.134].

94 Ibid.

95 Ibid.

96 Joel Harrison and Patrick Parkinson, ‘Freedom beyond the Commons: Managing the Tension between Faith and Equality in a Multicultural Society’ (2014) 40 *Monash University Law Review* 2, 433.

97 See *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 134 (Mason ACJ and Brennan J), 150 (Murphy J), 174 (Wilson and Deane JJ); *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256, [526]; *Hozack v Church of Jesus Christ of Latter-Day Saints* (1997) 79 FCR 441, [4].

98 Joel Harrison and Patrick Parkinson, ‘Freedom beyond the Commons: Managing the Tension between Faith and Equality in a Multicultural Society’ (2014) 40 *Monash University Law Review* 2, 433.

99 *Sex Discrimination Act 1984* (Cth) s 37; *Anti-Discrimination Act 1977* (NSW) s 56(d); *Equal Opportunity Act 1984* (SA) s 50(1)(c); *Equal Opportunity Act 1984* (WA) s 72; *Equal Opportunity Act 2010* (Vic) s 82.

100 *Anti-Discrimination Act 1998* (Tas) s 52; *Discrimination Act 1991* (ACT) s 32.

that any conduct must be in conformity with the relevant religious beliefs will help to prevent those with arbitrary prejudices from abusing the exemptions, as employers will need to provide positive evidence to justify why an employee should receive different treatment. The requirement that the conduct not only have some doctrinal basis, but also be done with the intention of preventing some other form of harm, namely injury to the religious susceptibilities of adherents, justifies the existence of the exemptions by indicating that these serve a purpose of protection. The phrase 'necessary to avoid injury' also ensures that religious beliefs, once certain conditions are satisfied, are not privileged over other rights without proper reason. The use of 'injury' is such that mere offence to the norms or views of religious adherents will not be sufficient, whereas the use of 'necessary' and 'avoid' emphasise that actual injury to the religious susceptibilities is not required as this would be self-defeating where the aim is the prevention of harm.¹⁰¹ As a result, it is argued that the harm caused to employees by otherwise unlawful discrimination is properly balanced by the potential harm to adherent's religious susceptibilities.

This reform of changing all relevant exemptions to join the two limbs using 'and' should be adopted across Australia to rectify the inconsistency that currently exists across the jurisdictions. If a court currently reached a conclusion that a religious body's act conformed to the relevant doctrines but was not necessary to avoid injury to religious susceptibilities (or vice versa), the outcome would differ greatly depending on what jurisdiction

the case was heard in. This leads to the unsatisfactory situation of a dispute being, as pertinently described by Liam Elphick, 'determined not by the merits of the case at hand but by its geographical location'.¹⁰²

i. *The role of courts and a religious body's margin of appreciation*

The High Court has held that it is not the role of the courts to make an 'assessment of the... intellectual quality, or the essential 'truth' or 'worth' of religious beliefs.¹⁰³ This stems from a recognition that secular courts are ill-equipped to evaluate the moral calculus of religion.¹⁰⁴ Courts are furthermore prevented from dictating the religious nature of doctrines as the right to freedom of religion not only allows religious believers to determine their own religious doctrines, but also entitles them to a margin of appreciation to determine what conformity with these religious beliefs requires.¹⁰⁵

Although a wide variety of interpretations of religious doctrine can exist within religious communities,¹⁰⁶ courts should not choose between these different views as judicial preference of one view over another can lead to severe communal disharmony.¹⁰⁷ As was noted in *OV and OW*,¹⁰⁸ Parliament did not intend to only exempt the operation of anti-discrimination protections for acts based on doctrines common to all denominations within a religion.¹⁰⁹ Instead, the language of the religious exemptions applies to all religious bodies which promote religious beliefs, irrespective of whether certain religious beliefs are held only in variants of the main religion.¹¹⁰ The court also stated in *OV and OW* that the term 'doctrine' should

¹⁰¹ *Hozack v Church of Jesus Christ of Latter-Day Saints* (1997) 79 FCR 441, [4].

¹⁰² Liam Elphick, 'Sexual Orientation and 'Gay Wedding Cake' cases under Australian Anti-Discrimination Legislation: A Fuller Approach to Religious Exemptions' (2017) 38 *Adelaide Law Review* 150, 166-167.

¹⁰³ *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 174 (Wilson and Deane JJ).

¹⁰⁴ *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256, [526]; *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 134.

¹⁰⁵ *United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, GA Res 36/55, UN Doc A/RES/36/55 (25 November 1981) Art 1; Chris Sidoti, *Report of Inquiry into a Complaint of Discrimination in Employment and Occupation: Discrimination on the Ground of Sexual Preference* (HRC Report No 6, Australian Human Rights Commission, March 1998) 22-3.

¹⁰⁶ Chai Feldblum, 'Moral Conflict and Liberty: Gay Rights and Religion' (2006) 72 *Brooklyn Law Review* 61; *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256, [522].

¹⁰⁷ Anthony Gray, 'The Reconciliation of Freedom of Religion with Anti-Discrimination Rights' (2016) 42 *Monash University Law Review* 72, 102; *Hozack v Church of Jesus Christ of Latter-Day Saints* (1997) 79 FCR 441, [4].

¹⁰⁸ *OV and OW v Members of the Board of the Wesley Mission Council* (2010) 79 NSWLR 606.

¹⁰⁹ *Ibid* [41].

¹¹⁰ *Ibid* [50].

not be treated as an abstract concept, but rather as 'concept given content and meaning in its context'.¹¹¹ The role of a court or tribunal in this domain therefore is to not make judgement on whether a doctrine itself is appropriate, but rather to decide whether discriminatory conduct was in conformity with that doctrine.¹¹² In doing so, a court is able to respect and accommodate the views of different denominations and subset groups within that religion.

On this basis, the strict interpretation of 'conformity' taken in *Christian Youth Camps* should not be followed.¹¹³ Under that view, a religious body could only demonstrate that the relevant conduct was in 'conformity' with the relevant religious teachings where there was no alternative but to act in this way.¹¹⁴ This is an unduly strict interpretation which does not respect the margin of appreciation that religious bodies are entitled to when acting in accordance with their religious beliefs.¹¹⁵ An appropriate degree of flexibility could be achieved by reforming the relevant provisions to include an in-section definition of conformity which would adopt its ordinary meaning, i.e. to act in accordance or in harmony with something.¹¹⁶

ii. *The importance of a nuanced approach*

Recognising the importance of respecting a religious body's beliefs however does not mean that the merits of using an objective approach should be ignored. It was held in *Christian Youth Camps* that it was essential to objectively, rather than subjectively,

determine the necessity of an act a religious body to avoid injury to adherents' religious susceptibilities.¹¹⁷ This conclusion was reached as it was argued that the sole use of a subjective assessment would always result in genuinely held religious beliefs trumping an employee's right to be free from discrimination.¹¹⁸ Indeed, it would not be satisfactory if a religious exemption could be enlivened solely because of a person's mere assertion that their religious beliefs require them to discriminate.¹¹⁹ This is because this would in effect enable a religious body, rather than a court, to determine which laws apply to themselves.¹²⁰

Legislators face a challenging task in drafting religious exemptions because it is difficult to draft such provisions without excessively tipping the scales against, or in the favour of, religious bodies. On one hand, a court must not be allowed to overstep their proper role when determining the applicability of a religious exemption by questioning the veracity or theological validity of the religious beliefs of a religious body.¹²¹ On the other hand, a religious exemption should not be drafted in a way that places an excessive emphasis on a religious body's subjective evidence regarding what their religious beliefs requires. If this were to occur, the threshold necessary to invoke the application of a religious exemption may be too easily satisfied and thereby result in a similar situation that would occur if clause 11 of the *RDB* was legislated. The nature of legislating in an area where there are competing fundamental human rights is that some concessions must be made.¹²² The

111 Ibid [26].

112 OW & OV v *Members of the Board of the Wesley Mission Council* [2010] NSWADT 293 (10 December 2010) [35].

113 *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256.

114 Ibid [286] – [287].

115 *United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, GA Res 36/55, UN Doc A/RES/36/55 (25 November 1981) Art 1; Chris Sidoti, *Report of Inquiry into a Complaint of Discrimination in Employment and Occupation: Discrimination on the Ground of Sexual Preference* (HRC Report No 6, Australian Human Rights Commission, March 1998) 22–3.

116 Macquarie Dictionary, *Conform* (Web Page, 24 May 2020) <https://www.macquariedictionary.com.au/features/word/search/?search_word_type=Dictionary&word=conform>.

117 *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256, [424].

118 Ibid [424].

119 Anthony Gray, 'The Reconciliation of Freedom of Religion with Anti-Discrimination Rights' (2016) 42 *Monash University Law Review* 72, 95.

120 Jurgen Habermas, 'Religion in the Public Sphere' (2006) 14 *European Journal of Philosophy* 1, 9.

121 See *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 134 (Mason ACJ and Brennan J), 150 (Murphy J), 174 (Wilson and Deane JJ); *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256, [526]; *Hozack v Church of Jesus Christ of Latter-Day Saints* (1997) 79 FCR 441, [4].

122 See Anthony Gray, 'The Reconciliation of Freedom of Religion with Anti-Discrimination Rights' (2016) 42 *Monash*

best that can be done is for a court to take a nuanced approach which takes into account the relevant circumstances of each case.

To achieve this, it is submitted that two key amendments be made to existing religious susceptibilities exemptions. The first amendment would involve amending the definition of a religious body in anti-discrimination laws to specifically include that a religious body includes a body of a denomination or sect within a religion. The rationale for this would be to recognise in statute that denominations and sects within religions are entitled to their own religious interpretations, even if these are contrary to other groups of the same faith.¹²³ The question of whether or not a body was part of a recognised denomination or branch of a religion would be determined objectively and the body seeking to rely on the exemption would have the onus of proving this. Once this has been established, a court would not be able to question the accuracy of the interpretation of the religion by the religious body, thereby preventing a court from dictating what the religious body's beliefs are or should be.

The second amendment would involve legislating Allsop P's interpretation in *OV & OW* that 'adherents', for the purposes of determining whether an act was necessary to avoid injury to adherent's religious susceptibilities, refers to a significant proportion of the group.¹²⁴ This reform would ensure that the properly representative views, rather than extreme fringe views, are used to justify adverse action against employees. Although this would result in certain minority views within groups being excluded, this would be counterbalanced by a court not being able to ignore the views of a significant proportion of adherents

within a minority denomination or sect. The combined effect of these reforms is argued to strike the appropriate balance as a court would be able to objectively verify the religious and representative nature of religious beliefs, whilst also not overstepping its role and assessing the theological validity of those religious beliefs.¹²⁵

B. Reforms to the religious educational institution exemptions

Whereas religious susceptibilities exemptions require an element of generality as these have a broad application which extends beyond employment, religious educational institution exemptions typically apply specifically to employment and therefore can have more tailored drafting. Reforms in this context should take into account that religious educational institutions, unlike other educational institutions, are specifically chosen by some parents or religious believers to ensure that the education received is one that promotes, and is taught in accordance with, religious values.¹²⁶ As such, there is an expectation that a religious educational institution will lead by example in order to shape and guide the moral development of those receiving the religious education.¹²⁷ Professor Parkinson echoes this sentiment through his perspective that, for certain Christian denominations, the modelling by religious educational institutions within a faith community is as important, if not more important, than the teaching within the classroom or place of worship.¹²⁸

The work of employees at religious educational institutions therefore cannot be fully understood by merely taking an instrumental view of the tasks that an employee performs in their role.¹²⁹ Rather, the

University Law Review 72, 76.

123 See *OV & OW v Members of the Board of Wesley Mission Council* (2010) 79 NSWLR 606, [41].

124 *Ibid* [12].

125 Liam Elphick, 'Sexual Orientation and 'Gay Wedding Cake' cases under Australian Anti-Discrimination Legislation: A Fuller Approach to Religious Exemptions' (2017) 38 *Adelaide Law Review* 150, 191.

126 Carolyn Evans and Leilani Ujvari, 'Non-Discrimination Laws and Religious Schools in Australia' (2009) 30 *Adelaide Law Review* 33, 39–40.

127 *Ibid*.

128 Patrick Parkinson, 'Christian Concerns about an Australian Charter of Rights' (2010) 15(2) *Australian Journal of Human Rights* 83, 97.

129 Alvin Esau, 'Islands of Exclusivity: Religious Organizations and Employment Discrimination' (2000) 33 *University of British Columbia Law Review* 719, 733.

role of employees at religious educational institutions needs to be viewed in light of the organisation's enterprise which is the promotion and teaching of religion.¹ It follows from this that religious educational institutions should be able to take reasonable action against employees who openly undermine their religious ethos as this allows them to protect their predominant purpose for existence. Such reasoning is consistent with the right to freedom of association, which necessarily involves an institution being able to protect the collective interests of its members by expelling persons who engage in conduct which is hostile to the organisation's purpose.² If the State was to prevent employers from taking action against employees who openly undermined the institution's religious ethos, religious liberty consequently would suffer as this depends on religious bodies maintaining a degree of autonomy over their internal affairs.³

The above proposition however has been extended by some to justify adverse action being taken against employees where those person's privately held beliefs or personal attributes are deemed to be inconsistent with the institution's religious teachings.⁴ This argument stems from a perception that religious belief and action cannot be separated as religion is not just a value system, but also a way of life which prescribes certain conduct to be taken.⁵ However, it does not necessarily follow that employees should be able to be treated unfavourably because of their personal attributes or privately held beliefs where their public conduct otherwise adheres to, or does not undermine, the institution's religious ethos.⁶ The aims of leading by example and promoting an institution's religious values are dependent on the

public conduct of an employee, rather than on an individual's personal information or characteristics, as the former actually has a tangible impact on others within a community. For this reason, it is submitted that the application of specific exemptions for religious educational institutions should not be invoked on the grounds of an employee's personal attributes or privately held beliefs, but rather only when the employee has openly undermined the institution's religious ethos.⁷ On this basis, a religious school would not be able to dismiss a teacher because of their sexuality or private views on abortion; this however could be done where the teacher openly expressed views about gay marriage or abortion which were contrary to the school's religious beliefs.

The appropriate balance can be struck in this context by adopting a religious educational institution exemption across all jurisdictions which uses the best elements from South Australia's religious educational institution exemption and Queensland's genuine occupational requirements exemption. South Australia's religious educational institution exemption permits otherwise unlawful discrimination only where:

- the religious educational institution is administered in accordance with the doctrines of the relevant religion;
- the discrimination is founded on those doctrines;
- there is a written policy on the religious educational institution's position regarding employment and its expectations of employees; and
- this policy is provided to prospective employees during the hiring process

1 Ibid 734–5.

2 Manfred Nowak, *CCPR Commentary* (Kehl am Rhein: Engel, 1993) 386–9.

3 Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford University Press, 2010) 136; Perry Dane, 'The Varieties of Religious Autonomy' in Gerhard Robbers (ed), *Church Autonomy: A Comparative Survey* (Peter Lang Publishing, 2001) 119–200.

4 See Associated Christian Schools, Submission No 45 to Senate Legal and Constitutional Affairs References Committee, *Submission – Inquiry legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff* (20 November 2018) 11–12.

5 Harrop Freeman, 'A Remonstrance for Conscience' (1958) 106 *University of Pennsylvania Law Review* 806, 826.

6 Senate Legal and Constitutional Affairs References Committee, *Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff* (Report, November 2018) [2.134].

7 Greg Walsh, 'The Right to Equality and the Employment Decisions of Religious Schools' (2014) 16 *University of Notre Dame Australia Law Review* 107, 142.

and is able to be requested by employees to whom it relates.⁸

This model is advantageous as it enables religious educational institutions to create their own written employment policies which incorporates their own religious beliefs and therefore provides the institution with an important degree of self-determination.⁹ The requirement that this written policy must be provided to prospective employees also is beneficial as this gives employees early notice of the employer's expectations and religious beliefs, thereby preventing prospective employees from being caught off-guard.

While it is a suitable base model, the South Australian exemption requires further refining as it currently exempts otherwise unlawful discriminatory conduct against an employee based on their personal attributes where this conduct is founded on religious doctrines. To address this, it is recommended that the exemptions further stipulate that otherwise unlawful discrimination against a person be only exempt where the prospective employee or employee has also:

- openly acted 'in a way that the person knows or ought reasonably to know is contrary to the employer's religious beliefs'¹⁰ —
 - '(i) during a selection process; or'¹¹
 - '(ii) in the course of the person's work; or'¹²
 - '(iii) in doing something connected with the person's work'.¹³

This condition that an employee must 'openly act', derived from Queensland's genuine occupational requirements exemption,¹⁴ prevents an employer from discriminating on the basis of an individual's personal

attributes or privately held beliefs, while simultaneously enabling employers to deal with employees who publicly undermine the institution's religious ethos. The conditions that an employee's open conduct contrary to the employer's religious beliefs must have occurred during the selection process or course of employment further balances the provision by allowing employees to express their own views outside of work.

It is important to note however that the proposed reform, in contrast to the Queensland exemption,¹⁵ will not only apply where it is a genuine occupational requirement that an employee act consistently with the employer's religious beliefs. This wording was deliberately omitted as its inclusion would greatly narrow the application of the proposed reform. The test of a 'genuine occupational requirement' in this context requires a court or tribunal to objectively determine whether religious observance or practice is actually essential for a person to successfully perform the functions required of that role.¹⁶ As a consequence, it is likely that only a few roles in religious educational institutions would meet this strict criteria. This test accordingly is not appropriate in present circumstances where it is reasonable, in light of the purpose of religious educational institutions, to take action against all - and not only a minority of - employees who publicly undermine the educational institution's religious ethos.

If adopted uniformly, the above proposed reforms to religious educational institutional exemptions will limit the scope of exemptions across the jurisdictions as existing analogous exemptions contain far fewer,¹⁷ if any,¹⁸ restrictions. The proposed exemption, which adopts the best elements of Queensland's

⁸ *Equal Opportunity Act 1984* (SA) s 34(3).

⁹ Nicholas Aroney, Submission to the Attorney General's Department, *Religious Discrimination Bill – Exposure Draft* (2 October 2019) 4.

¹⁰ *Anti-Discrimination Act 1991* (Qld) s 25(3).

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ See *Walsh v St Vincent de Paul Society Queensland* (No. 2) [2008] QADT 32, 89.

¹⁷ See *Anti-Discrimination Act 1998* (Tas) s 51; *Equal Opportunity Act 2010* (Vic) s 83(2); *Anti-Discrimination Act 1992* (NT) s 37A; *Equal Opportunity Act 1984* (WA) s 73.

¹⁸ See *Anti-Discrimination Act 1977* (NSW) ss 25(3)(c), 38C(3)(c), 40(3)(c), 49ZH(3)(c).

genuine occupational requirements exemption and South Australia's religious educational institution exemption, is argued to strike the appropriate balance between allowing religious educational institutions to reasonably regulate their employee's conduct and the promotion of equality of opportunity. This is achieved by allowing religious educational institutions to take adverse action against employees who undermine the organisation's religious ethos. This is proportionate as a religious educational institution is able to protect their core enterprise of religious teaching, but also importantly is prohibited from taking adverse action against employees on the grounds of their personal attributes or privately held beliefs. As a result, equality of opportunity is accommodated in a way which does not excessively deny the autonomy of a religious educational institution. Further protections which remedy the faults of existing religious educational institutions are also made to prevent unfairness against employees. These are the requirement that an employment policy is provided during the hiring process and the condition that the 'open acting' of an employee needs to occur during the course of employment. Such conditions will respectively improve the status quo by encouraging employers to clearly lay out their expectations for prospective employees and by helping to prevent an employer from intruding into an employee's private life.

VI. CONCLUSION

The religious exemptions to Australia's anti-discrimination laws evidently are a highly contentious and important issue, given the impact these provisions have on a person's right to freedom from discrimination in employment and a religious body's right to manifest their religious beliefs. Although the current status quo is imperfect, this does not mean that religious exemptions per se are irreconcilable with the aims of equality of opportunity and freedom from discrimination. This paper has demonstrated that the law can be improved by limiting, rather than completely removing, the operation of the religious exemptions. In proposing reforms to the religious

exemptions, the different forms and case law interpretations of three distinct categories of religious exemptions were identified and drawn upon as inspiration for reforms. The Government's most recent attempt at reform in this area, the *RDB* and its general religious exemption, subsequently was critiqued so that the shortcomings with that clause could be addressed. This analysis highlighted how the proposed breadth and low threshold of that provision would push the law too far in the favour of religious bodies at the expense of employees' right to freedom from discrimination.

That issue, along with a court's proper role in this area and a religious body's entitlement to a margin of appreciation in determining their beliefs, were then considered so that a nuanced approach could be taken in proposing reforms to religious susceptibilities exemptions. This included changing the conjunctions in religious susceptibilities exemptions from 'or' to 'and' to narrow the scope of these provisions. Other reforms which acknowledged that denominations and sects within a religion can have different views from other groups of the same faith were balanced by requiring that the relevant religious beliefs be held by a significant proportion of adherents of that group.

Reforms to religious educational institutions were also proposed to prevent discrimination on the grounds of a person's personal attributes while also protecting a religious educational institution's ability to take reasonable action against employees who openly undermine their religious ethos. To achieve these aims, a hybrid provision adopting the best elements of South Australia's religious educational institution exemption and Queensland's genuine occupational requirements exemption also was proposed. In particular, it was recommended that this exemption should only be successfully invoked where two conditions are met. These are where the religious educational institution's employment policy is provided during the hiring process and where an employee has openly acted contrary to the employer's religious beliefs during the course of employment. It is hoped that all of these reforms demonstrate

that well drafted religious exemptions do not amount to a license to discriminate. Rather, religious exemptions containing proper safeguards can be effective measures to enable religious organisations to proportionately manifest their religious beliefs in the employment context by reasonably conducting their affairs in a way that is consistent with their religious ethos.

HOW INTERNATIONAL LAW BALANCES RELIGIOUS FREEDOM AND ANTI-DISCRIMINATION: DO RITES TRUMP RIGHTS?

PHOEBE KENAFKE

I. INTRODUCTION

A particular set of human rights has been declared universal, inalienable and indivisible. However, as Christopher McCrudden highlights, ‘the scope and meaning of human rights is anything but settled’.¹ Since individual human rights are often expressed in broad principles, this presents a challenge when trying to reconcile two rights that appear to limit the enjoyment of the other. This dilemma arises with the right to freedom of religion and the right to be free from discrimination, both of which are protected by major human rights treaties.

This paper focuses on how international and regional legal frameworks address the intersection between religious freedom and anti-discrimination rights and balance them when they come into conflict. In particular, it argues that the *International Covenant on Civil and Political Rights* (‘ICCPR’),² an instrument of the United Nations (‘UN’), and the *European Convention on Human Rights* (‘ECHR’),³ an instrument of the Council of Europe (‘CoE’), provide guidance on how to strike an appropriate balance between these rights. These instruments contain a

robust set of criteria that must be followed before religious freedom can be limited, and their enforcement bodies do not apply the limitation provisions in a way that materially undermines religious freedom. At the same time, both instruments protect the right to be free from discrimination, and do not allow the freedom of religion to vitiate that protection. These two rights are reconciled in a way that maximises the protection of each, without privileging one over the other.

This paper is divided into four sections. The first section provides an overview of the right to freedom of religion and the ways it can conflict with anti-discrimination rights. It references the current debate in Australia as an example of how pluralistic societies can struggle with this balance. It also explains the scope and aim of the paper, and demonstrates why countries such as Australia should look to international jurisprudence for guidance. The second section focuses on the *ICCPR*. It relies on soft law sources and the jurisprudence of the Human Rights Committee (‘HRC’) to explain how the *ICCPR* reconciles the two rights in question. The third section conducts the same analysis in relation to

1 Christopher McCrudden, ‘Religion, Human Rights, Equality and the Public Sphere’ (2011) 13(1) *Ecclesiastical Law Journal* 26, 38.
2 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
3 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

the *ECHR* and references jurisprudence from the European Court of Human Rights ('ECtHR'). Finally, the fourth section highlights the differences between the *ICCPR* and the *ECHR*, and reflects on how these differences influence the overall adequacy of their protection of religious freedom and anti-discrimination rights.

This assessment is important, because if either of these rights are at risk of erosion, international law and its promise of indivisible human rights will be significantly weakened. Given the power of the law to shape social attitudes and behaviours, it is imperative that such instruments function to the highest standard in their protection of human rights.

II. BACKGROUND AND SCOPE

A. *Tensions between religious freedom and freedom from discrimination*

Even though 'religion' has not been explicitly defined in international law,⁴ freedom of religion is a widely accepted fundamental human right. This part explores the significance of protecting religious freedom and explains how it can interfere with anti-discrimination rights.

It is not only the religious who may benefit from the protection of religious freedom. For the secular population, what is valuable about protecting religious freedom is that it encompasses the right not to have a religion, and that protecting this right promotes pluralism and diversity, which is beneficial to society as a whole.⁵ Regardless of one's personal convictions, with the

intensification of Islamophobia in many Western democracies, and the continued persecution of religious minorities around the world,⁶ religious freedom is as important as ever. However, while some religious groups positively contribute to progressive change,⁷ others do not so easily accommodate the fundamental right of equality.⁸

The principle of equality is the *sine qua non* of most international human rights instruments.⁹ It is especially important in liberal democracies that people are treated equally in law, regardless of their personal attributes. However, religious freedom may interfere with this principle in a number of ways. Former UN Special Rapporteurs on freedom of religion and belief have highlighted how harmful discriminatory practices such as female genital mutilation, forced marriage and the denial of education for girls have all been defended in the name of religious traditions.¹⁰ In less extreme ways, religious groups can also perpetuate gender stereotypes that sustain the subordination of women.¹¹ For example, many religious groups exclude women from positions of leadership within their organisation,¹² or believe that women should be denied access to healthcare, such as contraception or abortions.¹³

Religion can also clash with the prohibition on discrimination on the basis of sexual orientation or gender identity.¹⁴ Recent examples discussed in the media have included the refusal of services to same-sex couples by accommodation providers, those in the wedding industry (e.g. bakers and celebrants), and adoption agencies.¹⁵ This antagonism also translates into the

4 Peter Radan, 'International Law and Religion: Article 18 of the International Covenant on Civil and Political Rights' in Peter Radan, Denise Meyerson, and Rosalind Atherton (eds), *Law and Religion: God, the State and the Common Law* (Taylor & Francis Group, 2005) 8, 12.

5 Heiner Bielefeldt, 'Freedom of Religion or Belief: A Human Right under Pressure' (2012) 1(1) *Oxford Journal of Law and Religion* 15, 17.

6 Jeremy Patrick, 'Evidence of Absence in the Ruddock Report' (2019) 93 *Australian Law Journal* 747, 749.

7 Heiner Bielefeldt, *Interim Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/68/290 (7 August 2013) 8.

8 Julian Rivers, 'Law, Religion and Gender Equality' (2007) 9 *Ecclesiastical Law Journal* 24, 35.

9 Nazila Ghanea, 'Religion, Equality, and Non-Discrimination' in John Witte et al (eds), *Religion and Human Rights: An Introduction* (Oxford University Press, 2011) 204.

10 Bielefeldt (n 7).

11 Ibid 5.

12 Heiner Bielefeldt and Michael Wiener, *Religious Freedom Under Scrutiny* (University of Pennsylvania Press, 2020) 86.

13 Ibid.

14 Martina Prpic, 'Religion and human rights' (Briefing, European Parliamentary Research Service, December 2018) 4.

15 Bielefeldt and Wiener (n 12) 95.

employment sphere, in circumstances where religious institutions argue that the application of anti-discrimination laws in their workplaces undermines religious freedom.¹⁶

However, the idea that these two rights are completely contradictory is a dangerous oversimplification. Any understanding of this issue must acknowledge that there are intersections of discrimination, especially for women and members of the LGBT+ community who are also religious.¹⁷ This issue should be approached from the perspective that there is no normative hierarchy of rights, and while the two rights may be incongruous at times, they should not be interpreted as 'corrosive of one another'.¹⁸

B. Religious freedom in Australia

Since the vote in favour of same-sex marriage in 2017, public debate on the adequacy of Australia's protection of religious freedom has intensified. One side of the debate argues that anti-discrimination laws are a tool for those who disagree with religion being part of public life,¹⁹ while others argue that exemptions from anti-discrimination legislation privilege religious freedom over other rights.²⁰ The intractable nature of the debate demonstrates why Australia should heed the example set by international and regional legal frameworks before it makes any concrete reforms in this area, such as enacting the Religious Discrimination Bill 2019 and associated draft

legislation, which at the time of writing were still in the form of second exposure drafts.²¹

The interpretation and application of the *ICCPR* and the *ECHR* are relevant to Australia. Even though Australia has not enacted the *ICCPR* fully into domestic law, it is a party to it and has agreed to respect and ensure the rights it protects.²² While the *ECHR* does not have any binding effect on Australia,²³ its provision on freedom of religion is very similar to the *ICCPR*,²⁴ and decisions relating to it are regularly referenced by the HRC.²⁵ Furthermore, the articles on religious freedom in these instruments both derive from the *Universal Declaration of Human Rights* ('*UDHR*'),²⁶ which is widely accepted to reflect principles found in customary international law.²⁷ The decisions made by bodies overseeing the application of these instruments are also relevant to Australia. The High Court has established that, as far as the language permits, statutes should be interpreted in comity with international law.²⁸ At the state level, for example, section 48 of the *Human Rights Act 2019* (Qld) provides that international law, and the judgments of international courts relevant to human rights, may be considered in interpreting a statutory provision. Thus, Australia should closely observe how these instruments mediate the tensions between religious freedom and anti-discrimination.

16 Carolyn Evans and Anna Hood, 'Religious Autonomy and Labour Law: A Comparison of the Jurisprudence of the United States and the European Court of Human Rights' (2012) 1(1) *Oxford Journal of Law and Religion* 82.

17 Bielefeldt (n 7) 2.

18 Ibid 5.

19 Joel Harrison and Patrick Parkinson, 'Freedom Beyond the Commons: Managing the Tension Between Faith and Equality in a Multicultural Society' (2014) 40(2) *Monash University Law Review* 413, 427.

20 Joel Harrison, 'Towards Re-thinking "Balancing" in the Courts and the Legislature's Role in Protecting Religious Liberty' (2019) 93 *Australian Law Journal* 734, 735.

21 Religious Discrimination Bill 2019 (Cth), Religious Discrimination (Consequential Amendments) Bill 2019 (Cth), and Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 (Cth).

22 Philip Ruddock et al, *Religious Freedom Review: Report of the Expert Panel* (Australian Government, Department of the Prime Minister and Cabinet, May 2018) 20.

23 Ibid 23.

24 Anja Hilkmeyer and Amy Maguire, 'Religious Schools and Discrimination against Staff on the Basis of Sexual Orientation: Lessons from European Human Rights Jurisprudence' (2019) 93 *Australian Law Journal* 752, 753.

25 See, eg, Human Rights Committee, *Views: Communication No 2662/2015*, 123rd sess, UN Doc CCPR/C/123/D/2662/2015 (24 September 2018) ('*F.A. v France*'); Human Rights Committee, *Views: Communication No 2747/2016*, 123rd sess, UN Doc CCPR/C/123/D/2807/2016 (7 December 2018) ('*Yaker v France*').

26 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/81 (10 December 1948).

27 Radan (n 4) 9.

28 *Polites v The Commonwealth* (1945) 70 CLR 60, 68.

C. Scope and methodology

This paper is divided between global international law, focussing on the instruments of the UN, and regional international law, focussing on Europe. Within the UN, the *ICCPR* was selected because it is a core international human rights instrument with 173 state parties, and its implementation is monitored by the HRC, which has resulted in numerous changes to national laws and policies.²⁹ Within the European framework, this paper specifically focusses on the *ECHR*. The *ECHR* is worthy of analysis due to its wide membership and enforcement mechanism through the ECtHR, regarded by some as ‘the world’s most sophisticated human rights court’.³⁰

The decisions of international human rights-adjudicating bodies have been criticised as ad hoc and incoherent.³¹ This paper aims to provide a road map of how the ECtHR and the HRC balance the rights at issue and seeks to clarify their approach. It relies on a variety of secondary material, such as General Comments from the HRC, the Siracusa Principles on the Limitation and Derogation Provisions in the *ICCPR* (the ‘Siracusa Principles’),³² reports by various UN Special Rapporteurs on freedom of religion and belief, and the jurisprudence of both the HRC and the ECtHR. However, this analysis is inhibited by the relatively few cases that have arisen where religious freedom and anti-discrimination directly conflict. Nevertheless, the overall application of the provisions is instructive of how well

religious freedom and anti-discrimination are protected under the instruments.

III. RELIGIOUS FREEDOM UNDER THE *ICCPR*

This section introduces the *ICCPR*, interprets its key provisions using secondary materials, and discusses a number of HRC decisions, to demonstrate how the *ICCPR* protects both religious freedom and anti-discrimination rights.

A. Overview of the *ICCPR*

Upon its adoption by the General Assembly in December 1966,³³ the *ICCPR* converted the general protection for religious freedom, originally enumerated in the *UDHR*, into a binding legal obligation in Article 18, and provided for how the right could be limited. In 1981, the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (*‘Declaration’*),³⁴ was proclaimed by the General Assembly. While the *Declaration* is non-binding, it has interpretive value for the *ICCPR*,³⁵ as it largely repeats and expounds upon the content of Article 18.³⁶

These key instruments make it clear why protecting religious freedom is desirable. The *Declaration* states that religion is one of the fundamental elements in people’s conception of their lives,³⁷ and the *ICCPR* describes the right as ‘far-reaching and profound’.³⁸ The importance of religious pluralism is also recognised by the prohibition on religious discrimination contained in both instruments, and such

29 UN Office of the High Commissioner for Human Rights, *Civil and Political Rights: The Human Rights Committee: Fact Sheet No. 15 (Rev. 1)* (May 2005) 30 (‘Fact Sheet No. 15’).

30 Hilkmeyer and Maguire (n 24).

31 Eva Brems, ‘Objections to Antidiscrimination in the Name of Conscience or Religion: A Conflicting Rights Approach’ in Susanna Mancini and Michel Rosenfeld (eds), *The Conscience Wars: Rethinking the Balance between Religion, Identity, and Equality* (Cambridge University Press, 2018) 280.

32 UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4 (28 September 1984) (‘The Siracusa Principles’).

33 Malcolm Evans, *Religious Liberty and International Law in Europe* (Cambridge University Press, 1997) 207.

34 *Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief*, GA Res 36/55, UN GAOR, 3rd Comm, 36th sess, Agenda Item 75, Supp No 51, UN Doc A/RES/36/55 (25 November 1981).

35 Oxford University Press, *Max Planck Encyclopedias of International Law* (online at 2 May 2020) ‘Religion or Belief, Freedom of, International Protection’ [8].

36 Harry Hobbs and George Williams, ‘Protecting Religious Freedom in a Human Rights Act’ (2019) 93 *Australian Law Journal* 721, 723.

37 *Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief* (n 34).

38 Human Rights Committee, *CCPR General Comment 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 48th sess, UN Doc. CCPR/C/21/Rev.1/Add.4 (30 July 1993) [1] (‘General Comment 22’).

discrimination is described in the *Declaration* as ‘an obstacle to peace among nations’.³⁹

The HRC monitors compliance with the *ICCPR* by receiving reports from state parties on the measures they have taken to comply with the articles, and by hearing ‘communications’ from individuals alleging violations of these rights against the 116 states that are party to the first Optional Protocol.⁴⁰ Additionally, the HRC makes policy recommendations to other UN organs to promote the *ICCPR*’s implementation.⁴¹ It has also produced General Comment 22 on religious freedom,⁴² a highly influential tool for interpreting Article 18.⁴³

B. Interpretation of Article 18

Article 18 has four parts. The first paragraph explains what is protected by the freedom of thought, conscience and religion. The second paragraph provides that no one can be coerced in any way that would impair the freedom to have or adopt a religion or belief. The third paragraph lists the only circumstances where religious freedom can be limited, and the fourth requires state parties to respect the liberty of parents or guardians to have their children educated per their religious or moral convictions.

As for paragraph one, the rights protected are the freedom of thought, the freedom of conscience and the freedom of religion.⁴⁴ It was originally believed that the words ‘thought’ and ‘conscience’ were both synonymous with ‘religion’.⁴⁵ However, the HRC has clarified that

Article 18 encompasses freedom of thought on all matters, ‘as well as personal convictions’, and it protects ‘theistic, non-theistic and atheistic beliefs’.⁴⁶ Since freedom of thought and conscience are directed towards beliefs that are political, philosophical, historical or scientific in nature,⁴⁷ this paper focuses on the degree of protection granted to religious beliefs.

The next part of the analysis addresses what is covered by ‘religion’. While it is not defined in the *ICCPR*, it is to be broadly construed.⁴⁸ Thus, the provisions must encompass religions that do not possess typical or traditional characteristics.⁴⁹ However, Article 18 bifurcates the right into the freedom to have or adopt a religion (the *forum internum*), and the freedom to manifest one’s religion (the *forum externum*). This distinction is important, because the limitation provision in Article 18 only restricts the way in which religion can be manifested. The right to merely believe in something, and be free from coercion about one’s beliefs, cannot be limited in any way.⁵⁰

Under Article 18, religion may be manifested individually or in community with others, and in public or in private, provided it falls into the category of ‘worship, observance, practice and teaching’.⁵¹ According to General Comment 22, this entails a broad range of acts, including participation in rituals and ceremonies, displaying symbols, wearing distinctive clothing, and choosing religious leaders, priests and teachers.⁵² The HRC has held that conscientious objection to military service can amount

39 Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief (n 34) art 3.

40 Radan (n 4) 9.

41 Elisabeth Kaponyi, ‘The Development of the International Human Rights Law with Specific Regard to the European Human Rights System’ (2015) *Hungarian Yearbook of International Law and European Law* 7, 17.

42 General Comment 22 (n 38).

43 Bielefeldt and Wiener (n 12) 154.

44 General Comment 22 (n 38).

45 Radan (n 4) 11.

46 General Comment 22 (n 38).

47 Radan (n 4).

48 General Comment 22 (n 38) [2].

49 Ibid.

50 Oxford University Press, *Max Planck Encyclopedias of International Law* (online at 2 May 2020) ‘Religion or Belief, Freedom of, International Protection’ [24] (‘Religion or Belief’).

51 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18(1).

52 General Comment 22 (n 38) [4].

to the manifestation of religion,⁵³ whereas conscientious objection to paying taxes cannot be a manifestation.⁵⁴ The *ICCPR* also prohibits manifestations of religion that amount to propaganda for war or advocacy of national, racial or religious hatred.⁵⁵ Furthermore, the HRC has held that a claim by members of the 'Assembly of the Church of the Universe', that their drug convictions violated their religious freedom, was not admissible, because 'a belief consisting primarily or exclusively in the worship and distribution of a narcotic drug cannot conceivably be brought within the scope of Article 18'.⁵⁶ Therefore, only once there has been a permissible manifestation of religion, can the HRC assess whether the right has been interfered with.

C. The limitation provision

The Siracusa Principles state that any limitation provision in the *ICCPR* should be interpreted strictly and in favour of the rights at issue.⁵⁷ They must not be applied arbitrarily, or in a way that jeopardises the essence of the right concerned.⁵⁸ Furthermore, the current Special Rapporteur on freedom of religion and belief has noted that any limitation on religious freedom 'must be the exception not the rule'.⁵⁹

Article 18, paragraph three, states:

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.

The most relevant element of the limitation provision is that religious freedom can be limited to protect 'the fundamental rights and freedoms of others'. This category encompasses the right to be free from discrimination, which is a right protected in Article 26 of the *ICCPR*. However, the HRC has not considered a Communication where the state party has argued that religious freedom should be limited under that category specifically to prevent discrimination. Therefore, this section will assess how the limitation is generally applied, in order to demonstrate how the *ICCPR* protects both rights.

The term 'prescribed by law' means that limitations must be provided for in national laws and be consistent with the *ICCPR*.⁶⁰ The law must not be arbitrary or unreasonable and must be clear and accessible to everyone.⁶¹ The term 'necessary' suggests that any limitation must be more than merely desirable.⁶² The limitation must relate to the five grounds listed, respond to a pressing public or social need, pursue a legitimate aim, and be proportionate to that aim.⁶³ Generally, an aim will be legitimate if it reasonably promotes one of the categories listed.⁶⁴ For a limitation to be proportionate, the state must specify exactly how that particular manifestation of religion interferes with the law it uses to justify it.⁶⁵ The HRC will also consider whether there was

53 Human Rights Committee, *Views: Communication No 1593/2007*, 98th sess, UN Doc CCPR/C/98/D/1593-1603/2007 (30 April 2010) ('*Jung et al v The Republic of Korea*').

54 Human Rights Committee, *Views: Communication No. 466/1991*, 43rd sess, UN Doc CCPR/C/43/D/446/1991 (7 November 1991) [4.2] ('*J.P. v Canada*'); Human Rights Committee, *Views: Communication No. 483/1991*, 45th sess, UN Doc CCPR/C/45/D/483/1991 (23 July 1992) [4.2] ('*J.v.K. and C.M.G.v.K.-S. v The Netherlands*').

55 General Comment 22 (n 38) [7].

56 Human Rights Committee, *Views: Communication No 570/1993*, 50th sess, UN Doc CCPR/C/50/D/570/1993 (25 April 1994) ('*M.A.B. W.A.T. and J.-A.Y.T. v Canada*').

57 The Siracusa Principles (n 32) [3].

58 Ibid [2], [7].

59 Ahmed Shaheed, 'Protecting and Promoting the Right to Freedom of Religion and Belief For All: Challenges and Opportunities' (2019) 16(29) *International Journal on Human Rights* 41, 44.

60 The Siracusa Principles (n 32) [15].

61 Ibid 16.

62 T. Jeremy Gunn, 'Permissible Limitations on the Freedom of Religion or Belief' in John Witte et al (eds), *Religion and Human Rights: An Introduction* (Oxford University Press, 2011) 261.

63 The Siracusa Principles (n 32) [10].

64 Bielefeldt (n 5) 22.

65 Heiner Bielefeldt, Nazila Ghana and Michael Wiener, *Freedom of Religion or Belief: An International Law Commentary* (Oxford University Press, 2016) 488.

a less restrictive means available to achieve the purpose of the limitation.⁶⁶

While the HRC does ensure that the limitation falls within a permitted category,⁶⁷ it has interpreted those categories broadly.⁶⁸ For example, it has held that 'the regulation of surnames and the change thereof was eminently a matter of public order and restrictions were therefore permissible under paragraph 3 of article 18'.⁶⁹ The widest category is the limitation to 'protect the fundamental rights and freedoms of others'.⁷⁰ For example, a number of cases have invoked this limitation to try to prevent Muslim women from wearing religious dress in public. In *FA v France*,⁷¹ a Moroccan national working at a childcare centre was dismissed for failing to remove her headscarf. France argued that it was necessary to protect the rights and freedoms of the children and their parents from 'conspicuous displays of religious affiliation'.⁷² However, France failed to prove how wearing a headscarf would interfere with their rights. The HRC held this to be a violation of Article 18, as well as Article 26, because it amounted to intersectional discrimination based on gender and religion. Thus, even though this limitation category is broad, state parties still need strong arguments to interfere with religious freedom.

A similar finding was made in *Yaker v France*,⁷³ where a Muslim woman wearing a niqab was convicted of an offence for concealing her face in public. France argued that the law protects public order and safety.

It argued that it also protects the rights and freedoms of others, because face coverings impair the principle of 'living together' in an open society. The HRC dismissed the public order and safety argument, as France had not adequately demonstrated any threat. Additionally, France did not articulate how wearing the veil would prevent the enjoyment of the rights of others in a public space. Even if 'living together' was a legitimate objective, and was not a 'very vague and abstract' argument,⁷⁴ the blanket ban was not proportionate to that aim, or the least restrictive means. Thus, France violated Articles 18 and 26.

The 'rights and freedoms of others' limitation also restricts religious freedom where it amounts to discrimination. However, the limitations imposed must not be applied in a manner that would vitiate the rights guaranteed in Article 18.⁷⁵

The main case on this point is *Ross v Canada*.⁷⁶ While Mr Ross was employed as a school teacher, he published books and made public statements that denigrated the Jewish faith. He was removed from his teaching position after a complaint was made against the School Board, arguing that its failure to take action against him amounted to discrimination on the basis of religion and ancestry in the provision of public educational services.⁷⁷ Even though the material was published while he was off-duty, the Board of Inquiry found it reasonable to infer that his behaviour influenced the 'poisoned environment' within the school, and various discriminatory

66 The Siracusa Principles (n 32) [11].

67 For example, in *Hudoyberganova v Uzbekistan*, the author argued that her university violated her Article 18 rights when it excluded her for refusing to remove her hijab. The HRC accepted that this constituted a manifestation of her religion and noted that the freedom is not absolute. As Uzbekistan failed to invoke any specific ground of limitation to justify why this restriction was necessary, it was found to have violated Article 18: Human Rights Committee, *Views: Communication No 931/2000*, 82nd sess, UN Doc CCPR/C/82/D/931/2000 (18 January 2005) ('*Hudoyberganova v Uzbekistan*').

68 Evans (n 33) 225.

69 Human Rights Committee, *Views: Communication Number 453/1991*, 52nd sess, UN Doc CCPR/C/52/D/453/1991 (31 October 1994) [6.1] ('*Coeriel and Aurik v The Netherlands*').

70 Australian Human Rights Commission, 'Religious Freedom Review: Submission to the Expert Panel' (February 2018) 12 [50] ('Religious Freedom Review').

71 *FA v France* (n 25).

72 *Ibid* [8.7].

73 *Yaker v France* (n 25).

74 *Ibid* [7.10].

75 General Comment 22 (n 38) [8].

76 Human Rights Committee, *Views: Communication No 736/1997*, 70th sess, UN Doc A/56/40 (26 October 2000) ('*Ross v Canada*').

77 *Ibid* [3.4].

incidents against Jewish students. The school was found vicariously liable and was ordered to place Mr Ross on a leave of absence without pay for eighteen months, after which he could be appointed to a non-teaching position. Mr Ross brought his case before the HRC under Article 18, as well as Article 19, which sets out the right to freedom of expression and the right to hold opinions without interference. However, the HRC found that the issues were substantially the same under both articles.⁷⁸

Mr Ross argued that, if his off-duty expression of religion could be subject to scrutiny by the state or his employer, religious freedom would be meaningless. However, the HRC agreed with the findings of the domestic courts, as the action was necessary to protect 'the right to have an education in the public school system free from bias, prejudice and intolerance'.⁷⁹ This is especially because exercising the freedom of expression 'carries with it special duties and responsibilities',⁸⁰ and the manifestation took place around young students, over whom teachers can exert considerable influence and legitimise discriminatory views.

Given the emphasis on the age of the students, and Mr Ross's position of influence, it is unclear if this limitation would have been justified if he held a non-teaching position, or was a university lecturer.⁸¹ It has been argued that, given the entitlement to have a learning environment free from intolerance, this principle could be applied to a much wider context, undermining the *ICCPR*'s protection of the freedom of expression and the manifestation of

religion.⁸² However, any erosion of the right based on this argument has yet to be seen.

While the HRC has not considered any cases arising under Article 18 that directly amount to discrimination on the basis of sex, the HRC and various Special Rapporteurs on freedom of religion and belief have commented on the topic. Additionally, sexual orientation and gender identity are not specifically mentioned in the *ICCPR*, but the HRC has said that they are encompassed in the prohibition on sex discrimination.⁸³ In 2010, former Special Rapporteur on freedom of religion or belief Asma Jahangir wrote that '[i]t can no longer be taboo to demand that women's rights take priority over intolerant beliefs used to justify gender discrimination'.⁸⁴ Furthermore, in a report in 2020, the current mandate holder Ahmed Shaheed emphasised that the right to equality has no commensurate limitation based on the rights and freedoms of others, as is the case with religious freedom under the *ICCPR*.⁸⁵ However, he also stated that acknowledging the tensions between religious freedom and anti-discrimination does not mean that we must assume there is always an inherent incompatibility between the two.⁸⁶

D. *Evaluation of the ICCPR*

One of the primary criticisms of the HRC's jurisprudence is that, due to a lack of 'rigorous analysis' when applying the limitation provisions, how and when religious freedom will be permissibly restricted remains 'surprisingly opaque'.⁸⁷ For example, it is unclear how much weight the HRC places on the autonomy of the state party, or what evidence the HRC looks for in resolving competing claims.⁸⁸

78 Ibid [11.8].

79 Ibid [11.5].

80 Ibid [11.6].

81 Radan (n 4) 20.

82 Ibid.

83 Human Rights Committee, *Views: Communication No 488/192*, 50th sess, UN Doc CCPR/C/50/D/488/1992 (31 March 1994) ('*Toonen v Australia*'); Human Rights Committee, *Views: Communication No 2172/2012*, 119th sess, UN Doc CCPR/C/119/D/2172/2012 (28 June 2017) ('*G v Australia*').

84 Asma Jahangir, *Interim report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/65/207 (29 July 2010) [69].

85 Ahmed Shaheed, *Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/HRC/43/48 (27 February 2020) [69].

86 Ibid.

87 Evans (n 33) 212; Radan (n 4) 21.

88 Gunn (62) 262.

This problem is partly due to the scarcity of decisions involving both religious freedom and anti-discrimination, especially given that cases involving the expression of opinions can be brought under Article 19 instead.⁸⁹

The HRC has also been criticised for having a restrictive approach to religious freedom, on the basis of its assessment of what constitutes a ‘manifestation’,⁹⁰ and its broad interpretation of the categories of limitation.⁹¹ However, making the distinction between manifestation and belief means that religious belief can be protected absolutely. The HRC’s interpretation of ‘manifestation’ also promotes equality by preventing any act whatsoever from being justified on the basis of religion. Furthermore, the categories of limitations are not so broad that they permit the limitation of religious freedom, for example, to protect national security.⁹² Additionally, the cases relating to religious dress demonstrate that a state must be able to specifically point to a category of limitation before the HRC will restrict religious freedom, and the limitation must withstand the HRC’s analysis of its necessity and proportionality. Thus, even where preventing discrimination is a legitimate reason to limit religious freedom, the law must ‘actually be conducive to pursuing the said purpose’.⁹³

Overall, the commentary and jurisprudence make it clear that imposing a limitation on religious freedom, in order to protect the rights of others, is fundamentally important. It ensures that ‘[u]tilizing a human right in order to legitimize brutal human rights violations of others can never be legitimate’.⁹⁴ However, this is only after the HRC has applied the robust criteria required by Article 18. From this analysis, it is clear that the HRC takes

both rights seriously, and does not limit religious freedom without due cause.

IV. RELIGIOUS FREEDOM UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

This section discusses the protection of religious freedom in the *ECHR*, and references jurisprudence from the ECtHR, to demonstrate how religious freedom and anti-discrimination can be balanced in a regional legal framework.

A. Overview of the ECHR

The *ECHR* has significantly contributed to normalising human rights discourse in Europe.⁹⁵ All 47 members of the CoE are parties to it, and are bound to respect the rights declared within it. The ECtHR hears allegations by individuals or member states of any violations of the *ECHR*.⁹⁶ Its judgments guide member states on how best to observe the articles in their domestic laws and has led to many changes in the legislation or policies of member states, raising the standard of human rights protection across Europe.⁹⁷

Since its early judgments on religious freedom, the ECtHR made it clear that it values the protection of religious freedom as an aspect of promoting pluralism and diversity. It stated that religious freedom is ‘one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned’.⁹⁸ At the same time, the ECtHR has been hailed as creating

89 Human Rights Committee, *General Comment 34 – Article 19: Freedoms of opinion and expression*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011) [9].

90 Radan (n 4) 21.

91 Evans (n 33) 225.

92 General Comment 22 (n 38).

93 Bielefeldt (n 7).

94 Bielefeldt and Wiener (n 12) 96.

95 Colm O’Cinneide, ‘Values, rights and Brexit: Lessons to be learnt from the slow evolution of United Kingdom discrimination law’ (2017) 30 *Australian Journal of Labour Law* 236, 243.

96 Kaponyi (n 41) 29.

97 European Court of Human Rights, ‘Guide on Article 9 of the European Convention on Human Rights: Freedom of thought, conscience and religion’ (30 April 2020) 5 (‘Guide on Article 9’); Bielefeldt and Wiener (n 12) 156.

98 *Kokkinakis v Greece* (European Court of Human Rights, Application No 14307/88, 25 May 1993).

an environment more conducive to the protection of anti-discrimination rights.⁹⁹

B. Interpretation of Article 9

Article 9 of the *ECHR* protects the freedom of thought, conscience and religion. As with the *ICCPR*, 'religion' is not defined, to ensure that the article is flexible enough to encompass a variety of faiths, but can also be narrowed down and applied to specific cases.¹⁰⁰

The first paragraph of Article 9 is the same as Article 18 of the *ICCPR*, but it refers to the right to 'change' one's religion, rather than 'to have or adopt' a religion or belief. The second paragraph is also the same as paragraph three of the *ICCPR*, except the limitations must be necessary 'in a democratic society' to protect the five categories listed.

Article 9 also distinguishes between religious 'belief' and 'manifestation'. With regards to the *forum internum*, the ECtHR is to remain neutral and impartial.¹⁰¹ It is not its role to assess the validity or legitimacy or religious beliefs that 'attain a certain level of cogency, seriousness, cohesion and importance'.¹⁰² For example, the ECtHR cannot rule that a particular belief is not religious because it is contentious, or even discriminatory.¹⁰³ Only religious manifestations can be limited, making the assessment of what constitutes manifestation crucial.¹⁰⁴

However, it is not the case that any act which is motivated or influenced by religion will amount to a manifestation.¹⁰⁵ The act

must be 'intimately linked' to religion in a 'generally recognised form' and actually express the belief concerned.¹⁰⁶ Whether there is a sufficient nexus between the act and the religious belief is determined 'on the facts of each case'.¹⁰⁷

For example, in *Knudsen v Norway*,¹⁰⁸ a vicar of a state Church was dismissed for refusing to carry out the administrative duties of his role, in protest of progressive amendments to an Abortion Act. The ECtHR held that, despite being motivated by his beliefs, such a refusal 'did not actually express the applicant's belief or religious view', and it was therefore not protected by Article 9.¹⁰⁹ In *Pichon and Sajous v France*,¹¹⁰ the applicants refused to supply contraceptives at their pharmacy. They argued that their freedom of religion had been violated when this caused them to be found guilty of an offence under the Consumer Code. However, without explicitly stating that such an act was not a manifestation of religion, the ECtHR ruled their application inadmissible. The applicants could not use their religious beliefs as a justification to refuse to sell medicine, especially where they could manifest their beliefs in many ways outside of the professional sphere.

One way that ECtHR has protected the manifestation of religious freedom is by protecting the autonomy of religious institutions.¹¹¹ For example, it has not interfered with decisions concerning the internal structures and functioning of the Romanian Orthodox Church,¹¹² the Catholic Church,¹¹³ and a community of Muslim

99 O'Cinneide (n 95).

100 Guide on Article 9 (n 97) 8 [14].

101 Helen Keller and Corina Heri, 'The Role of the European Court of Human Rights in Adjudicating Religious Exception Claims' in Susanna Mancini and Michel Rosenfeld (eds), *The Conscience Wars: Rethinking the Balance between Religion, Identity, and Equality* (Cambridge University Press, 2018) 307.

102 *Eweida v United Kingdom* (2013) 57 EHRR 8, [81].

103 Keller and Heri (n 101) 312.

104 Esra Demir Gursel, 'The Distinction Between the Freedom of Religion and the Right to Manifest Religion: A Legal Medium to Regulate Subjectivities' (2013) 22(3) *Social & Legal Studies* 377, 378.

105 Guide on Article 9 (n 97) 29 [81].

106 Religion or Belief (n 50) [15]; Paul Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge University Press, 2005) 211.

107 *Eweida v United Kingdom* (2013) 57 EHRR 8, [82].

108 *Knudsen v Norway* (1986) 8 EHRR CD63.

109 Ibid 65.

110 *Pichon and Sajous v France* (European Court of Human Rights, Application No 49853/99, 2 October 2001).

111 Religion or Belief (n 50) [23]; McCrudden (n 1) 33.

112 *Sindicatul Păstorul cel Bun v Romania* (2014) 58 EHRR 10.

113 *Travas v Croatia* (European Court of Human Rights, Application No 75581/13, 4 October 2016).

believers.¹¹⁴ The ECtHR interprets Article 9 in light of Article 11, 'which safeguards associative life against unjustified state interference'.¹¹⁵ The ECtHR's commitment to neutrality towards the values and tenets of religions also prevents it from interfering with internal religious decisions,¹¹⁶ such as the regulation of their membership to exclude those who do not share their beliefs.¹¹⁷ Furthermore, employees of religious organisations are subject to a heightened degree of loyalty to their employer, and can be dismissed for not adhering to religious doctrines, such as marital fidelity.¹¹⁸ While the degree of loyalty required depends on the employer's specific mission and the nature of the employee's role,¹¹⁹ provided there is a direct link to their professional activities,¹²⁰ the ECtHR protects religious institutional autonomy, even if it interferes with the right to private life under Article 8.¹²¹ However, the ECtHR has not addressed how this principle would be applied if an employee was dismissed on the basis of personal attributes, such as their sexual orientation or gender. Nevertheless, the ECtHR has said that it considers sexual orientation to be a 'suspect' ground of differential treatment,¹²² and that discrimination based on gender or sexual orientation requires particularly serious reasons to be justifiable.¹²³

C. The limitation provision

As with the ICCPR, religious freedom under the *ECHR* cannot be limited on the grounds of national security.¹²⁴ This reflects the importance placed on religious pluralism

as 'one of the foundations of a democratic society'.¹²⁵ The ECtHR has also made it clear that some restrictions on religious freedom are necessary to respect the diversity of beliefs in democratic societies.¹²⁶ However, the only way religious freedom can be limited is in accordance with Article 9.

The ECtHR has emphasised that the *ECHR* is 'a living instrument which...must be interpreted in the light of present-day conditions'.¹²⁷ Furthermore, any limitation under the permissible categories must be 'prescribed by law' and 'necessary in a democratic society' to protect the aim of that category.¹²⁸ As with the *ICCPR*, the *ECHR* also protects against discrimination in Article 14. However, there are few cases where a limitation on the grounds of discrimination has been applied, meaning that an analysis of the operation of the entire provision is necessary to understand the *ECHR*'s overall protection of religious freedom.

'Prescribed by law' means that the interference with religious freedom has been sanctioned by the domestic legal system through statute or common law.¹²⁹ The law must be accessible and not applied arbitrarily.¹³⁰ In assessing whether a limitation is 'necessary in a democratic society', the ECtHR will determine whether the measure taken by the state is justified in principle, meaning it corresponds to a 'pressing social need',¹³¹ and whether it is proportionate, such that there is no less restrictive measure available.¹³² In assessing proportionality, the ECtHR considers the margin of appreciation that should be granted to the

114 *Hasan and Chaush v Bulgaria* (2002) 34(6) EHRR 1339.

115 *Fernandez v Spain* (European Court of Human Rights, Application No 56030/07, 12 June 2014), [126].

116 Guide on Article 9 (n 95) 9 [16].

117 McCrudden (n 1) 27-28.

118 Hilkmeeijer and Maguire (n 24) 758; Guide on Article 9 (n 95) 76 [224].

119 Hilkmeeijer and Maguire (n 24) 758.

120 *Fernandez v Spain* (European Court of Human Rights, Application No 56030/07, 12 June 2014), [110].

121 *Obst v Germany* (European Court of Human Rights, Application No 425/03, 23 September 2010).

122 Hilkmeeijer and Maguire (n 24) 762.

123 *L and V v Austria* (European Court of Human Rights, Application Nos. 39392/98 and 39829/98, 9 January 2003), [45].

124 General Comment 22 (n 38) [8].

125 Guide on Article 9 (n 97) 16 [34].

126 Evans (n 33) 283.

127 *Tyrer v United Kingdom* (European Court of Human Rights, Chamber, Application No 5856/72, 25 April 1978) [31].

128 *ECHR* (n 3), Article 9(2).

129 Evans (n 33) 319.

130 Donna J. Sullivan, 'Gender Equality and Religious Freedom: Toward a Framework for Conflict Resolution' (1992) 24 *New York University Journal of International Law and Politics* 795) 809.

131 Guide on Article 9 (n 97) 18 [43].

132 *Ibid* 53 [153].

state to determine the balance of contentious rights.¹³³ The margin will be wider where there is no consensus among member states on an issue,¹³⁴ as domestic authorities are in a better position to assess the relevant factors in the local context.¹³⁵ However, the ECtHR will still assess whether the measure is relevant and sufficient, and in line with the values protected by the *ECHR*.¹³⁶

For example, the ECtHR formerly reasoned that the ability for an employee to change jobs meant that their religious freedom could not be violated by workplace rules.¹³⁷ However, it moved away from this approach in *Eweida v United Kingdom* ('*Eweida*').¹³⁸ The first applicant, Ms Eweida, was a Christian woman employed as a flight attendant. The airline's uniform policy prohibited her from displaying her cross necklace. After she was asked several times to remove it, and declined to transfer to an administrative post (which did not require a uniform), she was sent home without pay. While the airline then amended its uniform policy to accommodate her, she argued before the ECtHR that its refusal to compensate her for lost earnings breached Article 9. The ECtHR acknowledged that the domestic court considered the company's desire to promote a certain image of itself was a legitimate aim and noted that the airline offered her an alternative, paid job, before it relaxed its stance. Nevertheless, taking into account the state's margin of appreciation, the ECtHR found that the domestic courts placed too much weight on the company's aim to control its image and not enough on Ms Eweida's right to manifest her religion, particularly given the discreet nature of the religious dress

in question.¹³⁹ Thus, the ECtHR held that the United Kingdom violated Article 9.

Conversely, the ECtHR has demonstrated where this right can be limited in the workplace. The second applicant in *Eweida*, Ms Chaplain, was demoted from her nursing position after refusing to remove her cross necklace in accordance with the hospital's uniform policy. The United Kingdom argued that it was necessary to protect the health and safety of patients and staff. In finding that there had been no violation of Article 9, the ECtHR distinguished Ms Chaplain's application from Ms Eweida's circumstances. The protection of health and safety in a hospital was 'inherently of a greater magnitude', and a wide margin of appreciation was applied, because the ECtHR recognised that hospital managers are better positioned to make judgements about public health policies.¹⁴⁰ This case demonstrates how the category of limitation can factor into the ECtHR's balancing exercise.

D. *The rights and freedoms of others*

Under the 'rights and freedoms of others' limitation, the ECtHR has considered a myriad of cases relating to Muslim religious dress, and has generally upheld the interference. In *SAS v France*,¹⁴¹ the applicant was a Muslim woman who wore a burqa and niqab. She argued that the French law prohibiting public face concealment violated Article 9, as well as Article 8 (the right to respect for private and family life) and Article 10 (freedom of expression). France argued that the law was necessary to protect public safety (e.g. to prevent identity fraud), and to protect the rights and freedoms of others, by promoting gender equality and the concept of 'living together'. The ECtHR

133 Ibid 18 [44].

134 Ibid.

135 Shannon Riggins, 'Limitations on the Right to Manifest Religion in European Private Companies: Achbita vs G4S Secure Solutions NV Under Article 9 of the ECHR and Article 18 of the ICCPR' (2018) 33(4) *American University International Law Review* 977, 991.

136 Guide on Article 9 (n 97) 18 [43].

137 *Konttinen v Finland* (1996) 87 DR 68; *Stedman v the United Kingdom* (1997) 23 EHRR CD 168; *Kalaç v Turkey* (1997) 27 EHRR 552, [28]-[29].

138 *Eweida v United Kingdom* (2013) 57 EHRR 8.

139 Ibid [83].

140 Ibid [99].

141 *SAS v France* (European Court of Human Rights, Application No 43835/11, 1 July 2014).

was not persuaded by the public safety argument, as it required women to 'give up completely an element of their identity that they consider important', without the actual risk to safety being established.¹⁴² Nor did the ECtHR accept the equality argument, as the practice is defended by many women (including the applicant). However, it did find that 'living together' was a legitimate aim to protect the rights and freedoms of others, due to the crucial role the face plays in social interactions.¹⁴³ It also deferred to the margin of appreciation, stating that there was no discernible consensus on this topic in Europe. Therefore, the value placed on pluralism and democracy in French society was given special weight.¹⁴⁴ The ban was also considered proportionate, because it only targeted religious dress that concealed the face and only affected a small number of women.

The main case where this head of limitation has been invoked to prevent discrimination is in relation to the third and fourth applicants in *Eweida*. The third applicant, Ms Ladele, was employed by a local authority as a registrar of births, deaths and marriages. In contravention of its 'Dignity for All' anti-discrimination policy, Ms Ladele refused to participate in civil partnership ceremonies on account of her Christian beliefs. She argued that the disciplinary action against her breached Article 14 (prohibition of discrimination), taken in conjunction with Article 9. The fourth applicant, Mr McFarlane, was dismissed from his employment as a relationship counsellor with a private company, for refusing to provide psycho-sexual therapy to same-sex clients due to his Christian beliefs.

With respect to both applicants, the ECtHR acknowledged the seriousness of the interference with their religious freedom, but ruled that there had been no violation of Articles 9 or 14. In Ms Ladele's case, the ECtHR held that the local authority's policy

pursued a legitimate aim, by preventing discrimination against same-sex couples, as protected by Article 14. In relation to Mr McFarlane, the fact that he voluntarily signed up to the company's training program in psycho-sexual counselling, with full knowledge of its Equal Opportunities Policy, was not determinative. While it was one factor in assessing where the balance should be struck, the ECtHR placed more emphasis on the aim of the policies to promote non-discrimination in the provision of services, which was a fundamental part of the employer's ethos.

This case demonstrates that discrimination on the basis of sexual orientation in the provision of services is one area where religious freedom can be justifiably limited under Article 9.

E. *Evaluation of the ECHR*

While there is limited jurisprudence from the ECtHR on the balance between religious freedom and anti-discrimination, it has consistently expressed the importance of both rights. However, one criticism is the ECtHR's narrow approach to what constitutes a 'manifestation' of religion.

Critics argue that the ECtHR can avoid grappling with the balance between religious freedom and other rights, by deeming that the act in question is not a 'manifestation'.¹⁴⁵ The criticism that the ECtHR treats the distinction between the *forum internum* and *forum externum* as 'self-evident'¹⁴⁶ is valid when considering cases such as *Pichon and Sajous v France*, where there was no justification for why their case was inadmissible. However, since then, the ECtHR has demonstrated more willingness to engage with contentious expressions of religious belief. For example, in *Eweida*, the United Kingdom tried to argue that Ms Ladele's claim was indistinguishable from *Pichon and*

142 Ibid [139].

143 Ibid [141].

144 Ibid [129].

145 Adriana Lamačková, 'Conscientious Objection in Reproductive Health Care: Analysis of *Pichon and Sajous v France*' (2008) 15 *European Journal of Health Law* 7, 12.

146 Gursel (n 104) 379.

Sajous v France, but the ECtHR ‘did not follow its own previous conflict-minimizing approach’.¹⁴⁷ It accepted that her objection to performing civil partnership ceremonies fell within the ambit of Article 9, allowing the Court to consider whether preventing discrimination was a legitimate aim.

The ECtHR’s proportionality analysis has also been criticised as ad hoc, especially when it defers to the margin of appreciation.¹⁴⁸ Given that the scope of the margin of appreciation varies depending on the degree of consensus on an issue across Europe, the doctrine does contribute to divergent outcomes in similar cases.¹⁴⁹ This is clear when comparing the lack of protection for Muslim religious dress in France, and the protection accorded to Ms Eweida in the UK to wear a cross at work. While some argue that this is merely the ECtHR adopting a more forgiving attitude towards Christianity than it does for Islamic religious expression,¹⁵⁰ others perceive it as a way to avoid substantively engaging with the issue of balancing religious freedom with other rights.¹⁵¹ However, the margin of appreciation goes ‘hand in hand with a European supervision’, and the ECtHR gives the final determination of whether a limitation is sufficiently justified.¹⁵²

On the whole, this analysis demonstrates that the ECtHR promotes the right to religious freedom to the furthest extent possible, until it infringes on the rights of others. The ECtHR avoids any assessment of the value of internal religious beliefs and protects religious institutional autonomy. It has moved away from previous findings that religious freedom cannot be interfered with in employment.¹⁵³ Finally, its decision to limit religious freedom to prevent discrimination still gave sufficient weight to the importance of protecting religious freedom, as it was not limited without the United Kingdom

proving that it was a proportionate measure to pursue a legitimate aim.

V. COMPARISON AND REFLECTION

This final section discusses the key differences between the texts of the *ICCPR* and the *ECHR*, and the jurisprudence of their respective enforcement bodies. It also reflects that countries such as Australia should emulate how these instruments protect religious freedom and anti-discrimination rights where they come into conflict.

A. Comparison of the *ECHR* and the *ICCPR*

It is difficult to perfectly compare the *ICCPR* and *ECHR*, given that there are significantly more decisions from the ECtHR on this topic than have been considered by the HRC.¹⁵⁴

On a textual level, there are few differences between the *ICCPR* and the *ECHR*.¹⁵⁵ Both instruments protect the freedom of religion absolutely, and provide for the manifestation of religion to be limited under the same circumstances. Both instruments also exclude the option of limiting religious freedom on the grounds of national security.

There are also a number of similarities in the jurisprudence of the HRC and the ECtHR. Both prevent any act whatsoever from being justified as a manifestation of religion. They have also demonstrated that a state must be able to point to a particular head of limitation and provide a sufficiently specific justification before religious freedom can be limited. However, the main difference is the weight the ECtHR places on the margin of appreciation.¹⁵⁶

147 Keller and Heri (n 101) 313.

148 Gunn (n 62) 264.

149 Riggins (n 135) 991; *SAS v France* (European Court of Human Rights, Application No 43835/11, 1 July 2014), [124], [156].

150 Samuel Moyn, ‘Too Much Secularism? Religious Freedom in European History and the European Court of Human Rights’ in Nehal Bhuta (ed) *Freedom of Religion, Secularism, and Human Rights* (Oxford University Press 2019) 95.

151 Harrison (n 20) 742; Keller and Heri (n 101) 317; Taylor (n 106) 302.

152 Evans (n 33) 321. See also *Eweida v United Kingdom* (2013) 57 EHRR 8, [84].

153 *Eweida v United Kingdom* (2013) 57 EHRR 8.

154 Taylor (n 106) 293.

155 Bielefeldt and Wiener (n 12) 154-155.

156 Taylor (n 106) 185.

The divergence this creates in outcomes is most evident from the cases involving Muslim religious dress, where the doctrine was relied upon to uphold the limitation on religious freedom, whereas the HRC was not willing to permit a vague concept such as 'living together' to justify a limitation. This is because the HRC applies 'universal standards across a much more diverse constituency, and regards the margin of appreciation in matters relating to the rights of religious minorities as problematic'.¹⁵⁷ Thus, the doctrine has been described as a 'perennially controversial principle',¹⁵⁸ and 'seems particularly disappointing from the perspective of certain religious minorities'.¹⁵⁹ These criticisms should not be discounted, but the value in states retaining some sovereignty in areas where they are better placed to understand local issues should also be considered. Nevertheless, since the *ECHR* does not outline a hierarchy of rights,¹⁶⁰ the ECtHR still has the final determination on whether a state's interference with religious freedom is reasonable.

Overall, the ECtHR has endorsed religious freedom in a number of ways, such as by protecting religious institutional autonomy and its recognition that workplace policies can violate religious freedom. It has also protected against discrimination, by limiting religious freedom in the provision of services. While the HRC has not considered cases relating to religious institutional autonomy or in the provision of services, it has demonstrated its willingness to protect both religious freedom and anti-discrimination. It has emphasised that any limits on religious freedom are to be the exception, not the rule. However, it has also stated that preventing discrimination on

the basis of sex and sexual orientation are permissible limitations on religious freedom.

One point that can be taken away from this analysis is that '[t]he architecture of human rights and its relationship to religion is in the course of being constructed'.¹⁶¹ In the relatively few cases that have arisen in this area, the enforcement bodies have received various criticisms, including that their application of the limitation criteria is ad hoc. Thus, further jurisprudence in this area is required before a conclusive approach will emerge, especially in relation to the interplay of religious freedom and anti-discrimination rights. From the case law and commentary that is available, the HRC and the ECtHR do not allow all religious manifestations to be invoked as an excuse to breach other rights protected by the instruments,¹⁶² and they do not allow religious freedom to be diminished on those grounds, without proper consideration of the necessity and proportionality of the measure.

B. *Lessons for other jurisdictions*

Per Article 46(1) of the *ECHR*, member states agree to 'abide by the final judgments of the Court in any case to which they are parties'. Their primary obligations are to pay any compensation awarded by the ECtHR, take measures to stop any violations, and take action to prevent future violations.¹⁶³ Such measures may include a re-examination by the domestic authorities of the applicant's complaint, or could entail legislative or policy reform, where a large number of people are affected by a violation.¹⁶⁴ However, domestic courts tend to be reluctant to unconditionally follow the rulings of the ECtHR, and are prone to deciding whether to give effect to its judgments on a case-by-case

157 'UN Human Rights Committee Condemns "Burqa Ban", Countering European Court', *The International Justice Resource Center* (Web Page, 14 November 2018) <<https://ijrcenter.org/2018/11/14/un-human-rights-HRC-condemns-burqa-ban-countering-european-court/>>.

158 Moyn (n 151) 100.

159 Bielefeldt and Wiener (n 12) 164.

160 Keller and Heri (n 101) 309.

161 McCrudden (n 1).

162 Sullivan (n 130) 807.

163 Maria Issaeva, Irina Sergeeva and Maria Suchkova, 'Enforcement of the Judgments of the European Court of Human Rights in Russia' (2011) 8(15) *International Journal on Human Rights* 67, 68.

164 Ibid.

basis.¹⁶⁵ Under Article 2 of the *ICCPR*, state parties must respect and ensure the rights recognised within the Covenant. If the HRC finds a violation, the state party is requested to remedy it within 180 days, after which the Special Rapporteur will follow up and report on whether it has taken the necessary measures to give effect to the HRC's views.¹⁶⁶

While there is no universal compliance with the rulings of either bodies, there appears to be a higher level of compliance with judgments from the ECtHR, given that its rulings contain more specific measures that state parties must undertake, and that there is more political incentive and institutional follow-up within the CoE to ensure compliance with its rulings.¹⁶⁷ While the near-universal commitment of states to the rights enshrined in the *ICCPR* should not be underrated as an achievement for human rights progress, the higher degree of compliance with the *ECHR* demonstrates that regional frameworks may be more effective at monitoring and enforcing human rights protections.

Even though Australia has ratified the *ICCPR*, it has not fully incorporated the obligations contained in it, and has been criticised for having a 'piecemeal, rather than a comprehensive, approach in the incorporation of its international human rights obligations into domestic law'.¹⁶⁸ Therefore, Australia may benefit from contributing to the development of a regional framework, as an additional mechanism to protect and enforce human rights. While there would be a number of challenges to implementing such a framework, a regional or sub-regional mechanism is 'a crucial

component missing from the human rights machinery of the Asia-Pacific region'.¹⁶⁹

Furthermore, by assessing both the UN and CoE frameworks, Australia can observe the value of enshrining a positive right to protect religious freedom. While many of the applications under the *ECHR* and the *ICCPR* arguing a violation of religious freedom could also be brought under the protection of other articles, such as the freedom of expression or association,¹⁷⁰ the ECtHR and the HRC have specifically emphasised that religious freedom deserves its own protection. Thus, the best way for Australia to resolve the current debates is to develop a positive right to religious freedom, that is accompanied by a limitation provision. Any limitation provision should mirror the robust criteria set out in both the *ECHR* and the *ICCPR*, to ensure that religious freedom is neither elevated above other rights, nor diminished without sufficient justification.

VI. CONCLUSION

The *ICCPR* and the *ECHR* are examples of how international and regional legal frameworks can protect religious freedom, while also enforcing the right to be free from discrimination, and without compromising the essence of either right.

The importance of religious freedom has been consistently underscored and is protected in a number of ways. Under no circumstances can a person's right to religious belief be diminished. Only under the limited circumstances expressed by the instruments can the manifestation of religion be restricted. It is also not enough that a state party sufficiently proves the need to limit religious freedom in order to prevent discrimination. Regardless of how much reliance is placed on the state's

165 Raffaella Kunz, 'Judging International Judgments Anew? The Human Rights Courts before Domestic Courts' (2019) 30(4) *European Journal of International Law* 1129, 1139.

166 Fact Sheet No. 15 (n 29) 20.

167 Lutz Oette, 'Bridging the Enforcement Gap: Compliance of States Parties with Decisions of Human Rights Treaty Bodies' 2010 16(2) *Interights Bulletin* 51.

168 Religious Freedom Review (n 70) 25 [131].

169 Joint Standing Committee on Foreign Affairs, Defence and Trade, *Human rights in the Asia-Pacific Challenges and opportunities* (April 2010), [5.4]; Natalie Baird, 'To Ratify or Not to Ratify? An Assessment of the Case for Ratification of International Human Rights Treaties in the Pacific' (2011) 12 *Melbourne Journal of International Law* 249, 251.

170 Bielefeldt, Ghana and Wiener (n 65) 482.

margin of appreciation, the interference must still be proportionate to that aim. Thus, by only limiting religious freedom in a proportionate way to prevent discrimination, the ECtHR and the HRC have demonstrated that it is possible for both fundamental rights to operate at the same time.

While there is by no means a perfect solution to balance these rights in every case, the approach established by the *ECHR* and the *ICCPR* should be an example for jurisdictions such as Australia, where the tension between religious freedom and anti-discrimination rights has not been adequately addressed in law. If Australia wishes to maintain its status as a progressive, liberal democracy, it should take note of the example set by these international and regional frameworks.

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