



Australian
Human Rights
Commission

Religious Educational Institutions and Anti-Discrimination Laws

Submission to the Australian Law Reform Commission

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1 Introduction

1. The Australian Human Rights Commission (Commission) makes this submission to the Australian Law Reform Commission (ALRC) in relation to its inquiry into Religious Educational Institutions and Anti-Discrimination Laws.
2. At the end of 2021, the Commission made submissions to two parliamentary inquiries considering a package of laws including a Religious Discrimination Bill 2021 (Cth). Those submissions were substantially in the same form and were made to:
 - the Parliamentary Joint Committee on Human Rights¹
 - the Senate Legal and Constitutional Affairs Legislation Committee.²Those submissions touched on the existing exemptions available for religious educational institutions in the *Sex Discrimination Act 1984* (Cth) (SDA) and proposed exemptions for religious educational institutions under the Religious Discrimination Bill 2021 (Cth).

2 Summary

3. The Commission welcomes the work of the ALRC in producing a thoughtful and well researched consultation paper to assist in focusing the attention of the public and civil society on the key issues raised by the present inquiry.
4. The Commission agrees with the articulated commitments of the Australian Government in its terms of reference to the ALRC, namely commitments to ensure that religious educational institutions:
 - must not discriminate against a student on the basis of sexual orientation, gender identity, marital or relationship status or pregnancy;
 - must not discriminate against a member of staff on the basis of sex, sexual orientation, gender identity, marital or relationship status or pregnancy;
 - can continue to build a community of faith by giving preference, in good faith, to persons of the same religion as the educational institution in the selection of staff.

5. The task for the ALRC has been how to give effect to these commitments through law reform in a way that is consistent with Australia's human rights obligations.
6. The Government has described the ALRC inquiry as 'a crucial first step towards ... extending anti-discrimination protections to more Australians, including people of faith and to staff and students in religious schools'.³ The Commission considers that, in addition to reforms that emerge from this inquiry, there needs to be law reform to introduce enforceable protections against religious discrimination for all people in Australia.
7. Just as Australians are provided with statutory protection against discrimination on the grounds of race, sex, disability and age, so too should they be provided with equivalent protection against discrimination on the ground of religious belief or activity. This reinforces the idea, reflected in article 2 of the Universal Declaration of Human Rights, that human rights are indivisible and universal.
8. The subject matter of the current inquiry deals with an intersection between a number of human rights – primarily the freedom of religion and belief, and rights to equality and non-discrimination. The appropriate approach is to seek to accommodate both sets of rights and to limit their enjoyment only where this is necessary and is permitted by international law.
9. Under international law, a restriction on the rights set out in the *International Covenant on Civil and Political Rights* (ICCPR) is permissible only if it is in accordance with the relevant provisions of the ICCPR. In particular, the State must demonstrate the necessity of any restriction and it may only take measures that are reasonable and proportionate in carrying out legitimate aims.⁴
10. It is important to recognise that the law cannot solve all conflicts between intersecting human rights. Laws provide an important structure for our relationships and say something about the norms and principles that we consider should govern the way that we interact with each other. What is even more important is the way that people actually interact; how they seek to understand each other, and how they work to accommodate differences.
11. The Commission considers that each of the technical proposals put forward for consultation by the ALRC is directed towards a legitimate aim. In many cases, the Commission's view is that these proposals are

both necessary and proportionate to the achievement of that aim. In some cases, the Commission has formed the view that the proposals are not necessary, because the aim can be achieved through existing legal structures or an alternative proposal in a way that is simpler and better accommodates the respective rights in issue. In some cases, the Commission has concluded that the technical proposal is one of a number of ways that could legitimately achieve an appropriate balance between intersecting human rights.

12. The following points summarise the Commission's responses to the 14 technical proposals. The details of these responses are set out in the body of this submission.
13. The Commission supports technical proposals 1, 2, 3 and 5. These proposals substantially implement the first two of the Government's commitments. In relation to technical proposal 5, the Commission has identified two matters for the ALRC to consider in ensuring consistency between the amendments to the SDA and the operation of the FWA.
14. The Commission considers that technical proposal 4 (in relation to discrimination in accommodation) is consistent with these proposals and supports it, but notes that it has not had the benefit of considering any arguments that may be put against it.
15. The Commission agrees with the objective of technical proposal 6, to extend protections to students against discrimination on the ground of an attribute of a family member or carer. The Commission considers that there should be a single, simple reform to prohibit discrimination on the ground of an attribute of a family member or carer in relation to all SDA grounds. This would bring the SDA into line with equivalent State and Territory law in each jurisdiction and would avoid inconsistencies within the SDA itself.
16. The Commission considers that technical proposal 7 (in relation to the curriculum) is not necessary, particularly because conduct will not amount to indirect discrimination if it is reasonable in the circumstances.
17. The Commission considers that technical proposal 8 (in relation to preferencing on the basis of religion) responds to the Government's third commitment in a way that is consistent with caselaw in relation to human rights, particularly from the European Union. The Commission notes that there may be alternative ways to achieve an appropriate balance between human rights in the Australian context and refers to

previous submissions of the Commission which address the aims of both technical proposals 8 and 9 together.

18. The Commission considers that technical proposal 9 (in relation to new termination rights) is not necessary and that the aim of ensuring that staff respect the religious ethos of religious educational institutions can be achieved in a way that is simpler and less restrictive of the rights of staff members through existing employment and workplace relations laws.
19. The Commission agrees with technical proposal 10 to the extent that any future law prohibiting discrimination on the basis of religious activity or belief should be consistent with the final position adopted in relation to the topics dealt with in technical proposals 8 and 9.
20. The Commission considers that technical proposal 11 (in relation to proposed amendments to the *Australian Human Rights Commission Act 1986* (Cth)) is not necessary because the Commission already has the power to inquire into the conduct of religious educational institutions. However, the Commission would support a legislative amendment to clarify this issue.
21. The Commission agrees with the other consequential amendments in technical proposals 12, 13 and 14. In relation to future reforms, the Commission notes that as part of its *Free and Equal* protect it has published a detailed position paper on a reform agenda for federal discrimination laws⁵ and will soon publish a second position paper on embedding enforceable human rights protections into Australian domestic law at the federal level.

3 Relevant human rights

22. The ALRC consultation paper identifies a wide range of human rights as relevant to the current inquiry.⁶ The Commission agrees with this list and highlights a number of those rights in this section in particular.
23. Human rights are universal, inalienable and interdependent. Care must be taken to accommodate human rights whenever they come into tension.
24. Under international law, the right to the right to hold religious or other beliefs is absolute and not subject to any limitations.⁷ This is a matter of personal choice and conscience. No one may be subject to coercion that would impair their freedom to have or adopt a religion or other

belief.⁸ In a similar vein, everyone has the right to hold opinions without interference.⁹

25. The right to freedom of thought, conscience and religion also includes the freedom to *manifest* religion or belief in worship, observance, practice and teaching. There are both individual and collective aspects to the right to manifest religion or belief. The manifestation of religion includes the following freedoms:
- to worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes
 - to establish and maintain appropriate charitable or humanitarian institutions
 - to make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief
 - to write, issue and disseminate relevant publications in the area of religion or belief
 - to teach a religion or belief in places suitable for these purposes
 - to solicit and receive voluntary financial and other contributions from individuals and institutions
 - to train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief
 - to observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief
 - to establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.¹⁰
26. These rights may be enjoyed by individuals or by congregations of individuals of the same faith but they are essentially rights accruing to people. The rights in the ICCPR derive from 'the inherent dignity of the human person'.¹¹ They are not rights held, for example, by institutions in their own right.¹²

27. The manifestation of religion generally involves some positive external conduct and, like any other conduct, has the potential to impact on other people in various ways including their enjoyment of human rights. Article 18(3) of the ICCPR deals directly with how tensions between the freedom to manifest religion or belief and other important public objectives, including the human rights of others, are to be reconciled. It provides that the freedom to manifest one's religion or other beliefs may be subject to limitations in defined circumstances. Any limitations must be prescribed by law and must be necessary to protect one or more other important public goals. The ICCPR identifies these other public goals as the protection of public safety, order, health, or morals or the fundamental rights and freedoms of others.¹³ When the achievement of one of these other goals interferes with the right to manifest one's religion, it is necessary to conduct a proportionality analysis to determine whether the right to manifest one's religion has been impermissibly infringed.¹⁴
28. The Human Rights Committee is established by article 28 of the ICCPR and has a number of roles in supervising the application of that treaty. Considerable weight should be given to its interpretations of treaty obligations.¹⁵ It has said that in interpreting the scope of the identified legitimate limitations under article 18(3), States should proceed from the need to protect the rights guaranteed under the ICCPR, including the rights to equality and non-discrimination on the grounds specified in articles 2, 3 and 26.¹⁶ Equivalent grounds are included in other human rights treaties such as article 2(2) of ICESCR. Those articles prohibit discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. These grounds include a prohibition on discrimination on the basis of sexual orientation¹⁷ and gender identity.¹⁸ The *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) contains general and specific prohibitions against discrimination that include discrimination on the grounds of pregnancy and marital or relationship status.¹⁹
29. It is also useful at the outset of this submission to say something about the relationship between the rights of parents and their children. Article 18(4) of the ICCPR and article 13(3) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) both provide that States must respect the liberty of parents or guardians 'to ensure the religious and moral education of their children in conformity with their own

convictions'. The Committee on Economic Social and Cultural Rights has said that article 13(3) of ICESCR has two elements. First, public education that includes instruction in a particular belief or religion must ensure non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians.²⁰ The Special Rapporteur on freedom of religion has expanded on this point, saying:

A minimum requirement would be that members of minorities have the possibility of "opting out" of a religious instruction that goes against their own convictions. Such exemptions should also be available for persons adhering to the very same faith on which instruction is given, whenever they feel that their personal convictions – including maybe dissenting convictions – are not respected.²¹

30. Secondly, parents and guardians should have the freedom to choose to enrol their children in private schools, including schools established on religious grounds, provided that the schools conform to minimum educational standards established by the State.²² In relation to this element, the Special Rapporteur on freedom of religion has said:

[P]rivate schools, depending on their particular rationale and curriculum, might accommodate the more specific educational interests or needs of parents and children, including in questions of religion or belief. Indeed, many private schools have a specific denominational profile which can make them particularly attractive to adherents of the respective denomination, but frequently also for parents and children of other religious or belief orientation. In this sense, private schools constitute a part of the institutionalized diversity within a modern pluralistic society.²³

31. While article 18(4) of the ICCPR and article 13(3) of ICESCR focus on the liberty of parents with respect to the education of their children, these rights also need to accommodate the rights of children themselves. Many students may not have chosen the school in which they are enrolled; it may have been a decision by a parent or guardian. Young people are at a formative stage of development and their religious beliefs may change over time, including in ways that are different from their parents.
32. Article 12(1) of the *Convention on the Rights of the Child* (CRC) provides that children have the right to express their own views in all matters affecting them, and that their views should be given due weight in accordance with their age and maturity. Article 14 of the CRC provides that States must respect the right of children to freedom of thought, conscience and religion. It also provides that States must respect the

rights of parents to provide direction to their children in the exercise of the child's right, in a manner consistent with the evolving capacities of the child. The Committee on the Rights of the Child has confirmed that:

[Article 14] highlights the right of the child to freedom of religion and recognizes the rights and duties of parents and guardians to provide direction to the child in a manner consistent with his or her evolving capacities In other words, it is the child who exercises the right to freedom of religion, not the parent, and the parental role necessarily diminishes as the child acquires an increasingly active role in exercising choice throughout adolescence. Freedom of religion should be respected in schools and other institutions, including with regard to choice over attendance in religious instruction classes, and discrimination on the grounds of religious beliefs should be prohibited.²⁴

33. Similar comments have been made by the Special Rapporteur on freedom of religion or belief.²⁵

4 Background

4.1 Reference to the ALRC

34. The Attorney-General has given a reference to the ALRC to consider what reforms should be made to federal anti-discrimination laws (including s 38 of the SDA and the *Fair Work Act 2009* (Cth)) to ensure that those laws reflect the following commitments by the Government in a manner that is consistent with the rights and freedoms recognised by the international agreements to which Australia is a party including the International Covenant on Civil and Political Rights.
35. The relevant Government commitments are to amend relevant laws to ensure that an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed:
 - must not discriminate against a student on the basis of sexual orientation, gender identity, marital or relationship status or pregnancy;
 - must not discriminate against a member of staff on the basis of sex, sexual orientation, gender identity, marital or relationship status or pregnancy;

- can continue to build a community of faith by giving preference, in good faith, to persons of the same religion as the educational institution in the selection of staff.
36. On 27 January 2023, the ALRC released a consultation paper in relation to this inquiry containing four general propositions and 14 technical proposals for reform. This submission responds to that consultation paper.

4.2 Religious educational institutions

37. The terms of reference for this inquiry deal with ‘educational institutions that are conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed’. This is the phrase used in s 38 of the SDA. An ‘educational institution’ is defined as ‘a school, college, university or other institution at which education or training is provided’.²⁶
38. School education (primary and secondary) is compulsory for children and young people between the ages of 6 and 16.²⁷
39. Religious schools, colleges and universities have a significant role in public life in Australia. They provide education to a large proportion of the Australian public. Around 1.4 million primary and secondary school students attend a faith-based school,²⁸ and approximately 30 per cent of primary and secondary schools in Australia are faith-based.²⁹ In some remote areas, a faith-based school is the only one available.³⁰ Religious educational institutions also employ a large number of people. In 2022, non-government schools (the overwhelming majority of which are faith-based) employed approximately 173,000 full time equivalent teaching and non-teaching staff.³¹
40. Three of the 43 universities in Australia are faith-based universities: Australian Catholic University, University of Notre Dame Australia, and the University of Divinity. Other universities have affiliated residential faith-based colleges. There is also a number of tertiary faith-based colleges in Australia, including theological colleges. The Commission understands that no change is proposed by the ALRC to the status of theological colleges, which will continue to be able to rely on the exemption available to them under s 37(1)(b) of the SDA.

41. Many religious educational institutions receive a significant amount of public funding to support them in carrying out their activities. In 2021, non-government schools received approximately \$14.8 billion from the Australian Government.³² Additional funding to this sector was provided by States and Territories.³³
42. Religious educational institutions have a long history in Australia.³⁴ Over that time, they have provided education to many millions of Australians, provided parents with an increased choice of education options for their children, and contributed to the diversity of Australia's multicultural, multifaith and pluralistic society. The decisions made by religious educational institutions about the enrolment, treatment or expulsion of students; and the employment, treatment or termination of staff, have a significant impact on the lives of many Australians.

5 Proposed reforms

5.1 Removal of current exemptions in the SDA for religious educational institutions

43. Reform propositions A and B, and technical proposals 1 to 5 would remove the current exemptions available under the SDA that permit religious educational institutions to discriminate on grounds covered by the SDA, and would ensure that the exemptions in the FWA are consistent with this position. These proposals would substantially achieve the first two of the Government's reform commitments in a way that is consistent with Australia's human rights obligations.
44. The Commission supports each of technical proposals 1, 2, 3 and 5; and gives in-principle support to proposal 4.

(a) History of exemptions in s 38 of the SDA

45. Prior to 1 August 2013, s 38 of the SDA permitted religious educational institutions to discriminate:
 - against actual or potential employees or contractors by making employment and dismissal decisions on the grounds of the person's sex, marital status or pregnancy
 - against actual or potential students on the grounds of the person's marital status or pregnancy.

46. In each case, the discrimination was only permitted when the conduct was done in good faith in order to avoid injury to the religious susceptibilities of adherents of the religion or creed in relation to which the educational institution was established.
47. This exemption was proposed when the when the SDA was first being debated in 1984, in response to strong representations from private schools that said that they wanted the right to decline to employ, for example, teachers living in de facto relationships or those who became unmarried parents.³⁵ Senator the Hon Susan Ryan, Minister Assisting the Prime Minister for the Status of Women, considered that the proposed exemption was not consistent with the objectives of the SDA. She proposed that the exemption be subject to a two year sunset provision and that, in the meantime, an inquiry into the provision be conducted by the Commission.³⁶ Ultimately, the exemption was passed without a time limit attaching to it.
48. Subsequent inquiries including by the Sex Discrimination Commissioner in 1992³⁷ and the ALRC in 1994,³⁸ recommended the repeal of s 38. A submission by the Independent Teachers Federation of Australia to the Sex Discrimination Commissioner's inquiry identified concerns about the use of this exemption in relation to staff, and highlighted what it considered to be a 'double standard' in what was expected of female teachers and male teachers:

In one case a female teacher was dismissed by a Catholic Education Office three months before her marriage because she allegedly breached the conditions of her employment by sharing a house with her fiancé who was also employed by the Education Office. In another case reported to the Lavarch Committee, an application for promotion was rejected by a Catholic Education Office because the applicant's marriage status was seen as not in accord with the official teaching of the Church. (The applicant's marriage has been celebrated in the Anglican Church.)³⁹
49. Since 1984, there have been changes in social attitudes towards de facto relationships which are now seen by many as equivalent to married relationships in terms of the rights that should be accorded to de facto couples under federal law. Significantly, there is also a broad acceptance in the community that rights accruing to de facto couples are not limited to heterosexual couples. In 2007, the Commission published a report titled *Same-Sex: Same Entitlements* that identified 58 federal laws that discriminated against non-heterosexual couples. At the end of 2008, the Australian Government amended 84 laws which

discriminated against non-heterosexual couples in a wide range of areas including taxation, social security, employment, Medicare, veteran's affairs, superannuation, worker's compensation and family law.⁴⁰ In 2017, Australians voted in favour of changing the law to allow same-sex couples to marry. This demonstrated broad community acceptance that the right to marry should not be limited to heterosexual couples. The law was changed later that year to give effect to this position.

50. The exemptions in s 38 of the SDA that are currently under consideration were amended during this period of social and legal reform. In 2013, the SDA was amended to prohibit discrimination on the grounds of sexual orientation, gender identity or intersex status in a range of areas of public life, including in employment and in education.⁴¹ At the time that these protections against discrimination were inserted into the SDA, the exemptions available to religious educational institutions in s 38 of the SDA were expanded. The new exemptions permitted religious educational institutions to discriminate:
 - against actual or potential employees or contractors by making employment and dismissal decisions on the grounds of the person's sexual orientation or gender identity
 - against actual or potential students on the grounds of the person's sexual orientation or gender identity.
51. At the same time, the concept of 'marital status', including in the exemption in s 38, was amended to refer to 'marital or relationship status'. No exemptions were granted that would have permitted discrimination by religious educational institutions on the grounds of intersex status.
52. The statement of compatibility with human rights to the Bill that introduced these amendments made clear that the amendments to s 38 responded to concerns raised by religious bodies and were aimed at largely maintaining the status quo for religious educational institutions prior to the introduction of the prohibitions against discrimination on the basis of sexual orientation and gender identity. There did not appear to have been a careful evaluation of whether these exemptions were too broad or whether they were appropriate at all in light of the aims of the amending legislation:

The Bill will extend the exemption at section 38 of the SDA, so that otherwise discriminatory conduct on the basis of sexual orientation and gender identity will not be prohibited for educational institutions established for religious purpose. Consequently, the Bill will not alter the right to freedom of thought, conscience, and religion or belief in respect of the new grounds of sexual orientation and gender identity.

The Bill will not extend the exemption to cover the new ground of intersex status. During consultation, religious bodies raised doctrinal concerns about the grounds of sexual orientation and gender identity. However, no such concerns were raised in relation to 'intersex status'. As a physical characteristic, intersex status is seen as conceptually different. No religious organisation identified how intersex status could cause injury to the religious susceptibilities of its adherents. Consequently, prohibiting discrimination on the basis of intersex status will not limit the right to freedom of thought, conscience and religion or belief.⁴²

53. It is appropriate to consider in more detail the human rights impacts of the exemptions in s 38 of the SDA and whether those exemptions are necessary.

(b) Impact of discrimination on mental health outcomes of young people

54. There is considerable evidence that LGBTIQ+ children and young people experience poorer mental health outcomes and have higher risk of suicidal behaviours than their peers. These health outcomes are directly related to experiences of stigma, prejudice, discrimination and abuse on the basis of being LGBTIQ+. According to LGBTIQ+ Health Australia:⁴³

- LGBTI young people aged 16–27 years old are five times more likely to have attempted suicide in their lifetime than the general population.
- Transgender young people aged 14–25 years old are fifteen times more likely to have attempted suicide in their lifetime than the general population.
- 62.1% of LGBTQA+ young people aged 14–21 years reported having ever self-harmed.⁴⁴
- LGBTIQ people are two and a half times more likely to have been diagnosed or treated for a mental health condition in the past 12 months than the general population.

55. In 2018, the Legal and Constitutional Affairs References Committee heard extensive evidence about how the discrimination exemptions for faith-based schools in the SDA could directly impact on these adverse mental health outcomes.⁴⁵
56. The ubiquity of faith-based schools (30% of all schools in Australia, and sometimes the only available option) means that some LGBTIQ+ people will inevitably be enrolled at such schools and may come to understand their identity while at those schools. It is clearly not realistic to expect students to identify personal characteristics about themselves that may result in discrimination prior to their enrolment and to seek to avoid schools that have an exemption to the prohibition against discrimination against them.
57. Schools, whether government or non-government, are providing a public good at substantial public expense and they must be safe environments for all students to learn and develop. As the ALRC position paper notes, this is a legitimate aim that is necessary to protect the rights of students to equality and non-discrimination, education, health, privacy, freedom of conscience, belief and religion, and the rights of the child.⁴⁶

(c) *Whether exemptions relied upon by religious educational institutions*

58. Many religious schools have confirmed that they do not rely, and do not intend to rely, on some or all of the exemptions in s 38 of the SDA. For example, during the Senate Committee inquiry in 2018:
 - Christian Schools Australia, representing over 170 Christian schools throughout Australia,⁴⁷ said that: ‘our schools have never expelled a student solely on the basis of their same-sex attraction. They never have, they never will and they don’t want the right to’.⁴⁸
 - The Australian Catholic Bishop’s Conference said that: ‘Catholic schools do not discriminate unjustly against students or staff. Our schools would not expel a student just because of their sexual orientation’.⁴⁹
 - The President of the Australian Catholic Primary Principals’ Association said that he was ‘unaware of situations where we’ve actually had to use the legislation’.⁵⁰

- The Islamic Schools Association of Australia said:

The association is not calling for staff to be hired and fired on the basis of their sexuality, but they are expected to uphold the ethos and values of the school. Likewise, with students, the association is not calling for students to be discriminated against or in fact to be expelled from the school because of their particular sexuality, but by the same token the students and their families need to understand that the school will be teaching the particular values and principles of the religion.⁵¹

59. In evidence to the inquiry by the Parliamentary Joint Committee on Human Rights (PJCHR) in 2021:

- the National Catholic Education Commission said that: 'We are very clear in our position. We do not in our schools discriminate against students or staff by virtue of their personal characteristics, but we do expect our staff to operate in sympathy with the religious faith that employs them.'⁵²
- the Chair of the Religious Freedom Reference Group in the Anglican Diocese of Sydney expressed the view that: '38(3) shouldn't be repealed in its entirety because it goes too far in seeking to address the presenting problem. If there needed to be a particular restriction that says that a school can't expel a student on the basis of their sexuality or gender, that is fine, but taking out 38(3) would have unintended consequences that would go much wider than that.'⁵³
- by contrast, the Public Affairs Commission of the Anglican Church of Australia supported the removal of exemptions in the SDA 'in order to prevent expulsion, suspension or penalisation of students or staff of religious schools on the grounds of sex, sexuality and the like'.⁵⁴

60. There was limited evidence given by tertiary religious educational institutions about their position on the exemptions in the previous parliamentary inquiries. The principal of a Christian theological college told the PJCHR in 2021 that in some circumstances his institution would discriminate in employment on the basis of marital status:

Ms Celia Hammond MP: Things like divorce and extramarital relationships are not supported by certain faith bodies. If you had an employee who was divorced, what would be the approach of your particular schools or your particular organisations? ...

Rev Dr Ross Clifford: With respect to divorce, we'd look at that matter on a case-by-case basis and actually see, as far as we could, what was behind that situation. If it's a divorce because the person is living a totally inconsistent lifestyle and the partner left them because of their infidelity or whatever, that would be very different from a divorce situation where the marriage had just clearly broken down and both partners believed they could no longer live together in that capacity.⁵⁵

61. As noted above, the Commission understands that the ALRC does not propose any change to s 37(1)(b) of the SDA, which would continue to provide a broad exemption in relation to the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order. This means that theological colleges would not be prohibited from discriminating in employment on the basis of marital status.
62. The Australian Christian Higher Education Alliance (ACHEA) represents eight higher education institutions including colleges (some of which are theological colleges) and universities.⁵⁶ The Executive Director of ACHEA did not address the topic as directly as Reverend Clifford. His evidence was as follows:

The fact that they were divorced may or may not, depending on the particular context and how they have responded to that, impact their employment. It really is impossible to be clear on that. You could have a range of situations where, depending on how they responded, they may not be a suitable fit for that school anymore.⁵⁷
63. This was far from a strong endorsement of the need to retain the exemptions in ss 38(1) and (2) of the SDA relating to marital or relationship status for tertiary institutions that did not have the benefit of the exemption in s 37(1)(b).

(d) *Proportionality analysis for students*

64. As noted in paragraphs 27 and 28 above, the freedom to manifest one's religion or beliefs may be subject to limitations that are necessary to protect the fundamental rights and freedoms of others.
65. In assessing whether the proposed removal of s 38(3) of the SDA and consequential amendments to s 37(1)(d) of the SDA are proportionate to the legitimate aim of protecting the rights of students to equality and non-discrimination, education, health, privacy, freedom of

conscience, belief and religion, and the rights of the child, it is necessary to weigh a number of factors.

66. The first comprises the harms to students from maintaining the exemptions. For the reasons described above, those harms directly interfere with the ability of students to be treated with equality and with respect to their inherent dignity. These harms present acute risk to students who may be subject to discrimination on the ground of attributes protected by the SDA.
67. The second factor relates to the degree to which the removal of the exemptions would impact on the freedom of religion of members of the community of people connected to relevant religious educational institutions, including staff, other students and their parents, and whether that impact is proportionate to the legitimate aim identified above.
68. It is important to appreciate that there may be different views within a school community about these issues. For example, parents decide to send their children to religious schools for a variety of reasons. A research paper that compared a number of surveys of parents concluded that although the religious affiliation of a school was an important factor in school choice, 'it is rarely the most important factor'. For most parents who chose a non-government school, the most important factors were educational factors and perceptions of the school's environment such as its values, discipline and security.⁵⁸
69. However, for some parents, explicit religious teaching is the most important reason why they choose to send their children to a faith-based school.
70. A strong theme running through the comments of peak bodies representing faith-based schools is a distinction between not seeking to discriminate against students on protected grounds, while preserving the ability of schools to teach in accordance with their faith. In the Commission's view, these two objectives are able to be reconciled in a way that substantially protects both sets of interests. The issue of teaching in accordance with the faith of the school is considered in more detail in section 5.3 below.
71. In some cases, the concerns expressed by peak bodies representing faith-based schools extended beyond teaching, to the regulation of the conduct of students based on their protected attributes. Perhaps the clearest articulation of this was in a submission from the Australian

Association of Christian Schools which said that the exemption in s 38(3) was necessary in order for schools to be able to:

- teach in accordance with widely held Christian beliefs regarding sexuality, gender and relationships, and
- manage the school community and student behaviour in ways that are appropriate to the faith of the school.⁵⁹

72. Parents who choose a faith-based school for their children have a legitimate interest in ensuring that their children receive a high quality education that reflects their faith. As the ALRC has said, this could (and currently does) include the school providing teaching on religious beliefs about matters of sexuality and relationships, in a way that respects its duty of care to students, and accreditation and curriculum requirements.
73. Schools must also be able to impose non-discriminatory codes of conduct for students to ensure that all students are able to access the education provided by the school in a safe, supportive and mutually respectful way. This does not require exemptions in the nature of s 38(3) of the SDA.
74. At present, s 38(3) permits religious educational institutions to discriminate against a student on the ground of that student's sexual orientation, gender identity, marital or relationship status or pregnancy:
- by refusing or failing to accept the person's application for admission as a student
 - in the terms or conditions on which it is prepared to admit the person as a student
 - by denying the student access, or limiting the student's access to any benefit
 - by expelling the student
 - by subjecting the student to any other detriment.
75. For the reasons given in paragraph 56 to 57 above, the Commission considers that it is neither realistic nor appropriate to expect children to select (or remain) in a school based on whether it is willing to accept them based on their sexual orientation or gender identity.
76. Further, the Commission considers that managing student behaviour in a way that discriminates against students based on the attributes

protected under the SDA is not a proportionate response when balancing the human rights identified above. It has the real potential for serious harm to those students, and is not necessary to protect the ability of other students to receive an education that is informed by the religious values of the school.

77. The Commission supports technical proposal 1, that s 38(3) should be repealed.

(e) *Natural experiment: Queensland and Tasmania*

78. When conducting a proportionality analysis in relation to likely human rights impact of a policy proposal, policymakers will have regard to a range of relevant factors that are likely to bear on future outcomes. A strong piece of evidence is what is often referred to as a 'natural experiment' where an equivalent policy change has been made in a comparable jurisdiction with comparable conditions.
79. A natural experiment assists in a proportionality analysis because it provides an indication of the likely counterfactual: what would occur if the policy proposal were implemented?
80. In both Tasmania⁶⁰ and Queensland,⁶¹ for many years religious educational institutions have been prohibited from discriminating against students on the grounds of sexual orientation, gender identity, marital or relationship status or pregnancy. This has been the case for 25 years in Tasmania and 20 years in Queensland. As schools in these jurisdictions are required to comply with both the State and Federal laws, the more stringent discrimination protections in the State laws applied.⁶²
81. Equivalent changes have been made more recently in other jurisdictions as described in the ALRC *Cross-Jurisdictional Summary of Exceptions for Religious Educational Institutions*⁶³ (the ACT in 2018,⁶⁴ Victoria in 2021⁶⁵ and the Northern Territory in 2022⁶⁶).
82. The law in Tasmania and Queensland does not appear to have had any adverse impact on the ability of religious educational institutions to teach according to their faith. A representative of Christian Schools Australia said that there was very rarely any litigation in Queensland and Tasmania based on their broader anti-discrimination provisions. He attributed this to the fact that: 'people coming to our schools know

who we are, the nature of our schools and what is expected of them'.⁶⁷
In 2018, the former Tasmanian Anti-Discrimination Commissioner said:

there have not been significant cases brought in relation to education or employment in education in relation to the requirement not to discriminate. Indeed, in my experience I have found that the faith-based schools genuinely worked quite hard to ensure that they complied with the non-discriminatory obligations that they had. I was certainly aware of examples of schools where children who were gender-questioning or transgender were being fully included in the school and enabled to go about their day-to-day lives without being challenged in relation to that gender. I think what we saw in Tasmania was that schools can and will do what is required by the law when the law is as clear as it is in Tasmania.⁶⁸

83. The Commission notes that the Catholic Education Diocese of Cairns has recently published a thoughtful Guideline on *Inclusion of students who identify as gender diverse and/or intersex*.⁶⁹ These guidelines demonstrate how the inclusion of students can be facilitated in a way that the Diocese considers is congruent with the Catholic faith.
84. These practical experiences in Australian conditions reinforces the view that the repeal of s 38(3) of the SDA will not have a disproportionate effect on the religious freedoms of members of the communities involved with faith-based schools.

(f) *Proportionality analysis for teachers and other staff*

85. The proportionality analysis for teachers and other staff is similar to that for students.
86. ALRC technical proposal 2 is to repeal the exemptions in ss 38(1) and (2) of the SDA. These exemptions permit religious educational institutions to discriminate in the employment of staff and contract workers on the grounds of sex, sexual orientation, gender identity, marital or relationship status or pregnancy. This is one more ground of discrimination than s 38(3) in relation to students.⁷⁰ However, the scope for discrimination is narrower than in s 38(3) in relation to students. Discrimination is only permitted in relation to decisions about whether to employ a staff member or engage a contractor, or whether to terminate the employment of the staff member or the engagement of the contractor.
87. There is no current exemption that permits religious educational institutions to treat staff members differently on the grounds of their

sex, sexual orientation, gender identity, marital or relationship status or pregnancy while they are employed or contracted. This is important because it reflects an underlying norm of the SDA of non-discrimination and respect for the inherent dignity of each person. As a result, *all* people are entitled to the same terms and conditions of employment, the same opportunities for promotion, transfer, training or other benefits, and the same protection against detriments in their employment, regardless of sex, sexual orientation, gender identity, marital or relationship status or pregnancy. This protection during the course of employment applies generally and without an exception for religious educational institutions.

88. The key question, therefore, is whether teachers and other staff of educational institutions should have the same *opportunity* to be employed by a faith-based school, regardless of their sex, sexual orientation, gender identity, marital or relationship status or pregnancy; and whether they should have protections against being fired for those reasons.
89. As noted above, non-government primary and secondary schools currently employ around 173,000 teaching and non-teaching staff. 30% of all schools are faith-based schools. This is a large share of a significant industry providing a public, and publicly funded, good. The starting point should be that this industry, like any other, should provide non-discriminatory access to employment opportunities for those that have trained for this vocation unless there are particularly good reasons not to.
90. Many peak bodies representing faith-based schools have indicated that they do not want to discriminate against teachers or other staff on grounds protected by the SDA when making employment decisions. As noted in paragraph 58 above, the Islamic Schools Association of Australia said that: 'The association is not calling for staff to be hired and fired on the basis of their sexuality, but they are expected to uphold the ethos and values of the school'. Similar comments have been made by peak bodies representing other faith traditions. This submission considers in more detail in section 5.5 below what it means to uphold the ethos of a faith-based school and how this can be achieved effectively in ways that do not require discrimination on SDA grounds.
91. For present purposes, it is important to acknowledge that *some* peak bodies have said that *part* of what they understand as upholding the

ethos of a faith-based school involves requiring all staff to ‘manifest’ the faith of the school by ‘living in accordance with’ the school’s beliefs.⁷¹ This will mean different things to different institutions. To the extent that this requires staff to act in a way that is contrary to their sexual orientation or gender identity, or to hide their marriage or relationship status, it is conduct that is currently unlawful under the SDA for the reasons described in paragraph 87 above. There are good reasons for this. Employees and contractors should not be required to disown fundamental parts of their identity or to hide from others the status of their lawful relationships with their partners. This would involve a very significant burden on the staff members’ right to equality and non-discrimination, as well as other key human rights such as privacy. It is a key reason for protections of discrimination law operating generally in key areas of public life.

92. The integral connection between a person’s identity and their conduct in facing the world with that identity was succinctly summarised in *Christian Youth Camps Limited v Cobaw Community Health Services Limited* [2014] VSCA 75:
- Sexual orientation, like gender, race and ethnicity, [is] part of a person’s being, or identity. The essence of the prohibitions on discrimination on the basis of attributes such as sexual orientation, gender, race or ethnicity is to recognise the right of people to be who or what they are. ... To distinguish between an aspect of a person’s identity, and conduct which accepts that aspect of identity, or encourages people to see that part of identity as normal, or part of the natural and healthy range of human identities, is to deny the right to enjoyment and acceptance of identity.⁷²
93. One reason given for proposed restrictions on staff conduct in relation to sexuality and gender identity is the idea that they are role models for students and ‘tasked with caring for and educating children in accordance with their faith foundations’.⁷³ However, it is just as important that LGBTQ+ students are not denied role models who can demonstrate that people like them can operate successfully in faith communities. Further, the exclusion of staff from faith-based schools on SDA grounds is unlikely to assist in preparing students for interactions with adults in every other public aspect of their lives.
94. It is important to separate out these questions of identity and personal conduct from questions of what students are taught at the school and how this is done. This is discussed further in section 5.3 below.

95. As is the case with students, we already have the benefit of a 'natural experiment' when it comes to removing the exemptions for discrimination against staff on SDA grounds. Tasmania has long had prohibitions against discrimination in employment on the grounds of pregnancy, marital or relationship status, sexual orientation and gender identity (see paragraph 80 above). There have been no exemptions for religious educational institutions and this does not appear to have had any adverse impact on the on the ability of religious educational institutions to teach according to their faith (see paragraph 82 above). Similar reforms have been made more recently in the ACT, Victoria and the Northern Territory.
96. In the Commission's view, the proposed removal of ss 38(1) and (2) of the SDA is proportionate to the aim of ensuring equality of opportunity in employment for people based on their sex, sexual orientation, gender identity, marital or relationship status or pregnancy. The Commission considers that the exemption is not necessary to protect the ability of students to receive an education that is informed by the values of the religious educational institution. To the extent that the employment of staff resulted in students being exposed to people with a broader range of sexual orientations or gender identities, who were comfortable with their identities and regarded them as normal, it is likely to be a useful factor in preparing students for the way they engage with other areas of their public life, and with life after school.

(g) Consequential amendment to s 37 of the SDA

97. Technical proposal 3 is effectively a consequential proposal to 1 and 2.
98. Section 37(1) of the SDA provides that none of the discrimination provisions in Divisions 1 and 2 of the SDA affects:
- (a) the ordination or appointment of priests, ministers of religion or members of any religious order;
 - (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order;
 - (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.
99. The ALRC's substantive reform propositions A.2 and B.2 confirm that no change is proposed in relation to ss 37(1)(a)–(c). Relevantly, this means that religious educational institutions (such as theological colleges) that are responsible for training religious ministers or members of a religious order will continue to receive a broad exemption from the SDA, including in relation to employment and education. Similarly, religious educational institutions more generally will also retain the benefit of these exemptions when appointing people to perform duties connected with religious observance or practice in their institutions.
100. These exemptions are appropriate because decisions about the training and appointment of people to leadership positions in a religion and the allocation of responsibility for the conduct of rites of religious observance are fundamental to the manifestation of religion through worship, observance, practice and teaching.
101. In a submission to the Senate Committee inquiry in 2018, the Attorney-General's Department said that it is arguable that 'a body established for religious purposes' under s 37(1)(d) of the SDA does not include a religious educational institution because of the specific exemption for religious educational institutions in s 38. However, it advised that if s 38 were repealed, consideration would need to be given to the operation of the exemption in s 37(1)(d).⁷⁴
102. ALRC technical proposal 3 is a clarification that the broad language of the exemption in s 37(1)(d) does not apply to religious educational institutions. This is necessary so that the interpretation of this section is not inconsistent with the policy sought to be achieved in repealing s 38. The Commission supports technical proposal 3.

(h) *Accommodation provided by religious educational institutions*

103. Technical proposal 4 would clarify the scope of the only other remaining exemption in the SDA for 'religious bodies', namely, the exemption in s 23(3)(b) which provides an exemption for religious bodies in relation to the provision of accommodation.

104. On its face, it appears that this technical proposal would be consistent with technical proposals 1 to 3 so that the removal of the specific exemption for religious educational institutions in s 38 does not give rise to a (new) inference that religious educational institutions are covered by the definition of 'religious bodies' in s 23(3)(b) and can discriminate in the provision of accommodation in circumstances where they previously could not.
105. In particular, there seems to be no reason why religious educational institutions who provide accommodation should be able to discriminate on the basis of, say, sexual orientation or gender identity.
106. The Commission notes that there is already a separate exemption in s 34(2) of the SDA that permits educational institutions to provide single sex accommodation. Given this specific exemption relating to students at educational institutions, the usual presumption would be that the broader exemption for religious bodies under s 23(3)(b) did not apply to the provision of accommodation to students at religious educational institutions (and therefore did not permit them to discriminate on the basis of sexual orientation or gender identity).
107. The Commission has not had the benefit of considering submissions from religious educational institutions in relation to whether they currently seek to rely on s 23(3)(b) in relation to the provision of accommodation to staff. There is a suggestion in the ALRC consultation paper at [83] that boarding schools may want to restrict the provision of certain accommodation only to staff members who are single. The Paper suggests that boarding schools that are run by charities could rely on the exemption in s 23(3)(c) of the SDA. However, it may be that all boarding schools, whether or not run by charities, could discriminate in the provision of accommodation to staff members who are single by relying on the exemption in s 34(1) of the SDA.
108. With the caveat that the Commission has not had a chance to consider any submissions against technical proposal 4, it appears to be generally consistent with technical proposals 1 to 3 and worthy of support.

(i) *Amendments to the Fair Work Act*

109. Technical proposal 5 would exclude religious educational institutions from the 'religious bodies' exception in four sections of the *Fair Work*

Act 2009 (Cth) (FWA). This would confirm that the non-discrimination requirements in relation to modern awards, enterprise agreements, adverse action and termination apply generally to religious educational institutions, subject only to:

- an ‘inherent requirements’ exception⁷⁵
- exceptions in s 37(1)(a)–(c) of the SDA
- exceptions in the *Age Discrimination Act 2004* (Cth) (ADA)
- certain minimum wage provisions (not relevant to the current ALRC reference).⁷⁶

110. The relevant exemptions for religious bodies are contained in s 153(2)(b) (modern awards), s 195(2)(b) (enterprise agreements), s 351(2)(c) (adverse action) and ss 772(1)(f) and 2(b) (termination).
111. The Commission agrees that there should be amendments to the FWA that achieve consistency with the amendments to the SDA described in technical proposals 1–4.
112. The Commission considers that there are two further issues that need to be considered to ensure that technical proposal 5 is consistent with other specific reforms proposed by the ALRC.

Protections against indirect discrimination

113. In order to ensure consistency with technical proposals 1–4, technical proposal 5 should also include an amendment to ss 153 and 195 of the FWA to clarify that a modern award or an enterprise agreement covering religious educational institutions may not include terms that *indirectly* discriminate against employees (at least on SDA grounds, but preferably on all grounds described in ss 153(1) and 195(1) of the FWA).
114. The reason that this clarification is necessary is because, as identified in the ALRC consultation paper at [40], there is currently uncertainty as to whether the prohibitions on discriminatory terms in modern awards and enterprise agreements cover indirect discrimination.
115. If terms that are indirectly discriminatory on SDA grounds are included in a modern award or an enterprise agreement, then they will not be unlawful under the SDA by reason of the exemption in s 40(1)(g) of the SDA. Section 40(1)(g) provides that the prohibitions against discrimination in the SDA do not affect anything done by a person in direct compliance with a ‘fair work instrument’ as defined in the FWA. A ‘fair work instrument’ means a modern award, an enterprise

agreement, a workplace determination, or a Fair Work Commission order.⁷⁷

116. There is therefore a risk that a modern award or an enterprise agreement could include terms that indirectly discriminate against staff on SDA grounds, and would not be unlawful by reason of s 40(1)(g) of the SDA, contrary to the policy intention of, at least, technical proposal 2.
117. Further, if the conduct is not unlawful under the SDA, then adverse action against staff on these grounds may also not be unlawful given that s 351 of the FWA only applies to conduct that is not unlawful under any anti-discrimination law in force in the place where the action was taken. Section 342(3) of the FWA may have a similar effect.
118. The Commission acknowledges the real uncertainty in this area given existing decisions of the Fair Work Commission.⁷⁸ However, the Commission considers that the better view is that, properly construed, ss 153 and 195 of the FWA include a prohibition on indirect discrimination given that the section implements in part Australia's obligations under article 1 of ILO 111.⁷⁹ Indirect discrimination under ILO 111 incorporates the concept of proportionality.⁸⁰ A legislative confirmation of this position would assist in providing clarity about the operation of ss 153 and 195, would promote consistency in the application of the non-discrimination provisions in the FWA, and would support the policy objectives behind technical proposals 1–4.

Interaction between existing 'inherent requirements' test in FWA and other technical proposals

119. As noted above, technical proposal 5 would exclude religious educational institutions from the 'religious bodies' exception in four sections of the *Fair Work Act 2009* (Cth) (FWA). The proposal does not specifically deal with the separate 'inherent requirements' exceptions in each of those sections.⁸¹
120. This will need to be considered further in conjunction with technical proposals 8 to 10. Technical proposals 8 and 9 deal with amendments to the FWA to permit religious educational institutions to preference staff on the basis of religion where this is a genuine occupational requirement (and not otherwise discriminatory), and to terminate the employment of staff where this is necessary to prevent an employee from 'actively undermining the ethos of the institution'. Technical proposal 10 is that these exemptions for religious educational

institutions also be reflected in any future federal legislation dealing with discrimination on the basis of religious belief or activity.

121. Technical proposals 5 (to the extent it relates to religion) and 8 to 10 all deal with the extent to which religious educational institutions should be permitted to discriminate on the ground of religion in relation to staffing decisions and it will be important that they are consistent.

5.2 Relatives and associates

122. Technical proposal 6 is that the SDA should be amended to extend anti-discrimination protections to prohibit discrimination against students and prospective students on the grounds that a family member or carer of the student has a protected attribute.
123. This proposal responds to an important policy issue that is directly relevant to the terms of reference of the ALRC: the potential for discrimination against students based on the sexual orientation, gender identity or relationship status of their parents.
124. The Commission has long advocated for a broader reform: that the SDA be amended to prohibit discrimination against all people in the areas of public life covered by the SDA on the ground that an associate or relative of the person has an attribute protected by the SDA. In the Commission's view, it is appropriate for the ALRC to recommend such a reform as part of the current inquiry. It would address the particular policy issue identified by the ALRC, but would also avoid a partial amendment to an important provision that would introduce inconsistency into the SDA and inevitably require reconsideration at a later date.
125. It would be appropriate, and uncontroversial, to implement the broader reform now because it would reflect equivalent protections in other federal discrimination law in relation to race and disability; and would replicate already existing protections for associates in state and territory discrimination law in relation to sexual orientation, gender identity and marital or relationship status that have been in place for many years.
126. At the federal level there are two statutes that provide protection for 'associates' of a person with a protected characteristic.
127. The *Racial Discrimination Act 1975* (Cth) (RDA) prohibits discrimination against a person on the ground of their own race, colour, national or

ethnic origin or immigrant status, or on the ground of those characteristics held by a relative or associate of that person. The protection for relatives and associates applies to discrimination in relation to access to premises (s 11); land, housing and other accommodation (s 12); provision of goods and services (s 13) and employment (s 15). The RDA does not provide a definition of 'associate'.

128. The *Disability Discrimination Act 1992* (Cth) (DDA) prohibits discrimination against a person who has an associate with a disability through the operation of s 7. 'Associate' is defined in s 4 in a non-exhaustive way, to include:
 - (a) a spouse of the person; and
 - (b) another person who is living with the person on a genuine domestic basis; and
 - (c) a relative of the person; and
 - (d) a carer of the person; and
 - (e) another person who is in a business, sporting or recreational relationship with the person.
129. When the *Religious Discrimination Bill 2021* (Cth) was being considered, the Commission supported the extension of protections to people who were relatives or associates of a person with a religious belief or who engaged in a religious activity.⁸²
130. The SDA was the subject of a comprehensive review by the Senate Legal and Constitutional Affairs Committee in 2008. The Commission's submission to that inquiry included a recommendation that the SDA be amended to cover disadvantage suffered as a result of an association with a person with a protected attribute.⁸³ This review was prior to the amendments to the SDA to include protected grounds of sexual orientation, gender identity and intersex status.
131. In 2011, the Commission published a consultation report on *Addressing sexual orientation and sex and/or gender identity discrimination*. Among other things, the report noted that all state and territory anti-discrimination laws prohibited discrimination against a person where that conduct was a response to the sexual orientation of the complainant's 'associate' or 'relative'.⁸⁴ Further, most states and territories had separate provisions prohibiting discrimination on the basis of gender identity, and in each of those jurisdictions there were

also prohibitions against discrimination on the basis of the complainant's 'associate' or 'relative'.⁸⁵ Since then, the language around gender identity has been updated and made consistent across all jurisdictions other than New South Wales (that uses the term 'transgender') and Western Australia (that uses the narrower concept of 'gender history'). The recent review of the Western Australian discrimination legislation recommended that the ground of 'gender history' be expanded to 'gender identity'.⁸⁶ In all states and territories, there continues to be protections for associates in relation to all of the prohibited grounds of discrimination discussed in this paragraph.⁸⁷

132. The Commission welcomed the proposed consolidation of federal discrimination law in the exposure draft of the Human Rights and Anti-Discrimination Bill 2012 (Cth) which would have extended the protection against discrimination on all grounds (including what at that stage were proposed grounds of sexual orientation, gender identity and intersex status) to a person who was an associate of a person with a protected attribute.⁸⁸
133. Given the long history of consideration of these matters and the current extensive level of protection for associates in other federal, state and territory laws, the Commission considers that there are good reasons to make a single, simple reform to protect associates in relation to all SDA grounds.

5.3 Teaching of religious doctrine in schools

134. The ALRC notes that some stakeholders have expressed concern that the repeal of s 38(3) of the SDA could adversely affect the ability of religious schools to teach their religious beliefs.
135. The Commission agrees that religious educational institutions that conform to minimum educational standards established by law must also be able to provide religious instruction in their own faith. As set out in paragraph 30 above, this is consistent with article 13(3) of ICESCR.
136. The Commission does not consider that the current ability of religious educational institutions to teach according to their religious beliefs will be prejudiced by the proposed repeal of s 38(3) of the SDA. As a result, the Commission does not consider that any further legislative amendment is required. The Commission has previously made submissions about a legislative proposal by the Government in 2018

aimed at achieving a similar objective, noting that such changes were unnecessary.⁸⁹

137. Further, the Commission considers that technical proposal 7 may result in some unintended consequences.
138. These points are expanded on below.

(a) *No legislative amendment is required*

139. The concern expressed in the ALRC consultation paper is that the teaching by faith-based schools of ‘their doctrine or beliefs on human sexuality and relationships could be held to be discriminatory to, for example, LGBTQ+ students’.
140. The SDA makes unlawful two kinds of conduct: direct and indirect discrimination. ‘Direct’ discrimination involves treating a person less favourably *by reason of*, for example, their sexual orientation or gender identity.⁹⁰ ‘Indirect’ discrimination involves imposing a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging people with, in this case, a particular sexual orientation or gender identity.⁹¹
141. In the case of religious instruction provided equally to all students, there can be no question of direct discrimination. LGBTQ+ students are not being singled out for different treatment by reason of their protected attributes. It appears that technical proposal 7 is motivated by a concern that religious instruction may amount to *indirect* discrimination. Crucially, indirect discrimination is subject to a test of reasonableness.
142. Section 7B of the SDA provides that the imposition of a condition, requirement or practice will not amount to indirect discrimination ‘if the condition, requirement or practice is reasonable in the circumstances’. This requires a consideration of a range of factors including:
 - (a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; and
 - (b) the feasibility of overcoming or mitigating the disadvantage; and
 - (c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice.

143. As recognised by the Special Rapporteur on freedom of religion or belief, private religious schools are important in a modern pluralistic society, so that parents have the ability to choose a school for their children that will provide religious and moral education in conformity with their own convictions.⁹² Providing religious education in the context of a particular faith tradition is a fundamental part of why these schools exist and a factor that distinguishes them from government schools. The Human Rights Committee has said that the liberty of parents in article 18(4) of the ICCPR, to ensure that their children receive a religious and moral education in conformity with their own convictions, is related to the guarantees of the freedom to teach a religion or belief set out in article 18(1).⁹³ More generally, education should provide students with a broad range of perspectives, including ideas that might be challenging or controversial. The provision of education in this way is unlikely to be properly characterised as a disadvantage and is consistent with international human rights law. In any event, it is difficult to imagine that this kind of instruction, delivered in good faith, could be considered to be unreasonable if a complaint was made under s 21 of the SDA about discrimination in the area of education.
144. The experience in Queensland and Tasmania, where for decades there have been no exemptions for religious educational institutions to discriminate on the grounds of sexual orientation or gender identity reinforces the view that no further legislative amendment along the lines of proposal 7 is necessary. As Christian Schools Australia has recognised, the lack of disputes in those jurisdictions over a long period of time is because ‘people coming to our schools know who we are, the nature of our schools and what is expected of them’.⁹⁴
145. At the same time, as the UK guidance quoted by the ALRC emphasises, it is important to retain protections for students against instruction that involves ‘haranguing, harassing or berating a particular pupil or group of pupils’.
146. The Special Rapporteur on freedom of religion or belief has provided guidance about how religious instruction in schools can be provided in a way that promotes ‘inclusive education’ including respect for religious diversity and the freedom of religion or belief of others. The Special Rapporteur has also recognised that the religious beliefs of children may not be the same as the religious beliefs of their parents and that this needs to be accommodated when religious instruction is given.⁹⁵

147. Australian domestic law doesn't prescribe the way in which religious instruction is to be provided in schools and the Commission does not suggest that religious schools need to be subject to further regulation to ensure that religious instruction is delivered in the way described by the Special Rapporteur. As with the good faith teaching of religious beliefs around sexual orientation and gender identity, these are matters that require careful and sensitive handling by school authorities.

(b) *Unintended consequences*

148. Technical proposal 7 could introduce a new kind of exception into the SDA that is of uncertain scope. There is also a risk that it could make certain forms of direct and indirect discrimination lawful, regardless of whether the conduct was reasonable in the circumstances, which would run counter to the terms of reference for this inquiry.

149. The ALRC has proposed that 'the content of the curriculum (as opposed to the way it is delivered)' should not be subject to the SDA. This is based generally on ss 89(2) and 94(2) of the *Equality Act 2010* (UK), although the language used in the UK provisions is that '*anything done in connection with the content of the curriculum*' is exempt from the Act. It is not clear that the UK provision makes the distinction proposed between content and delivery.

150. The Commission considers that it would be necessary to specify the kinds of conduct in relation to the curriculum that would be exempt, rather than exempting the curriculum as a subject area. This would be consistent with the scope of other prohibitions and exceptions in the SDA, which all identify the relevant conduct and (usually) the class of persons engaging in that conduct. For example, is it proposed that the drafting of the curriculum does not amount to discrimination? If so, it may be that the relevant conduct is that of an external body and not the religious educational institutions themselves. If the proposal was that religious educational institutions should not be the subject of a complaint about the drafting of the curriculum, it may be that they would not be a proper respondent in any event.

151. More significantly, though, by exempting conduct in relation to the school curriculum from the operation of the SDA, it appears that this would then provide a licence for forms of both direct and indirect discrimination, and not just in subjects related to religion. This seems

to be an unnecessarily broad response that has the potential for unintended consequences.

152. For these reasons, the Commission does not support technical proposal 7.

5.4 Preferring staff

153. The third of the commitments of the Government in its terms of reference to the ALRC is that religious educational institutions can continue to build a community of faith by giving preference, in good faith, to persons of the same religion as the educational institution in the selection of staff. The Government has asked the ALRC what changes should be made to federal anti-discrimination laws to achieve this commitment in a manner that is consistent with Australia's international human rights obligations.

(a) Concerns expressed by religious educational institutions

154. This is an issue that is of particular importance to many religious educational institutions and was considered by the two parliamentary committees that inquired into the Religious Discrimination Bill 2021 (Cth) and related bills.
155. Religious groups that operate a large number of schools and employ a large number of teachers, typically do not seek to employ exclusively staff who are of the same faith as the school as this is unlikely to be practicable. For example, a representative of the Sydney Diocese of the Anglican Church gave evidence to a 2021 Senate Committee inquiry that:

The Sydney diocese and schools employ a wide variety of people, a wide variety of faiths and a wide variety of sexualities. ... We do not require all of our teachers to profess the Christian faith, and in fact probably only 25 per cent or 30 per cent of our teachers would identify as active, practising Christians; therefore, we have quite a diverse and inclusive teaching body across our schools.

He also said that he was aware of:

exclusive Muslim schools and Islamic schools and some Christian schools, who do require all their teachers to profess their respective faiths.⁹⁶

156. The National Catholic Education Commission gave evidence to the 2021 PJCHR inquiry that it was in favour of preferring staff and

students on the basis of religious belief in order to maintain a ‘critical mass’ of Catholic staff and students, while also welcoming people from other religious backgrounds, or none:

Our concern is to be able to ... continue to operate with a critical mass of staff and students who are in sympathy with our faith, but we continue to provide what you might call a common good, which is to educate students of any or no faith. ...

There may well be some of our own schools that preference exclusively, if I could use that word. In the main, we do not. We respect that some other faiths might. Indeed, [schools that teach in accordance with] the Jewish faith, from the previous witness, may in some instances. We would respect a faith’s ability to preference in such a way, but we wanted to point out to the committee that that’s not the reality of how we operate.⁹⁷

157. However, some faith-based schools considered that it was important that they be able to exclusively select staff who would adhere to the faith of the school in both their beliefs and their conduct. Hillside Christian College gave the following evidence to the 2021 Senate Committee inquiry:

For a Christian school, with cultural focus on a Christian environment and associated support system, the vital importance of every employee being aligned with the educational and religious objects and values of the organisation is paramount. The Christian life is not compartmentalised rather it is holistic.⁹⁸

158. The Executive Council of Australian Jewry gave the following evidence to the 2021 PJCHR inquiry:

Teachers are role models and moral examples, in addition to being educators. A religious school may wish to operate not only as a strictly educational facility but also as a community of faith, with daily prayer meetings and other religious observances, so that students have before them the example of the religion as a way of life.⁹⁹

(b) Previously articulated position of the Commission

159. The Commission made submissions to the two parliamentary inquiries in 2021 that were considering the Religious Discrimination Bill 2021 (Cth) and related bills. In doing so, it was conscious of the fact that the question of religious exemptions in anti-discrimination laws had been referred to the ALRC for inquiry.

160. The position that the Commission reached was an attempt to effectively preserve what was then the status quo across most Australian jurisdictions in relation to the employment of staff, with some additional protections for staff once they were already employed, pending the more detailed inquiry by the ALRC. At that time, most jurisdictions in Australia permitted religious educational institutions to discriminate, at least to some extent, in the selection of staff on the grounds of the prospective staff member's religious belief or activity:¹⁰⁰
- In New South Wales and South Australia, there was no prohibition against discrimination on the grounds of religious belief or activity, with the result that preferencing for all roles based on religious belief or activity was permitted (in South Australia, there is a prohibition against discrimination in employment on the grounds of religious appearance or dress, but not on the grounds of religious belief or activity).¹⁰¹
 - In Western Australia and the Northern Territory, the issue was specifically contemplated by discrimination law, and religious educational institutions were permitted to discriminate in employment on the grounds of religious belief or activity if this was done in good faith, in order to avoid offending the religious sensitivities or susceptibilities of people of the particular religion.¹⁰²
 - In Tasmania and the Australian Capital Territory, religious educational institutions were permitted to discriminate in employment on the ground of religious belief or activity, if the discrimination was intended to enable the institution to be conducted in accordance with its doctrines, tenets, beliefs or teachings.¹⁰³ In the ACT, there was an additional requirement for the institution to have a published policy in relation to the employment of staff.¹⁰⁴
 - In Queensland, religious educational institutions were permitted to discriminate in employment on the ground of religious belief or activity, in a way that was not unreasonable, if having a religious belief was a genuine occupational requirement (which the legislation suggested would be satisfied for all teachers at faith-based schools) and the person openly acted in a way that the person knew or ought reasonably to know was contrary to the school's religious beliefs in doing something connected with the person's work.¹⁰⁵

- In Victoria, religious educational institutions were only permitted to discriminate in employment on the ground of religious belief or activity if the religious belief or activity was an inherent requirement of the position and the discrimination was reasonable and proportionate in the circumstances.¹⁰⁶
161. The Commission's position was as follows:
- (a) religious educational institutions should have the ability to discriminate in employment on the ground of religious belief or activity if having a particular faith was an inherent requirement of the job (that is, the Commission supported proposed clause 39 of the Bill)
 - (b) in addition, religious educational institutions should be permitted to give preference, in good faith, to persons of the same religion as the educational institution when making decisions about who should be offered employment, provided that this was done in accordance with a publicly available written policy that:
 - (i) outlines the institution's position in relation to particular religious beliefs or activities
 - (ii) explains how the position is or will be enforced by the religious body
 - (iii) is consistently applied
 - (c) religious educational institutions should not otherwise be permitted to discriminate on the ground of religious belief or activity in employment in any of the ways described in clause 19 of the Bill (including the terms and conditions of employment or decisions about the termination of employment).
162. Proposition (a) is a standard exemption to prohibitions against discrimination in employment, common across anti-discrimination laws at the federal, state and territory level. This would permit religious educational institutions to discriminate in employment on the basis of religious belief or activity where this was an inherent requirement of the role. For example, it would permit discrimination for roles involving the teaching, observance or practice of a religion.
163. The 'inherent requirements' or 'genuine occupational qualification' exceptions for discrimination in employment are well established. For example, under the SDA, it is permissible to discriminate in employment on the basis of sex if it is a 'genuine occupational

- qualification' to be of a particular sex.¹⁰⁷ Examples include jobs involving the conduct of searches of the clothing or bodies of persons of a particular sex, and jobs involving the fitting of clothing for persons of a particular sex where it is necessary for the employee to be of a particular sex in order to preserve the person's decency or privacy.¹⁰⁸
164. Similarly, under the DDA, it is permissible to discriminate in employment on the basis of disability if a person with a disability is unable to carry out the inherent requirements of a particular job as a result of their disability, even if the employer were to make reasonable adjustments for them.¹⁰⁹
 165. Under the ADA, it is permissible to discriminate in employment on the basis of age if the person is unable to carry out the inherent requirements of the particular employment because of their age.¹¹⁰
 166. The 'inherent requirements' test appears in article 1 of the International Labour Organisation *Convention No. 111 Concerning Discrimination in Respect of Employment and Occupation* (ILO 111). It applies as an exception when the Commission is inquiring into complaints about discrimination in employment on the basis of religion or irrelevant criminal record.¹¹¹ It also applies as an exception to the various discrimination provisions in the FWA, including on the basis of religion.¹¹² In each case, those provisions are based on Australia's obligations under ILO 111.
 167. Propositions (b) and (c) responded to the concerns expressed by religious educational institutions that they wanted to be able to preference people of the same religion in order to build a community of faith within the institution. To some extent there is a 'self-selection' process that occurs when teachers apply to work at faith-based schools that reflect their own faith.¹¹³ This is likely to lead organically to the building of faith communities. However, faith-based schools also expressed the desire to positively select staff members from an available pool of applicants based on their religious beliefs.
 168. When being of a particular faith is an inherent requirement of the job (as per proposition (a)), then it would be legitimate for a school to ask prospective teachers about their faith and to use that information when assessing whether to employ the person. When being of a particular faith is not an inherent requirement of the job, asking job applicants about their faith will interfere with their right to privacy. Further, preferencing the recruitment of some staff members based on

their faith will almost always involve a distinction between those successful applicants and other unsuccessful applicants who are not of that faith. This has the potential to interfere with a number of rights of those applicants who are not preferred, including rights to equality and non-discrimination on the grounds of their belief, and the right to work.

169. A key question is whether the burdens on the rights of the unsuccessful applicants are proportionate to the legitimate aim, recognised by article 13(3) of ICESCR, of establishing and maintaining a school based on a particular faith tradition. The answer to this question cannot be answered in the abstract and needs to take into account the particular characteristics of the Australian education system, including the options available to people for employment. The provision of education is a public good and schools, including faith-based schools, are significant employers. If the preferencing of staff members based on faith meant that prospective qualified teachers were unable, or would find it difficult, to obtain employment in their chosen field, it is likely that the burden on their rights could not be justified. However, there are a number of factors that militate against this outcome. First, while faith-based schools make up a significant proportion of all schools, there are many more schools (70%) that are not faith-based. Secondly, the faith traditions responsible for operating the two largest segments of faith-based schools (Catholic and Anglican) tend to employ a significant number of people who are not of those faiths. These factors tend to suggest that prospective teachers and other staff members would have other employment options available to them. This is a simple macro analysis and does not take into account geographic factors, for example, regions where a faith-based school is the only one available. Nevertheless, the interim view taken by the Commission was that the burdens on prospective staff members who were not already employed by a religious educational institution could be justified as proportionate to the aim identified above because of the benefit to schools in being able to attract prospective staff that were likely to be supportive of the educational mission of the school.
170. In the Commission's view, the balance shifted once staff were employed. While faith-based schools could legitimately seek to prefer staff of their own faith in seeking to build a community of faith, it would be inappropriate to make decisions about the way in which staff

were treated while employed, or about whether they should continue to be employed, based on their religious belief or activity, if their religious belief or activity was not an inherent requirement of the role.

171. The burdens on staff who are already employed are much more significant, and the justification for imposing them is much weaker. The key rights of staff members in this situation are their freedom of thought, conscience and belief (article 18 of the ICCPR), their right to work (article 6 of ICESCR) and their right to just and favourable conditions of work (article 7 of ICESCR). As noted earlier, the right to have or adopt a religion or belief are absolute rights. Article 18(2) of the ICCPR provides that no-one shall be subject to coercion which would impair their freedom to have or adopt a religion or belief of their choice. If a person is employed in a role for which having a particular religious belief is an inherent requirement, and the person ceases to hold that belief, the employer may be justified in responding to that. However, where having a religious belief is not an inherent requirement of the role, it would be fundamentally at odds with the individual freedom of belief of the staff member to cause them detriment in their employment or to terminate their employment on the basis of their religious belief or activity, including on the basis that their beliefs had changed. Once a person has already been employed, decisions to terminate their employment impact much more significantly on their rights. For example, the staff member may have moved to take up the position, or rearranged other aspects of their life in order to work in the role. The loss of employment may have significant adverse impacts on them and their family. An interference with the vested rights of employees requires a far greater justification. When the reason for the interference is the religious belief or activity of the staff member, and this is not an inherent requirement of the role, the Commission's view is that this interference cannot be justified as proportionate. This view is reinforced by the fact that there are other ways of managing staff behaviour (discussed in section 5.5 below) to ensure that they respect the religious ethos of the school, that do not involve imposing a detriment on the basis of religious belief or activity.
172. The combination of the Commission's proposals (b) and (c), which permitted preferencing based on religion at the point of employment, but did not permit discrimination thereafter, involved a narrower scope for religious educational institutions to discriminate on the basis of religion and belief in employment than was proposed in the Religious

Discrimination Bill 2021. It also involved a narrower scope for religious educational institutions to discriminate on the basis of religion and belief in employment compared with the position in all States and Territories other than Victoria. However, it was broadly similar to the position in at least half of those jurisdictions (Queensland, Tasmania, the ACT and the Northern Territory) when it came to discrimination against students.¹¹⁴ Those four jurisdictions permit preferencing of students at admission on the ground of religious belief or activity, but do not permit discrimination thereafter. The policy reasons for this stance, particularly in supporting individual freedom of religion and belief and the potential for this to change over time, supports an equivalent limitation in relation to staff.

173. Of course, it remains appropriate for religious educational institutions to require staff to adhere to reasonable codes of conduct. This issue is considered in more detail in section 5.5 below.

(c) *Subsequent developments*

174. Since the 2021 inquiries into the Religious Discrimination Bill 2021, there have been a number of relevant legislative and law reform developments.
175. The Northern Territory has amended the *Anti-Discrimination Act 1992* (NT) to remove the exemption for religious educational institutions in s 37A to discriminate in employment on the grounds of religious belief or activity. Following this amendment (which has not yet commenced), religious educational institutions will only be able to discriminate in employment on the basis of religious belief or activity if the discrimination is based on a genuine occupational qualification (existing s 35(1)(b)).
176. The Northern Territory amendment brings its law into line with the Victorian provision discussed in paragraph 160 above.
177. As the ALRC notes in its consultation paper, law reform bodies in Queensland and Western Australia have also recommended equivalent changes to their laws.¹¹⁵ If amendments were made in light of those recommendations, then half of Australia's States and Territories would have exemptions for religious educational institutions in relation to employment that were equivalent to those in Victoria.

(d) *ALRC technical proposal 8*

178. In the current legislative environment, there is no Religious Discrimination Act and the only judicially enforceable protections against religious discrimination at the federal level are in the FWA. As a result, the ALRC has focused first on these provisions when considering how the ‘preferencing’ aim of the government can be achieved in a way that is consistent with human rights. In broad terms, the relevant provisions of the FWA deal with:
- a prohibition on discriminatory terms in modern awards (s 153)
 - a prohibition on discriminatory terms in an enterprise agreement (s 195)
 - a prohibition on ‘adverse action’ against an employee for a discriminatory reason (s 351)
 - a prohibition on termination of employment for a discriminatory reason (s 772).
179. In each case, religion is one of the prohibited grounds of discrimination. In each case, there are exceptions to the prohibition where the discrimination:
- is based on the inherent requirements of the position; or
 - is done by a religious body, in good faith, to avoid injury to religious susceptibilities.
180. Technical proposal 8 is that the FWA should be amended such that a term of a modern award or enterprise agreement does not discriminate merely because it gives more favourable treatment on the ground of religion to an employee of an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, where:
- the treatment relates to the selection or promotion of employees
 - participation of the employee in the teaching, observance or practice of religion is a genuine occupational requirement, having regard to the nature and ethos of the institution
 - the treatment does not constitute discrimination on any other ground prohibited by ss 153(1) or 195(1) respectively, and
 - the treatment is proportionate in all the circumstances.

181. The Commission understands that this proposal would, for religious educational institutions, replace the existing exceptions described in paragraph 179 above. Certainly, it would be consistent with the ALRC's proposal to replace the 'religious bodies' exceptions, and the 'inherent requirements' exceptions to the extent that the later provisions permit discrimination on SDA grounds or on the basis of religion. Some consideration may need to be given to whether other inherent requirements exceptions in federal discrimination law (see paragraphs 164 and 165 above) can still be relied on by religious educational institutions in the context of the FWA.
182. The Commission considers that technical proposal 8 is a thoughtful and carefully constructed proposal that provides useful guidance as to how a preferencing scheme based on 'genuine occupational requirements' could operate. In particular:
- it focuses on positive treatment in selection and promotion of staff based on their religious belief (while the question of termination is addressed in proposal 9)
 - it uses the language of 'genuine occupational requirement' which is also a positive framing (compared with the language in the DDA and ADA of an inability to carry out the inherent requirements of a position)
 - while the focus is on whether 'teaching, observance or practice of religion is, genuinely, a part of the role',¹¹⁶ there is also an acknowledgement that this assessment must be made 'having regard to the nature and ethos of the institution' and that '[f]or some educational institutions, religion is infused through all school life, for others it is taught and practised separately from the other aspects of education'¹¹⁷
 - as a result, it is a practical test that is flexible in the circumstances while also providing an objective standard for assessment
 - importantly, in adhering to the terms of reference of the inquiry, it confirms that preferencing based on religious belief cannot be used as a proxy to discriminate based on SDA grounds
 - it limits the discrimination to what is proportionate in the circumstances.
183. While technical proposal 8 does not permit preferencing of staff more generally on the basis of religious belief or activity, it operates in

concert with technical proposal 9 to impose requirements on all staff to respect the religious ethos of the educational institution. In this way, it aims to protect the religious ethos of the institution, not through staff selection, but through requirements on all staff not to ‘actively undermine’¹¹⁸ that religious ethos. This test is considered in more detail in section 5.5 below.

184. A mechanism for preferencing staff based on genuine occupational requirements, combined with a mechanism for ensuring that all staff at a religious educational institution respect the religious ethos of the institution, appears to be an alternative way in which to achieve an appropriate balance between protecting the human rights of prospective and actual staff members and the ability to establish and maintain an educational institution based on a particular faith tradition.
185. The ALRC proposal in relation to the limits on preferencing has support in European discrimination and human rights law. For example, it reflects Directive 2000/78/EC of the Council of the European Union dealing with ‘establishing a general framework for equal treatment in employment and occupation’. Article 4(2) of that Directive provides that States may authorise religious bodies to discriminate in relation to ‘occupational activities’ on the basis of a person’s religion or belief ‘where, by reason of the nature of these activities or the context in which they are carried out, a person’s religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation’s ethos’.
186. The interpretation of article 4(2) was considered by the Court of Justice of the European Union (CJEU) in the case of *Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV*.¹¹⁹ Vera Egenberger had responded to a job advertisement published by Evangelisches Werk. The job involved producing a report on the *International Convention on the Elimination of All Forms of Racial Discrimination*. One of the criteria in the job advertisement was that applicants must be a member of a Protestant church and applicants were required to state their church membership in their application. Ms Egenberger was not a member of a church. She applied for the job and was shortlisted but was ultimately not invited for an interview. Evangelisches Werk argued that whether religion or belief was a legitimate occupational requirement depended only on the self-perception of the religious organisation.

187. The CJEU was asked by the Federal Labour Court in Germany to rule on the interpretation of article 4(2). The CJEU said that the objective of article 4(2) is ‘to ensure a fair balance between the right of autonomy of churches and other organisations whose ethos is based on religion or belief, on the one hand, and, on the other hand, the right of workers, inter alia when they are being recruited, not to be discriminated against on grounds of religion or belief, in situations where those rights may clash’.¹²⁰
188. The CJEU held that the question of whether religion or belief is a ‘genuine, legitimate and justified occupational requirement’ is a standard that is subject to judicial review. This does not involve an inquiry into whether the ethos of the religious organisation is legitimate. Rather, it examines whether the requirement ‘is necessary and objectively dictated, having regard to the ethos of the church or organisation concerned, by the nature of the occupational activity concerned or the circumstances in which it is carried out’ and whether it complies with the principle of proportionality.¹²¹ The substantive question of whether there was a breach of article 4(2) in this case was left to the German court to determine.

(e) *Positive discrimination*

189. When the Religious Discrimination Bill 2021 (Cth) was being debated, the Commission supported the inclusion in that Bill of a provision that allowed religious bodies to engage in ‘positive discrimination’ in certain circumstances. Clause 10 of the Bill provided that it is not discriminatory to engage in reasonable conduct, consistent with the purposes of the Bill, that is either:
- intended to meet a need arising out of a religious belief or activity of a person or group, or
 - intended to reduce a disadvantage experienced by a person or group on the basis of their religious beliefs or activities.
190. This provision was based on an understanding of the need for substantive, rather than merely formal, equality. It recognised that there is not currently a level playing field for everyone in society. Some people face individual disadvantage as a result of attributes that are personal and intrinsic to them, and some groups face structural barriers to equal participation in public life. Discrimination legislation needs to address both the prevention of negative conduct that causes

disadvantage, and the facilitation of positive conduct that is directed towards achieving equality.

191. Equivalent provisions are contained in each of the other federal discrimination Acts, described variously as ‘special measures’ or ‘positive discrimination’.¹²² They indicate that differential treatment (here, on the basis of religious belief or activity) is permissible, provided that it is directed towards the achievement of substantive equality in the enjoyment of human rights.
192. Provisions permitting positive discrimination can assist in compliance with article 27 of the ICCPR which provides that States must ensure that ethnic, religious and linguistic minorities have the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.
193. One example given in the Religious Discrimination Bill was that a residential aged care facility, retirement village or hospital would not engage in discrimination by providing services to meet the needs of minority religious groups, including dietary, cultural or religious needs. In the case of a Jewish hospital or aged care facility, it would not amount to discrimination to provide kosher food, or prayer facilities to Jewish patients and clients, or to observe Jewish holidays. A provision of this kind may also assist in ensuring that religious and culturally specific services are able to continue to be provided in faith-based schools.
194. While a provision of this kind may fall within the scope of technical proposal 14 (future reforms) rather than technical proposal 8, it may assist in the overall assessment of the proportionality of the measures proposed by the ALRC in combination.

5.5 Requirements to respect religious ethos

195. The Religious Freedom Review received a large number of submissions on behalf of faith-based schools dealing with the importance of being able to maintain the ‘religious ethos’ of the school. It appeared that this concept did not necessarily require all staff to be of the same religion (although, as noted above, some schools emphasised the importance of having a ‘critical mass’ of co-religionists in order to foster this ethos, and this was a factor in the Commission’s previous recommendation in relation to staff preferencing described in

paragraph 161 above). Instead, it meant that the school was a supportive environment in which religious principles could be taught, that staff respected the ability of the school to teach those principles and that they did not take any active steps to ‘undermine’ that religious ethos.¹²³

196. The Commission agrees that schools should be able to require staff to respect the religious ethos of the school, conceived in that sense. However, it considers that:
- there are already mechanisms in place to ensure that this occurs
 - a reasonable requirement to respect the religious ethos of the school should not require exceptions from discrimination law or exceptions to existing non-discrimination provisions in the FWA
 - a new exception permitting termination of staff on the grounds that it was ‘necessary to prevent an employee from actively undermining the ethos of the institution’ is likely to generate uncertainty, including because of the potential for different understandings of what it means to undermine the ethos of an institution.
197. As a result of these factors, the Commission does not support technical proposal 9.

(a) *Existing mechanisms are sufficient*

198. There are two existing sets of obligations that employees owe to their employers which are sufficient to ensure that they respect the religious ethos of a faith-based school, which is one of the defining features of such a school.
199. The first set of obligations arises under the common law: principally the common law duty of loyalty and fidelity or of good faith. All employees have an obligation to serve their employer faithfully, and this duty is implied into every employment contract to the extent that it is not expressly dealt with.¹²⁴ Public comments by an employee that disparage their employer can constitute a breach of this implied duty of good faith. A breach of the duty of good faith is a breach of the employment contract and can be a reason for termination of employment. In addition, senior staff at a school may also have common law fiduciary obligations to the school.¹²⁵
200. The Independent Education Union of Australia is the federally registered union that represents staff, including teachers, principals

and support staff in faith-based and community independent schools throughout Australia. It regularly acts for staff members in employment disputes with schools. The IEUA gave evidence to the 2018 Senate Committee inquiry that, based on its experience, the common law requirement of fidelity and good faith 'is sufficient to address a situation where a staff member is alleged to have acted in a manner contrary to the ethos and fundamental principles of a school'.¹²⁶

201. The second set of obligations arises through the statutory scheme established under the FWA. Schools, along with many other institutions in the national workplace relations system, will require their staff to adhere to codes of conduct. Those codes of conduct are often incorporated by reference into an enterprise agreement. When an enterprise agreement is registered under the FWA, the terms of the agreement have statutory force and apply to all employees.¹²⁷
202. Codes of conduct usually describe in some detail what is expected of staff and can be tailored to the individual circumstances of the particular institution. Relevant terms of a code of conduct at one (non-faith-based) educational institution recently considered by the High Court required staff, among other things, to:
 - behave in a way that upholds the integrity and good reputation of the institution, and
 - treat fellow staff members, students and members of the public with honesty, respect and courtesy, and have regard for the dignity and needs of others.¹²⁸
203. Providing religious education in the context of a particular faith tradition is a fundamental part of why faith-based schools exist, as recognised in article 13(3) of ICESCR, and a factor that distinguishes them from government schools. The Commission considers that codes of conduct that required staff to respect the ability of the school to teach in accordance with that faith would generally be considered reasonable in the circumstances.
204. Section 195 deals with discriminatory terms in an enterprise agreement. A discriminatory term is an unlawful term, and the Fair Work Commission must be satisfied that an enterprise agreement does not include any unlawful terms when determining whether to approve it.¹²⁹ A term of an enterprise agreement is a discriminatory term to the extent that it discriminates against an employee on the basis of

religion. The Commission understands that technical proposal 9 is aimed at providing a further exception to permit employers to discriminate on the basis of religion (only) to prevent employees from actively undermining the religious ethos of the institution.

205. A reasonable code of conduct that required staff to respect the religious ethos of a faith-based school would not include provisions that involved direct discrimination against people of other faiths or no faith, and provisions involving direct discrimination on the ground of religion could not be validly incorporated into an enterprise agreement. It is possible that a code of conduct may include terms for the benefit of members of a particular religion, particularly minority religious groups, that are necessary to achieve substantive equality, but these would be permitted under s 195(4) of the FWA. In general, however, to the extent that a code of conduct requiring respect for the religious ethos of a school had a discriminatory impact on the basis of religion, it is likely to involve indirect discrimination: standards of behaviour that apply generally but that may impose additional burdens on those of a different faith or no faith.
206. The ALRC has noted that s 195 of the FWA may not prohibit indirect discrimination.¹³⁰ For the reasons set out in paragraphs 113 to 118 above, the Commission considers that it would be appropriate to clarify that a modern award or an enterprise agreement covering religious educational institutions may not include terms that indirectly discriminate against employees (at least on SDA grounds, but preferably on all grounds described in ss 153(1) and 195(1) of the FWA).
207. In the Commission's view, the ordinary test of reasonableness (or proportionality) is an appropriate standard by which to judge codes of conduct that require staff to respect the religious ethos of religious educational institutions and is likely to support them. Any test of proportionality would take as its starting point the legitimate aim of establishing and maintaining specific faith-based schools. It would then consider whether any burden on the freedom of religion or belief of staff members in requiring them to teach in a way that is consistent with that faith, and not undermine the ability for that teaching to occur, was necessary for those schools to continue to operate as faith-based schools and proportionate to the achievement of that aim.

(b) *Further exceptions from discrimination law are not required*

208. As noted above, the Commission understands that one of the premises of technical proposal 9 is that the obligation on staff not to undermine the ethos of the institution must not constitute discrimination on any ground other than religion (including SDA grounds). This is an important point and is consistent with relevant human rights caselaw as described below.
209. A staff member cannot be said to undermine the ethos of the school because of who they are. As described in section 5.1(f) above, this protection against discrimination must also extend to conduct which accepts an aspect of a person's identity, such as their sexuality or gender identity, or 'encourages people to see that part of their identity, as normal, or part of the natural and healthy range of human identities'.¹³¹ To do otherwise would undermine the commitments given by the Government as described in its terms of reference for this inquiry, and ALRC Propositions A and B.
210. In *Schüth v Germany*, the European Court of Human Rights (ECtHR) found that an interference with private life (in that case, marital or relationship status) could not be justified on the basis of a perceived impact on the reputation of a Church community. Mr Schüth had been employed as an organist in a parish church in Essen for 10 years. He separated from his wife and started a new relationship with another woman. He was required to disclose aspects of his civil status to his employing Church as part of Germany's wage-tax card system. The Church terminated his employment on the basis that he had breached his duty of loyalty to the Church by committing adultery. Following the termination of his employment, Mr Schüth and his wife divorced. The Court held that German authorities had failed to weigh Mr Schüth's right to private life in a way that was compatible with article 8 of the European Convention on Human Rights (ECHR).¹³²
211. The ECtHR noted that the concept of 'private life' in article 8 of the ECHR covers:
- the physical and moral integrity of the person and sometimes encompasses aspects of an individual's physical and social identity, including the right to establish and develop relationships with other human beings The Court further reiterates that elements such as gender identification, names, sexual orientation and sexual life fall within the personal sphere protected by Article 8.¹³³

212. Any claim that staff members of a faith-based school have undermined the religious ethos of the school must relate to the conduct of staff members *as employees*. It should not extend to their conduct in their private life or to personal views that do not impact on their work. In *Lombardi Vallauri v Italy*, the ECtHR considered the interaction between the right to freedom of expression under article 10 of the ECHR and the ability of a religious educational institution to ensure that it provided education in accordance with its religious convictions. Mr Lombardi had been lecturing in legal philosophy at the Faculty of Law in the Catholic University of the Sacred Heart in Milan for more than 20 years on a rolling annual contract. In 1998, the faculty refused to accept his application for a further contract on the basis of a representation from the Congregation for Catholic Education that Mr Lombardi held views that ‘were in clear opposition to Catholic doctrine’ and that ‘in the interests of truth and of the well-being of students and the University’ he should no longer teach there. No further reasons were provided for this view. The case was decided primarily on procedural fairness grounds. In particular, the University had not asked which of Mr Lombardi’s views allegedly were contrary to Catholic doctrine and, importantly, the University had not sought to investigate the link between the views Mr Lombardi had allegedly expressed and his teaching work. This indicates that there was a burden on Mr Lombardi’s rights to freedom of expression, and the question of whether that burden was proportionate would have required an assessment of the *link* between the expression of his views and his teaching work.¹³⁴

(c) *Uncertainty about the scope of ‘actively undermining the ethos of the institution’*

213. It is consistent with the terms of reference for this inquiry and Propositions A and B in the ALRC consultation paper that maintenance of the ethos of a religious educational institution cannot extend to discrimination on SDA grounds, including the regulation by institutions of the private lives of their staff.

214. For some faith-based schools, this will not pose any problems. For example, Catholic Education in the Diocese of Cairns, responsible for 30 schools and colleges, has published a policy stating that ‘inclusive practices are fundamental to the ethos of Catholic schools and form part of the pastoral, spiritual, intellectual, physical, cultural and social

development of all students'.¹³⁵ It identifies a number of principles of inclusion, that include:

- Practice that is informed by Catholic social teaching, legislative requirements, educational philosophy and societal expectations.
- The uniqueness and the diversity of students as children of God.
- The need for belonging within a community underpinned by respectful relationships.
- A whole school approach to planning, curriculum development and school organisation.
- Access to differentiated resources and learning opportunities, and reasonable adjustments that enable all students to engage purposefully and experience learning success.¹³⁶

215. This view of the ethos of the school that emphasises inclusion and respect for diversity would not require any further exception for it to be consistent with s 195 of the FWA.

216. Evidence from the Anglican Bishop of South Sydney to the 2021 Senate inquiry was as follows:

There would be many gay teachers in Anglican schools. We require all of our teachers to undertake that they support the ethos of the school. We don't require the signing of a statement of faith that articulates particular beliefs, and heterosexual marriage is not one of those things that we require. There are many gay teachers in Anglican schools who nonetheless teach in accordance with the ethos of the school.¹³⁷

217. A representative of the Islamic Schools Association of Australia told the 2018 Senate inquiry:

The association is not calling for staff to be hired and fired on the basis of their sexuality, but they are expected to uphold the ethos and values of the school.¹³⁸

218. Both of these statements appear to indicate that teaching in accordance with the ethos of the school is not inconsistent with non-discrimination on SDA grounds. They do not appear to indicate that any further exemption from the FWA is required.

219. However, for other schools, the way that the 'ethos' of the school is described appears to include regulation of not only the way that staff do their jobs, but also how they conduct their lives outside of the school. For example, a representative of Christian Schools Australia gave evidence to the 2018 Senate inquiry that:

For our schools, we generally take the pretty clear view that there is a biblical truth around sexuality, a biblical truth around sexual conduct. That's a traditional, historical view. And there's a traditional, historical view around marriage that our schools would generally hold to. We have got staff in our schools who have indicated to the school leadership that they're same-sex attracted, but they take the view that it's not what God's best plan is for them. It's a struggle they have, but they don't accept it, they don't try to live it out, they don't try to be or identify as gay. They're struggling with same-sex attraction. Those teachers are within our schools now, and they're working within the confines of the doctrines of those particular schools. So those situations do exist ...

And we'd say, for those staff [who are same-sex attracted], that there are lots of other schools that they can seek employment in. No-one's forcing people to come and work in our schools. We're clear, we're explicit, about our faiths and beliefs and the doctrines and tenets we hold to, and people have choices, whether they come into our schools as parents or staff.¹³⁹

220. In the Commission's view, these kinds of requirements imposed on staff, that they deny or repress their sexual orientation or leave the school, are inconsistent with the commitments given by the Government in relation to removing discrimination, as set out in the terms of reference for this inquiry, and should not be licensed through a view about what it means to maintain the religious ethos of a school.
221. As a result of this range of different conceptions of what it means to actively undermine the ethos of a religious educational institution, the Commission suggests that this should not become a freestanding positive exemption from the non-discrimination protections in the FWA. The range of meanings attributed to this concept mean that it is not sufficiently precise to be used as a legal test. For the reasons described earlier in this section, the Commission considers that the religious ethos of faith-based schools can be sufficiently protected within the current framework of employment and workplace relations laws.

6 Consequential reforms

6.1 Inquiries by Australian Human Rights Commission

222. Technical proposal 11 is that the *Australian Human Rights Commission Act 1986* (Cth) should be amended so that religious educational institutions are subject to the Act.

223. The ALRC consultation paper identifies two areas of potential concern:
- inquiries into discrimination in employment under Part II, Division 4 of the AHRC Act
 - the new power to conduct inquiries into systemic unlawful discrimination under Part II, Division 4B of the AHRC Act.
224. The AHRC Act distinguishes in s 3 between ‘discrimination’ and ‘unlawful discrimination’. ‘Unlawful discrimination’, broadly speaking, refers to discrimination under the four federal discrimination Acts: *Age Discrimination Act 2004* (Cth), *Disability Discrimination Act 1992* (Cth), *Racial Discrimination Act 1975* (Cth) and *Sex Discrimination Act 1984* (Cth). ‘Discrimination’ refers to certain kinds of discrimination in employment under the International Labour Organisation *Convention No. 111 Concerning Discrimination in Respect of Employment and Occupation* (ILO 111).
225. If a person makes a complaint to the Commission of ‘unlawful discrimination’, the Commission has the function of conducting an inquiry and attempting to conciliate that complaint.¹⁴⁰ Provisions relating to this conciliation function are in Part IIB, Div 1 of the AHRC Act. If the complaint cannot be conciliated and is terminated, the complainant may be able to bring proceedings in the Federal Court or Federal Circuit and Family Court under Part IIB, Div 2 of the AHRC Act. There is no exemption for religious educational institutions in relation to complaints of unlawful discrimination, whether at the conciliation stage or at the court stage.
226. If a person makes a complaint to the Commission of ‘discrimination’ in employment under ILO 111, the Commission again has the function of conducting an inquiry and attempting to conciliate that complaint.¹⁴¹ This is described in the AHRC Act as the Commission’s function ‘relating to equal opportunity in employment’ and is dealt with in Part II, Div 4. If the complaint cannot be conciliated, and the Commission is of the opinion that the conduct complained of amounts to discrimination, the Commission may provide a report to the Attorney-General. However, the complainant has no right under the AHRC Act to commence court proceedings based on a complaint of ILO 111 discrimination.
227. The grounds of ‘unlawful discrimination’ and ILO 111 discrimination overlap. In practice, where a complaint is covered by both definitions, the Commission usually treats the complaint as one of unlawful discrimination because this has the potential for justiciable remedies

for the complainant. The grounds of ILO 111 discrimination (as amended by the Australian Human Rights Commission Regulations 2019 (Cth)) cover some grounds of discrimination that are not currently unlawful. These include 'irrelevant criminal record' and 'religion'.¹⁴²

228. The definition of ILO 111 'discrimination' contains an exception for any distinction, exclusion or preference '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'. In practice, this exception will only apply to the grounds of discrimination that are not otherwise unlawful (particularly 'irrelevant criminal record' and 'religion').
229. The lack of justiciable remedies for ILO 111 discrimination make it an unsatisfactory complaint pathway. The Commission has advocated for two reform proposals that would remove the need for a separate ILO 111 discrimination pathway:
- First, the Commission has consistently and strongly supported the introduction of enforceable protections against religious discrimination for all people in Australia.¹⁴³ If religious discrimination were made unlawful, complaints to the Commission about religious discrimination could be brought within the definition of 'unlawful discrimination' and dealt with under Part IIB of the AHRC Act.
 - Secondly, the Commission has advocated for 'irrelevant criminal record' to be included as a protected attribute in the 'unlawful discrimination' jurisdiction of the Commission.¹⁴⁴
230. If those two changes were made, the Commission's view is that the ILO 111 complaints jurisdiction of the Commission could be repealed.¹⁴⁵ Pending those reforms, the Commission does not consider that it is necessary to amend the scope of the ILO 111 complaints jurisdiction by limiting the exemption available to religious institutions. This should be dealt with comprehensively as part of future reforms to introduce of enforceable protections against religious discrimination.
231. In December 2022, the AHRC Act was amended to give the Commission a new function of conducting inquiries into complaints of systemic unlawful discrimination.¹⁴⁶ Systemic unlawful discrimination is defined as unlawful discrimination that affects a class or group of persons and

is continuous, repetitive or forms a pattern.¹⁴⁷ In the Commission's view, it is clear that its functions in relation to systemic unlawful discrimination relate directly to the definition of 'unlawful discrimination' and not the definition of ILO 111 'discrimination'. This view is reinforced by the separate, pre-existing function of the Commission to conduct inquiries into 'any systemic practice' that may amount to ILO 111 discrimination.¹⁴⁸ The Commission's power to conduct an inquiry into systemic unlawful discrimination is therefore not excluded when it comes to conduct by religious educational institutions.

232. The way in which the distinction between 'discrimination' and 'unlawful discrimination' is drafted has the potential to mislead. In particular, the definition of 'discrimination' in s 3 appears to apply throughout the Act 'except in Part IIB'. It appears that this way of distinguishing the two concepts was selected because the substantive provisions about redress for unlawful discrimination are contained in Part IIB (while the substantive provisions about inquiries into ILO 111 discrimination are in Part II, Div 4). However, there is also a reference to 'unlawful discrimination' in s 11(1)(aa), which is not in Part IIB but could only be sensibly interpreted as having the same meaning as in Part IIB.
233. The new provisions relating to 'systemic unlawful discrimination' are not in Part IIB. The Commission would have no objection to an amendment to the definition of 'discrimination' in s 3 of the AHRC Act, for the purpose of clarification, that made clear that the ILO 111 definition of 'discrimination' also did not apply in Part II, Div 4B (Functions relating to systemic discrimination). For completeness, any such amendment may also need to pick up s 11(1)(aa) and the new s 11(3C) of the AHRC Act.

6.2 Temporary exemptions

234. Technical proposal 12 is that the Commission should review its guidelines for temporary exemptions under the SDA in light of the proposed legislative changes.
235. The Commission may grant a temporary exemption to a person for up to 5 years from the operation of the SDA.¹⁴⁹ The Commission has published guidelines on its website that set out how it processes applications for temporary exemptions.¹⁵⁰ In general, the Commission will consider:

- whether an exemption is necessary (and, in particular, whether the conduct may otherwise be a ‘special measure’ under s 7D of the SDA)
 - the objects of the SDA (in particular, the objects of giving effect to CEDAW; eliminating, so far as is possible, discrimination and harassment on grounds covered by the SDA; and achieving, so far as practicable, substantive equality between men and women)
 - the applicant’s reasons for seeking an exemption
 - submissions by interested parties
 - all relevant provisions of the SDA.
236. Because the Commission only has the power to grant *temporary* exemptions from the SDA, it will generally only exercise this power when an exemption is needed by an applicant who is not currently in compliance with the SDA but is taking steps towards full compliance. Exemptions may be granted subject to conditions. The Commission does not grant rolling exemptions on an ongoing basis that exclude people from the operation of the SDA entirely.
237. The Commission keeps all of its guidelines under review and will consider what changes need to be made to its guidelines as a result of amendments to the SDA arising as a result of the reforms proposed by the ALRC.

6.3 Guidance for educational institutions

238. Technical proposal 13 is that the Commission, in consultation with the Attorney-General’s Department, should develop detailed guidance to assist educational institution administrators to understand and comply with the SDA and anti-discrimination provisions in the FWA, and for the public to understand the relevant provisions.
239. This proposal is consistent with the Commission’s function under ss 48(1)(ga) and (gaa) of the SDA.
240. The Commission regularly publishes information for the public about changes to the legislation that it administers, including the SDA.¹⁵¹ It also publishes more detailed guidelines about discrimination, including guidelines for people who may be a complainant or a respondent to a complaint.

241. The Commission agrees that it would be appropriate for it to publish guidance about the proposed amendments to the SDA.
242. In the Commission's view, it would be appropriate for the Fair Work Commission to publish guidelines about any changes to the FWA.

6.4 Future staged reforms

243. Technical proposal 14 deals with future staged reforms of the law relating to discrimination and human rights. The Commission agrees with the need for reform and has embarked on a substantial project called *Free & Equal* which identifies legislative priorities in each of these areas.
244. In 2021, following extensive consultation, the Commission published a detailed position paper on a reform agenda for federal discrimination laws.¹⁵²
245. In March 2023, the Commission will publish a second detailed position paper on embedding enforceable human rights protections into Australian domestic law at the federal level.

Endnotes

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- ³ The Hon Mark Dreyfus KC MP, 'Australian Law Reform Commission to review religious exemptions for educational institutions' *Media release*, 4 November 2022.
- ⁴ United Nation Human Rights Committee, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add. 1326 (2004) at [6]; United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (1985).
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- ⁷ ICCPR, article 18(1).
- ⁸ ICCPR, article 18(2).
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- ¹⁰ Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, proclaimed by General Assembly of the United Nations on 25 November 1981 (resolution 36/55), article 6.
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- ¹³ ICCPR, article 18(3).
- ¹⁴ United Nation Human Rights Committee, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add. 1326 (2004) at [6]; United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (1985).
- ¹⁵ *CRI026 v Republic of Nauru* (2018) 92 ALJR 529 at [22]; *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* [2010] ICJ Rep 639 at 664 [66].

- ¹⁶ Human Rights Committee, *General Comment No 22*, UN Doc CCPR/C/21/Rev.1/Add.4, 27 September 1993, at [8].
- ¹⁷ Human Rights Committee, *Toonen v Australia*, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (31 March 1994) [8.7]; Human Rights Committee, *Young v Australia*, Communication No. 941/2000, UN Doc CCPR/C/78/D/941/2000 (18 September 2003) [10.4].
- ¹⁸ For example, Committee on Economic, Social and Cultural Rights, *General comment No 20: Non-discrimination in economic, social and cultural rights*, 2 July 2009, UN Doc E/C.12/GC/20; *Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity*, adopted March 2007, principle 16.
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- ²³ Heiner Bielefeldt, *Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/HRC/16/53, 15 December 2010, at [54].
- ²⁴ Committee on the Rights of the Child, *General Comment No. 20 (2016) on the implementation of the rights of the child during adolescence*, UN Doc CRC/C/GC/20, 6 December 2016, at [43].
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- ³⁴ Jennifer Buckingham, *The Rise of Religious Schools*, Centre for Independent Studies (2010), pp 1–2; National Catholic Education Commission, submission to the Parliamentary Joint Committee on Human Rights regarding the Religious Discrimination Bill 2021 and related bills, 20 December 2021, p 2.
- ³⁵ Australian Human Rights Commission, *Sex Discrimination Act 1984: A Review of Exemptions* (1992), [4.26], [4.28], at <https://nla.gov.au/nla.obj-2150854932/view?partId=nla.obj-2153996623>.
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- ⁵⁰ Senate Legal and Constitutional Affairs References Committee, *Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff* (2018), [2.31].
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- ⁵⁴ Anglican Church of Australia, Public Affairs Commission, submission to the Parliamentary Joint Committee on Human Rights on the Religious Discrimination Bill 2021 and associated bills, 20 December 2021, p 9.
- ⁵⁵ Parliamentary Joint Committee on Human Rights, Official Committee Hansard, Religious Discrimination Bill 2022, 21 December 2021, pp 39–40.
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- ⁵⁸ Jennifer Buckingham, *The Rise of Religious Schools*, Centre for Independent Studies (2010), pp 8–10.
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- ⁶⁰ *Anti-Discrimination Act 1998* (Tas), ss 14, 15, 16, 22(1)(b) and see also s 51A. The most recent of those attributes to be protected, gender identity, has been protected since 2014; relationship status has been protected since 2004; and sexual orientation and pregnancy were included as protected grounds when the Act was first passed in 1998.
- ⁶¹ *Anti-Discrimination Act 1991* (Qld), ss 7, 9, 10, 11, 37, 38, 39 and see also s 41. Protections on the basis of relationship status, gender identity and sexuality were introduced in 2003 at the same time that the exemption for non-government schools in previous s 42 was removed. Protections on the basis of marital status and lawful sexual activity were part of the Act when it was first passed in 1991.
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- ⁷⁵ FWA, ss 153(2)(a), 195(2)(a), 351(2)(b) and 772(2)(a).
- ⁷⁶ FWA, ss 153(3) and 195(3).
- ⁷⁷ FWA, s 12 (definition of ‘fair work instrument’).
- ⁷⁸ *Minister for Industrial Relations v Metropolitan Fire and Emergency Services Board* [2019] FWCFB 6255 at [68]–[73].
- ⁷⁹ FWA, s 3(a).
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- ⁸⁷ *Anti-Discrimination Act 1977* (NSW), ss 38B(1)(a), 38B(1)(b), 39(1), 49ZG(1); *Anti-Discrimination Act 1991* (Qld), s 7(p); *Equal Opportunity Act 1984* (SA), ss 29(2a)(e), 29(3)(d), 85T(2)(d); *Anti-Discrimination Act 1998* (Tas), s 16(s); *Equal Opportunity Act 2010* (Vic), s 6(a); *Equal Opportunity Act 1984* (WA), s 35O(2); *Discrimination Act 1991* (ACT), s 7(1)(c); *Anti-Discrimination Act 1992* (NT), s 19(1)(r).
- ⁸⁸ Exposure draft of the Human Rights and Anti-Discrimination Bill 2012 (Cth), clause 19(4).
- ⁸⁹ Australian Human Rights Commission, *submission to the Senate Legal and Constitutional Affairs Legislation Committee in relation to the Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018*, (2019), pp 11–12.
- ⁹⁰ SDA, ss 5A(1) and 5B(1).
- ⁹¹ SDA, ss 5A(2) and 5B(2).
- ⁹² Heiner Bielefeldt, *Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/HRC/16/53, 15 December 2010, at [54]–[55].
- ⁹³ Human Rights Committee, *General Comment No. 22 (1993) on the right to freedom of thought, conscience and religion*, UN Doc CCPR/C/21/Rev.1/Add.4, 27 September 1993, at [6]. While the primary subject matter of the cases was teaching in State schools, see also the discussion of the role of private schools in *Kjeldsen, Busk Madsen and Pedersen v Denmark*, European Court of Human Rights, Chamber judgment, application no. 5095/71, 5920/72, 5926/72, 7 December 1976, [50]; confirmed more recently in *Folgerø v Norway*, European Court of Human Rights, Chamber judgment, application no. 15472/02, 29 June 2007, [84(b)].
- ⁹⁴ Senate Legal and Constitutional Affairs References Committee, *Official Committee Hansard, Legislative exemptions that allow faith based educational institutions to discriminate against students, teachers and staff*, 19 November 2018, p 33.
- ⁹⁵ Heiner Bielefeldt, *Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/HRC/16/53, 15 December 2010, at [22]–[26].
- ⁹⁶ Senate Legal and Constitutional Affairs Legislation Committee, *Official Committee Hansard*, 20 January 2022, p 69 (Rt Rev Dr Michael Stead, Bishop of South Sydney; Chair, Religious Freedom Reference Group, Anglican Church Diocese of Sydney).
- ⁹⁷ Parliamentary Joint Committee on Human Rights, *Official Committee Hansard*, 21 December 2021, p 60 (the Hon Jacinta Collins, Executive Director, National Catholic Education Commission).

- ⁹⁸ Senate Legal and Constitutional Affairs Legislation Committee, *Religious Discrimination Bill 2021 [Provisions]; Religious Discrimination (Consequential Amendments) Bill 2021 [Provisions] and Human Rights Legislation Amendment Bill 2021 [Provisions]*, Report (2022), [2.35].
- ⁹⁹ Parliamentary Joint Committee on Human Rights, *Religious Discrimination Bill 2021 and related bills*, Report (2022), [5.8].
- ¹⁰⁰ *Anti-Discrimination Act 1991* (Qld), s 25; *Anti-Discrimination Act 1998* (Tas), s 51(2); *Equal Opportunity Act 2010* (Vic), s 83A; *Equal Opportunity Act 1984* (WA), s 73(1)–(2); *Discrimination Act 1991* (ACT), s 46; *Anti-Discrimination Act 1992* (NT), s 37A.
- ¹⁰¹ *Equal Opportunity Act 1984* (SA), ss 85U–85Z.
- ¹⁰² *Equal Opportunity Act 1984* (WA), s 73(1)–(2); *Anti-Discrimination Act 1992* (NT), s 37A.
- ¹⁰³ *Anti-Discrimination Act 1998* (Tas), s 51(2); *Discrimination Act 1991* (ACT), s 46.
- ¹⁰⁴ *Discrimination Act 1991* (ACT), ss 46(2), (4) and (5).
- ¹⁰⁵ *Anti-Discrimination Act 1991* (Qld), s 25.
- ¹⁰⁶ *Equal Opportunity Act 2010* (Vic), s 83A.
- ¹⁰⁷ SDA, s 30.
- ¹⁰⁸ SDA, s 31.
- ¹⁰⁹ DDA, s 21A.
- ¹¹⁰ Eg, ADA, ss 18(4)–(5).
- ¹¹¹ ARHC Act, Part II, Div 4 (see section 6.1 of this submission for more detail).
- ¹¹² FWA, ss 153(2)(a), 195(2)(a), 351(2)(b) and 772(2)(a).
- ¹¹³ Senate Legal and Constitutional Affairs References Committee, Official Committee Hansard, *Legislative exemptions that allow faith based educational institutions to discriminate against students, teachers and staff*, 19 November 2018, p 33 (Mr Mark Spencer, Christian Schools Australia) and p 74 (Mrs Cationa Wansbrough, Principal, St Andrew’s Christian College).
- ¹¹⁴ *Anti-Discrimination Act 1991* (Qld), ss 41 and 109(2); *Anti-Discrimination Act 1998* (Tas), s 51A; *Discrimination Act 1991* (ACT), ss 32(2) and 46; *Anti-Discrimination Act 1992* (NT), s 30(2).
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- ¹¹⁶ ALRC Consultation Paper, [56].
- ¹¹⁷ ALRC Consultation Paper, [58].
- ¹¹⁸ Religious Freedom Review at [1.210].
- ¹¹⁹ *Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV*, (Court of Justice of the European Union, Grand Chamber, case C-414/16 (17 April 2018)).
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- ¹²¹ *Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV*, (Court of Justice of the European Union, Grand Chamber, case C-414/16 (17 April 2018)), [59]–[69].
- ¹²² RDA, s 8(1); SDA, s 7D; DDA, s 45; ADA, s 33.
- ¹²³ Religious Freedom Review at [1.210].
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- ¹²⁷ *Toyota Motor Corporation Australia Ltd v Marmara* (2014) 222 FCR 152 at 179-180 [89] (Jessup, Tracey and Perram JJ), referred to with approval in *Ridd v James Cook University* [2021] HCA 32 at [11] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ).
- ¹²⁸ *Ridd v James Cook University* [2021] HCA 32 at [15].
- ¹²⁹ FWA, ss 186(4), 194(a), 195.
- ¹³⁰ ALRC Consultation Paper at [40], citing *Minister for Industrial Relations v Metropolitan Fire and Emergency Services Board* [2019] FWCFB 6255 at [68]–[73].
- ¹³¹ *Christian Youth Camps Limited v Cobaw Community Health Services Limited* [2014] VSCA 75 (Maxwell J) at [57], quoting the first instance judgment *Cobaw Community Health Services v Christian Youth Camps Ltd & Anor (Anti-Discrimination)* [2010] VCAT 1613 at [193].
- ¹³² *Schüth v Germany*, European Court of Human Rights, Chamber judgment, application no. 1620/03, 23 September 2010.
- ¹³³ *Schüth v Germany*, European Court of Human Rights, Chamber judgment, application no. 1620/03, 23 September 2010, [53].
- ¹³⁴ *Lombardi Vallauri v Italy*, European Court of Human Rights, Chamber judgment, application no. 39128/05, 20 October 2009.
- ¹³⁵ Catholic Education, Diocese of Cairns, *Inclusive Practices*, Policy (2023), at <https://www.cns.catholic.edu.au/wp-content/uploads/2021/05/Inclusive-Practices.pdf>.
- ¹³⁶ Catholic Education, Diocese of Cairns, *Inclusive Practices*, Policy (2023), at <https://www.cns.catholic.edu.au/wp-content/uploads/2021/05/Inclusive-Practices.pdf>.
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- ¹³⁸ Senate Legal and Constitutional Affairs References Committee, *Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff* (2018), [2.44].
- ¹³⁹ Senate Legal and Constitutional Affairs References Committee, *Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff* (2018), [2.50].
- ¹⁴⁰ AHRC Act, s 11(1)(aa).
- ¹⁴¹ AHRC Act, s 31(b).
- ¹⁴² AHRC Act, s 3(1) (definition of ‘discrimination’, paras (a) and (b)(ii)); Australian Human Rights Commission Regulations 2019 (Cth), reg 6(a)(iii).
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- ¹⁴⁴ Australian Human Rights Commission, *Free & Equal: A reform agenda for federal discrimination laws* (2021), pp 258, 262–268, at <https://humanrights.gov.au/our-work/rights-and-freedoms/publications/free-and-equal-reform-agenda-federal-discrimination-laws>.
- ¹⁴⁵ Australian Human Rights Commission, *Free & Equal: A reform agenda for federal discrimination laws* (2021), pp 258–260.

- ¹⁴⁶ Part II, Div 4B of the AHRC Act, introduced by the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth).
- ¹⁴⁷ AHRC Act, s 35L.
- ¹⁴⁸ AHRC Act, s 31(b)(i) and see Explanatory Memorandum, *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022* (Cth), [223] and [229].
- ¹⁴⁹ SDA, s 44.
- ¹⁵⁰ Australian Human Rights Commission, *Temporary exemptions under the Sex Discrimination Act 1984* (Cth), at <https://humanrights.gov.au/our-work/legal/temporary-exemptions-under-sex-discrimination-act-1984-cth>.
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