



Law Council
OF AUSTRALIA

Religious Educational Institutions and Anti-Discrimination Laws

Australian Law Reform Commission

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The Law Council of Australia represents the legal profession at the national level, speaks on behalf of its Constituent Bodies on federal, national and international issues, and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 90,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2023 are:

- Mr Luke Murphy, President
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- Ms Juliana Warner, Treasurer
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member
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The Chief Executive Officer of the Law Council is Dr James Pople. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.asn.au.

Acknowledgements

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Executive Summary

1. The Law Council of Australia (**the Law Council**) welcomes the opportunity to comment on the Australian Law Reform Commission's (**ALRC's**) consultation paper on *Religious Educational Institutions and Anti-Discrimination Laws* (28 January 2023) (**the Consultation Paper**), released as part of the inquiry into Commonwealth laws that effectively permit (though the operation of bespoke exceptions) religious educational institutions to discriminate against students and staff on the basis of their sex, gender identity, marital or relationship status.
2. The Law Council **supports** the:
 - proposition¹ that religious educational institutions should not be allowed to discriminate between students (current or prospective) on the grounds of their sexual orientation, gender identity, marital or relationship status, or pregnancy, or on the grounds that a family member or carer has one of those attributes; and
 - the corollary proposed amendment² to repeal subsection 38(3) of the *Sex Discrimination Act 1984* (Cth) (**Sex Discrimination Act**), which effectively permits such discrimination (through the operation of an exception on a prohibition) and related proposed amendments (albeit with adjustments).³
3. The Law Council has long advocated for the repeal of provisions that permit religious educational institutions to discriminate against students on the grounds of sex, gender identity, marital or relationship status or pregnancy.⁴
4. Further, the Law Council has received uniform support for the proposition⁵ that religious educational institutions should not be allowed to discriminate against any staff (current or prospective) on the grounds of sex, sexual orientation, gender identity, marital or relationship status, or pregnancy.
5. Consistent with this, the Law Council **supports**:
 - the corollary proposed amendment⁶ to repeal subsection 38(3) of the *Sex Discrimination Act*, which effectively permits such discrimination (again, through the operation of an exception on a prohibition); and
 - proposed amendments⁷ to the *Fair Work Act 2009* (Cth) (**Fair Work Act**) to similarly repeal exceptions to discriminatory conduct on a number of grounds.

¹ Consultation Paper, general proposition A.1.

² Ibid technical proposal 1.

³ Ibid technical proposal 6.

⁴ See, for instance, Law Council, Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, 23 January 2018, [5] <<https://www.lawcouncil.asn.au/publicassets/55fe0a9d-bb29-e911-93fc-005056be13b5/3570%20-%20Sex%20Discrimination%20Amendment%20Removing%20Discrimination%20Against%20Students%20Bill%202018.pdf>>; Law Council, Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, 21 November 2018, [49]-[55] <<https://www.lawcouncil.asn.au/docs/f446c5d2-cbf2-e811-93fc-005056be13b5/3550%20-%20Legislative%20exemptions%20that%20allow%20faith-based%20educational%20institutions%20to%20discriminate%20against%20students,%20teachers%20and%20staff.pdf>>.

⁵ Consultation Paper, general proposition B.1.

⁶ Ibid technical proposal 2.

⁷ Ibid technical proposal 5.

6. However, the Law Council has reservations about the manner in which some proposals, which would expressly permit certain conduct by religious educational institutions, are drafted. These include:
 - The proposition that religious educational institutions should be permitted to set requirements on staff in relation to teaching religious doctrine or belief on sex or sexuality⁸ and the proposal to exclude content of the curriculum from the Sex Discrimination Act.⁹ While the Law Council raises no issue with these measures as applied in the context of religious education classes (as it understands is intended), it queries whether the manner in which these measures are expressed would apply to a broader range of educational contexts and topics than intended.
 - Proposed amendments to the Fair Work Act to permit preferencing on the basis of religion in selection of employees¹⁰ and terminating employment when 'necessary to prevent an employee from actively undermining the ethos of the institution'.¹¹ The Law Council suggests that some terms used in those proposals may require further consideration to ensure they are certain and consistent in their operation.
7. More generally, the inquiry and Consultation Paper demonstrate, however, that Commonwealth anti-discrimination laws are in need of holistic reform. Federal anti-discrimination laws have accreted into a complex system of inconsistent and incomplete protections, with Commonwealth law failing to develop in line with State and Territory laws.
8. The Law Council, therefore, strongly supports the ALRC's proposals for consultations on the future of discrimination law in Australia, and on the need for the protection of human rights more broadly to come through the enactment of a Federal Human Rights Act, having regard to the recent reports by the Australian Human Rights Commission (**AHRC**) which addressed both kinds of reforms.¹²

⁸ Ibid general proposition B.3.

⁹ Ibid technical proposal 7.

¹⁰ Ibid technical proposal 8.

¹¹ Ibid technical proposal 9.

¹² Australian Human Rights Commission, *Free and Equal: A reform agenda for federal discrimination laws*, 10 December 2021 and Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia*, December 2022.

The inquiry's scope and the need for wider reforms

9. The inquiry's terms of reference refer to the ALRC for inquiry and report, a consideration of what reforms to Commonwealth anti-discrimination law should be made to ensure that educational institutions conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed (**'religious educational institutions'**):
 - cannot discriminate against students and members of staff on the basis of gender identity, marital or relationship status or pregnancy and, in the case of employees and contract workers, sex (**'the relevant attributes'**); and
 - 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'.¹³
10. As part of its inquiry the ALRC is also to have regard to previous relevant Commonwealth, State and Territory reviews and the Australian Government's commitment to introduce legislation to prohibit discrimination on the basis of religious belief or activity.¹⁴
11. In response to these terms of reference, the ALRC has produced a Consultation Paper in which it has invited stakeholders to comment on 14 proposed amendments to the law (**'the technical proposals'**) and on the principles that have informed those technical proposals (**'the general propositions'**).
12. The Law Council's submission will focus primarily on a response to the technical proposals, with comments made on the four general propositions, where relevant. However, first it has addressed the general need for comprehensive reforms, the understood content of terms used but not defined in the Consultation Paper, and an overview of the present legislative framework.

The need for comprehensive reforms

13. The inquiry represents a timely review of the permanent exemptions provided to religious educational institutions (**'the relevant exemptions'**) under a range of Commonwealth laws,¹⁵ particularly of the appropriateness of continuing to permit discrimination against students on the basis of the relevant attributes.
14. While piecemeal reforms of the kind envisaged in the inquiry's terms of reference and reflected in the ALRC's technical proposals may resolve individual deficiencies in the law, they will do little to address the evolving complexity of Australia's anti-discrimination laws spanning:
 - a. the core Commonwealth anti-discrimination statutes, namely the *Age Discrimination Act 2004* (Cth) (**Age Discrimination Act**), *Disability Discrimination Act 1992* (Cth) (**Disability Discrimination Act**), *Sex Discrimination Act*, *Racial Discrimination Act 1975* (Cth) (**Racial Discrimination Act**);

¹³ Attorney-General, Terms of Reference, Inquiry: Religious Educational Institutions and Anti-Discrimination Laws (4 November 2022).

¹⁴ *Ibid.*

¹⁵ The wording and operation of the relevant exceptions will be discussed in more detail below.

- b. the inquiry and conciliation systems within the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**);
 - c. employment law provisions within the *Fair Work Act* and *Work Health and Safety Act 2011* (Cth);¹⁶ and
 - d. eight separate State and Territory unlawful discrimination statutes,¹⁷ which all operate alongside the core Commonwealth anti-discrimination statutes because the latter do not purport to ‘cover the field’.¹⁸
15. These overlapping anti-discrimination regimes ‘have many similarities’ but they also ‘differ significantly in detail’, with the ‘proliferation of laws creat[ing] complexity that is a challenge for any organisation or business that has to comply with the laws in more than one jurisdiction’¹⁹ and for individuals wishing to assert their rights to fair and equal treatment.²⁰
 16. There is a pressing need for greater consistency in, and accessibility to, anti-discrimination protections across Australia’s complex and interoperating statutes to avoid an uneven approach to rights protection.²¹
 17. A solution to the current complexity is for Commonwealth anti-discrimination laws to be consolidated in a single, comprehensive enactment that ensures adequate and effective substantive and procedural protection against all forms of discrimination on a full range of prohibited grounds.²² Consolidation of Commonwealth anti-discrimination laws would also provide an opportunity to ensure consistency in the entities and areas covered by, concepts within, attributes protected under, and exemptions in Commonwealth anti-discrimination provisions.
 18. The Law Council has repeatedly advocated for such reform.²³ A position paper from the AHRC on Commonwealth anti-discrimination laws recently put forward a range of proposals which, while they do not put forward a consolidated act, are intended to simplify and improve this complex regime.²⁴ Several of its proposals draw upon Law Council recommendations made to the AHRC.²⁵

¹⁶ *Work Health and Safety Act 2011* (Cth), Pt 6.

¹⁷ *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1992* (NT); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1998* (Tas); *Equal Opportunity Act 2010* (Vic); *Equal Opportunity Act 1984* (WA).

¹⁸ *Racial Discrimination Act*, s 6A; *Sex Discrimination Act*, ss 10(3) and 11(3); *Disability Discrimination Act*, s 13(3); *Age Discrimination Act*, s 12(3); *AHRC Act*, s 4.

¹⁹ Gaze, B, and Smith, B, *Equality and Discrimination Law in Australia: An Introduction*, Cambridge University Press: Cambridge (2017), 37.

²⁰ The ALRC itself notes that, if implemented in full, the technical propositions that would result in amendments to the *Sex Discrimination Act* and *Fair Work Act* would introduce further inconsistencies between federal anti-discrimination laws: see Consultation Paper, [84], [97] and [102] and technical proposal 14.

²¹ Law Council, *Religious Discrimination Bill 2021 and related bills*, Submission to the Parliamentary Joint Committee on Human Rights and Senate Legal and Constitutional Affairs Committee, 17 December 2021, [18] <<https://www.lawcouncil.asn.au/publicassets/392b2295-9e71-ec11-9446-005056be13b5/4149%20-%20Religious%20Discrimination%20Bill%202021%20and%20Related%20Bills.pdf>>.

²² As was attempted in the *Human Rights and Anti-Discrimination Bill 2012* (Cth).

²³ See, for instance, Law Council, *Religious Discrimination Bill 2021 and related bills*, Submission to the Parliamentary Joint Committee on Human Rights and Senate Legal and Constitutional Affairs Committee, 17 December 2021, [18]; Law Council, *Response to Discussion Paper: Priorities for federal discrimination law reform*, 20 December 2019.

²⁴ Australian Human Rights Commission, *Free and Equal: A reform agenda for federal discrimination laws*, 10 December 2021.

²⁵ Law Council, *Response to Discussion Paper: Priorities for federal discrimination law reform*, 20 December 2019 [23].

19. While the Law Council is broadly supportive of the general propositions and certain technical proposals contained within the ALRC's Consultation Paper, the inquiry's terms of reference necessarily pose wider questions than simply those relating to the permanent exemptions afforded to religious educational institutions under the Sex Discrimination, Fair Work and AHRC Acts. This is recognised by the ALRC itself in technical proposal 14, which raises the prospect of further consideration of and consultation on future reforms that would, amongst other matters, simplify and strengthen Commonwealth anti-discrimination law.
20. Rights and freedoms should be protected in a coherent legal framework. Any option for reform in this area should promote the understanding that human rights are 'universal, indivisible, interdependent and interrelated'.²⁶
21. The Law Council considers that Australia's international obligations related to non-discrimination should also be included in a comprehensive framework of substantial rights protection, which recognises that limitations on rights must be necessary and proportionate to achieving a legitimate aim in order to be justified and permissible.²⁷ This is best achieved through a Commonwealth human rights act, as outlined in the Law Council's *Federal Human Rights Charter Policy Position*²⁸ and the AHRC's position paper: *A Human Rights Act for Australia*.²⁹
22. The recommendations offered, positions adopted and observations made by the Law Council in this submission are all informed by the following **overarching recommendations** regarding anti-discrimination legislation and human rights protection in Australia.

Overarching recommendations:

- **that comprehensive, consolidated Commonwealth anti-discrimination legislation should be adopted, which preserves and strengthens existing protections, improves the regime's ability to promote substantive equality and removes regulatory burdens on business;**
- **that changes to Commonwealth anti-discrimination laws should reduce the complexity of legislation and promote consistency between Commonwealth statutes and the protections under State and Territory laws;**
- **that the holding and manifestation of religious beliefs by individuals should be protected under the proposed consolidated Commonwealth anti-discrimination law; and**
- **that Australia's international obligations relating to non-discrimination should also be included in and underpinned by a Federal Human Rights Act.**

²⁶ UN General Assembly, *Vienna Declaration and Programme of Action*, A/CONF.157/23 (12 July 1993), 5 (adopted by 171 states, including Australia).

²⁷ See Law Council, *Religious Discrimination Bill 2021 and related bills*, Submission to the Parliamentary Joint Committee on Human Rights and Senate Legal and Constitutional Affairs Committee, 17 December 2021, [16]-[19].

²⁸ Law Council, *Federal Human Rights Charter Policy Position*, November 2020

<<https://www.lawcouncil.asn.au/publicassets/c517fdbd-9a28-eb11-9436-005056be13b5/Law%20Council%20of%20Australia%20-%20Federal%20Human%20Rights%20Charter.pdf>>

²⁹ Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia*, December 2022, <https://humanrights.gov.au/human-rights-act-for-australia>.

Preliminary matters concerning the Consultation Paper

The general propositions and technical proposals

Defining 'religion', 'religious belief' and 'religious freedom'

23. The Consultation Paper does not provide a definition of 'religion', 'creed', 'doctrine', 'tenets', religious belief', 'religious activity', 'religious practices', 'faith' and related terms.
24. 'Religion' and 'creed' and related terms used in the relevant exemptions, are concepts left undefined in the Sex Discrimination, Fair Work and AHRC Acts.³⁰
25. The Law Council will, in this submission, use the term '**religion**' as defined according to the broad, principled approach adopted by the High Court, namely that, for the purposes of the law, the criteria for a religion are twofold:
 - first, belief, in a supernatural being, thing or principle; and
 - second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion.³¹
26. In adopting this approach to defining 'religion', it is understood that the High Court intended to avoid exhaustive and rigid definitions apt to become outdated over time and to accept that faith traditions may emerge or develop over time.
27. Moreover, the right to religious freedom enshrined in article 18 of the *International Covenant on Civil and Political Rights (ICCPR)*³² protects not only the 'traditional' religious beliefs of the major religions, but also non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief.³³
28. In this submission, the Law Council will use the terms '**religious belief**' and '**religious freedom**' in line with the High Court's definition of 'religion', noting that the absence of religious belief also falls within the notion of 'religious freedom'.

Religious freedoms of First Nations people

29. Other than noting in passing 'indigenous rights',³⁴ the Consultation Paper is silent on the religious freedoms of First Nations people.
30. The *United Nations Declaration on the Rights of Indigenous People (UNDRIP)*³⁵ recognises the right of Indigenous peoples to 'manifest, practice, develop and teach

³⁰ See Human Rights and Equal Opportunity Commission, 'Article 18 – Human Rights and Equal Opportunity Commission Freedom of religion and belief' (1998) 8-11
<https://humanrights.gov.au/sites/default/files/content/pdf/human_rights/religion/article_18_religious_freedom.pdf>.

³¹ *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 137.

³² Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

³³ United Nations Human Rights Committee (**UNHRC**), *CCPR General Comment No 22: Article 18 (Freedom of Thought, Conscience of Religion)*, UN Doc CCPR/C/21/Rev.1, 48th sess (30 July 1993) (**General Comment No 22**), [2]

³⁴ Consultation Paper, [20].

³⁵ G.A. Res. 61/295, UN Doc A/RES/47/1 (2007).

their spiritual and religious traditions, customs and ceremonies'.³⁶ The UNDRIP is not a treaty and therefore it does not itself create legally binding obligations. Insofar as the UNDRIP relies on, and elaborates upon, well-established human rights obligations in international treaty and customary law, it provides a useful and focused framework for identifying norms binding on Australia as they apply to the situations of First Nations peoples.³⁷

31. The Law Society of South Australia has observed that inquiries into religious freedom and religious educational institutions should expressly raise the need for First Nations people not to be discriminated against, particularly when adhering to traditional laws and customs.
32. Attempts to describe or determine concepts of the 'religious traditions, customs and ceremonies' of First Nations people require appropriate consultations and discussions with Aboriginal and Torres Strait Islander people who have authority to speak on such beliefs and practices. For present purposes, the Law Council simply notes that, where 'religion', 'religious belief' and 'religious freedom' are discussed in this submission, the traditional religious beliefs and practices of First Nations people are included.

Religious educational institutions

33. The term 'religious education institution' is used in, but not clearly defined in, the inquiry's terms of reference. In its Consultation Paper, the ALRC notes that religious educational institutions include 'early childhood education centres, schools, colleges, and universities'.³⁸ Impliedly, the Consultation Paper treats 'religious educational institutions' as those bodies that provide non-government educational services in place of the state in the pre-school, primary, secondary and tertiary sectors.
34. 'Religious educational institution' does not, however, appear in the Sex Discrimination Act, the Fair Work Act or AHRC Act or any other Commonwealth legislation, although it may be considered shorthand for certain terms which are contained in this legislation, as set out below.
35. The Consultation Paper does not address the two different but related ways in which relevant bodies concerned with education interact, namely an 'educational authority' and an 'educational institution' and the inconsistencies in the Sex Discrimination Act in how the conduct of an 'educational authority' and 'educational institution' are regulated.
36. 'Educational authority' is defined in the Sex Discrimination Act as 'a body or person administering an educational institution'³⁹ Section 21 of the Sex Discrimination Act—which as discussed below prohibits discrimination on the grounds of the relevant attributes in the context of student admission—applies to the conduct of an educational authority, not to an 'educational institution'. Subsections 21(1) and 21(2) of the Sex Discrimination Act do not expressly address the conduct of an

³⁶ UNDRIP, art 12(1). While not a treaty, UNDRIP's articles echo many of the rights articulated in legally binding human rights treaties but with a specific focus on Indigenous peoples and many of its provisions reflect customary international law.

³⁷ Law Council, Submissions to the National Indigenous Australians Agency, *Indigenous Voice Co-Design Process*, (Submission, 30 April 2021), <<https://www.lawcouncil.asn.au/publicassets/ad0ba076-01ae-eb11-943c-005056be13b5/3996%20-%20Indigenous%20Voice%20Co-Design%20Process.pdf>> [13].

³⁸ Consultation Paper, [3].

³⁹ Sex Discrimination Act, s 4(1).

'educational institution'. But particular 'educational institutions' have the benefit of the exception described in subsection 21(3).⁴⁰

37. 'Educational institution' is defined in the Sex Discrimination Act as 'a school, college, university or other institution at which education or training is provided'.⁴¹ For the purposes of the Sex Discrimination Act, Fair Work Act and AHRC Act 'religious institutions' are defined as organisations that are 'conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed'.⁴²
38. The definition of 'educational institution' in the Sex Discrimination Act includes any 'other institution at which education or training is provided'.⁴³ Such institutions could include seminaries, yeshivot (rabbinical colleges) and other centres for theological and doctrinal training, such as holiday camps or education attached to weekly church.
39. A distinction exists between two forms of 'religious educational institution'—the 'general' religious educational institution such as a primary or high school, and 'clerical'/'ecclesiastical' religious educational institution such as a seminary—that may have a bearing on amendments to Commonwealth anti-discrimination laws.
40. The adjective 'religious' carries a range of assumptions, which are not necessarily agreed or commonly understood. For example, a school could be understood to be 'religious' because:
 - it is or was at some time affiliated with a religion but operates and is governed by a board autonomously of any religious authority;
 - the property of the school is 'owned' by a religious property trust but not operated by a religious educational authority;
 - the school's primary purpose is to proselytises and convert students;
 - it offers religious studies only; or
 - it offers religious studies as an optional course of study.
41. The Law Council suggests the inquiry may be best directed to addressing how the religious connection to education occurs, by reference to the nature and substance of the religion, rather than just the form of the institution itself.
42. For the purposes of this submission, the Law Council will treat the term 'religious educational institution' to encompass bodies of both the 'general' and 'clerical'/'ecclesiastical' type.
43. Much of the Law Council's comment below focuses on 'general' educational institutions, particularly schools. In particular, it focuses on the rights of children at several points. Further consideration could be given to whether bodies such as 'clerical/ecclesiastical' religious educational institutions should be given broader latitude than that proposed in the ALRC discussion paper.

⁴⁰ See also for example sections 28F, 34(2) and 38 apply only to educational institutions, not educational authorities.

⁴¹ Sex Discrimination Act, s 4(1).

⁴² Sex Discrimination Act, 4; Fair Work Act, ss 153(2)(b), 195(2)(b), 351(2)(c) and 772(2)(b); AHRC Act, s 3(1).

⁴³ Sex Discrimination Act, s 4(1).

Other key terms

44. For the reasons discussed below, the Law Council is concerned to ensure clarity as to definitions of terms used in the general propositions and technical proposals such as 'curriculum', 'duty of care', 'ethos' and 'nature'.
45. In its responses to general propositions C.1 to D.3 and technical proposals 8, 9 and 10, the Law Council will also comment on the need to carefully define terms such as 'curriculum', 'duty of care', 'ethos' and 'nature'.

Freedom of religion

46. The Consultation Paper provides a comprehensive overview of the relevant Commonwealth, State, Territory and international law applicable to the questions raised by the inquiry's terms of reference.
47. The Law Council will, nevertheless, preface its response to the general propositions and technical proposals by laying out those aspects of the law most relevant to the observations and recommendations made in this submission.

International law

Religious rights and protections under international law

48. The ICCPR contains provisions which both recognise a fundamental right to religion, and which provide protection from religious-based discrimination.

Freedom of thought, conscience and religion

49. In relation to the right, article 18(1) of the ICCPR enshrines the freedom of individuals 'to have or to adopt a religion or belief' and 'to manifest' that religious belief in 'worship, observance, practice and teaching'.
50. States are also required under article 18(4) of the ICCPR to 'have respect for the liberty of parents ... to ensure the religious and moral education of their children in conformity with their own convictions'.⁴⁴ The communal and educational dimensions of the freedom of religion and parental rights regarding the schooling of children are also explicitly recognised by the ICESCR and the CRC to which Australia is party,⁴⁵ along with other non-binding international instruments.⁴⁶
51. Further, article 27 of the ICCPR provides that persons belonging to ethnic, religious or linguistic minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.
52. Though not a binding treaty provision, article 6 of the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*

⁴⁴ See also the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (**ICESCR**), arts 13(3) and (4); *Universal Declaration of Human Rights*, United Nations General Assembly Resolution A/RES/217(III) A (1948), art 26(3); *Convention on the Rights of the Child* (1989), opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (**CRC**), art 14(2).

⁴⁵ ICCPR, art 26; ICESCR, art 13(3); CRC, art 14(2).

⁴⁶ UNDRIP, art 12; *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, GA Res 36/55, UNGAOR, 36th sess, UN Doc A/36/684 (1981) (**the Religion Declaration**), arts 5(2) and (6).

stipulates that the religious community's joint or shared expression of its beliefs is protected equally with the individual's right and protects manifestation of religion or belief including, relevantly, 'teaching of religion and belief', 'training and appointment of religions leaders in accordance with the requirements and standards of the religion or belief' and 'communicating with individuals and communities on matters of religion and belief'.⁴⁷

53. There are, however, few human rights that are absolute.⁴⁸ Most rights can be limited in specified circumstances to achieve legitimate aims in a democratic society. While the right to hold religious belief is absolute,⁴⁹ the freedom of individuals to manifest their religious beliefs is but one of many limited rights and freedoms recognised under the numerous international instruments to which Australia is a party,⁵⁰ including the ICCPR.⁵¹
54. Freedom of religion cannot be 'used for ends that are inconsistent with' relevant human rights instruments and, like all human rights, may not be 'invoked to destroy another human right'.⁵² Importantly, article 18(3) of the ICCPR makes clear that freedom to manifest one's religion or beliefs may be subject 'to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or *the fundamental rights and freedoms of others* [emphasis added]'.⁵³

Protection against discrimination on the basis of protected characteristic that is justified by reference to religious belief

55. Articles 2 and 26 of the ICCPR provide protection against religious-based discrimination.
56. Article 26 of the ICCPR provides that all people 'are equal before the law and are entitled without any discrimination to the equal protection of the law'. It requires States parties to prohibit and guarantee protection against discrimination on the basis of 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. The phrase 'other status' in article 26 of

⁴⁷ Religious Declaration, art 6. The UNHRC has referred to the Religious Declaration when considering the scope of art 18 of the ICCPR in, for instance, *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v Sri Lanka*, Communication No 1249/2004, UN Doc CCPR/C/85/D/1249/2004 (2005).

⁴⁸ Absolute rights that cannot be encroached upon in any circumstances include those enshrined in arts 7, 8, 11, 15 and 16 of the ICCPR, namely the prohibition against torture, cruel, inhuman or degrading treatment or punishment (including the obligation of non-refoulement), the right not to be subjected to slavery, the right not to be imprisoned for inability to fulfil a contract, the right not to be subject to retrospective criminal laws and the right to recognition as a person before the law.

⁴⁹ ICCPR art 4(2).

⁵⁰ See, for instance, the *Convention relating to the Status of Refugees*, opened for signature on 28 July 1951 189 UTS 137 (entered into force 22 April 1954), art 1; *International Labour Organization Convention N° 111: Discrimination (Employment and Occupation) Convention*, adoption: Geneva, 42nd ILC session (25 Jun 1958) (entered into force 15 June 1960) (ILO 111), art 1(a); *International Labour Organization Convention N° 158: Termination of Employment Convention*, adoption: Geneva, 68th ILC session (22 Jun 1982) (entered into force 23 November 1985), assrt 5(d).

⁵¹ The freedoms of assembly and association enshrined in arts 21 and 22 of the ICCPR, respectively, are also relevant in the context of religious believers. It is, however, unnecessary to analyse those freedoms in this submission.

⁵² ICCPR, art 5; Shaheed, A, *Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/HRC/43/48 (24 August 2020), [60].

⁵³ ICCPR, art 18(3). Article 1(3) of the Religion Declaration and art 14(3) of the CRC similarly provide that the religious freedom may be subject 'to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others' Article 5(5) of the Religion Declaration also stipulates that 'practices of a religion or belief in which a child is brought up must not be injurious to his physical or mental health or to his full development, taking into account [art 1(3)]'.

the ICCPR has been interpreted by human rights treaty bodies to include attributes including sexual orientation.⁵⁴

57. Article 2(1) of the ICCPR further requires that States parties undertake to respect and ensure to individuals within their territory and subject to their jurisdiction the rights recognised in the ICCPR, without distinction of any kind, including on the basis of sex, religion, or other status. The United Nations Human Rights Committee stresses that this obligation is both negative and positive in nature—States parties must refrain from the violation of the rights recognised by the ICCPR,⁵⁵ and have a positive duty to ensure these rights, including through legislation, judicial or administrative action and education.⁵⁶

Conflicting fundamental rights and freedoms in the context of education and employment

58. A number of fundamental rights and freedoms may conflict with the exercise of religious freedoms in the context of the exemptions under the Sex Discrimination Act, Fair Work Act and AHRC Act. Relevant human rights include: the right to equal and non-discriminatory treatment;⁵⁷ the rights to privacy, family life and marriage;⁵⁸ the right to free expression;⁵⁹ and rights to work, education and health.⁶⁰
59. The right to be treated as ‘equal before the law’ and to be entitled ‘without any discrimination to the equal protection of the law’ requires Australia to prohibit, and to guarantee protection against, discrimination on the basis of, amongst other characteristics, one’s ‘sex’ or ‘other status’.⁶¹ The phrase ‘other status’ has been interpreted by human rights treaty bodies to include attributes such as sexual orientation⁶² and more recently transgender identity.⁶³

⁵⁴ Human Rights Committee, *Toonen v Australia*, Communication No 488/1992 (1992); Human Rights Committee, *Young v Australia*, Communication No 941/2000 (2003) [10.4].

⁵⁵ And any restrictions on any of those rights must be permissible under the relevant provisions of the ICCPR. Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of ICCPR rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of an ICCPR right: Human Rights Committee, General Comment No 31: The Nature of the General Legal Obligations Imposed on States Parties of the Covenant, UN Doc CCPR/C/21/Rev.1/Add. 13, 80th sess (29 March 2004), [6].

⁵⁶ *Ibid* [7].

⁵⁷ ICCPR, arts 2(1) and 26; *Convention on the Elimination of All Forms of Discrimination Against Women* opened for signature on 18 December 1979, 1249 UTS 13 (entered into force 3 September 1981) (CEDAW), art 10, 11 and 13.

⁵⁸ ICCPR, arts 17 and 23. The European Court of Human Rights’ jurisprudence illustrates the scope of the concepts of privacy and family life, which encompass: one’s sexual life, physical and social identity in the context of gender identity and sexual orientation and personal development and ability to develop relationship with others in the outside world as, for instance, a transgendered, along with relationships between transgendered persons, same-sex couples, de facto partnerships and non-biological same-sex parents: see, for instance, *X and Y v the Netherlands*, 26 March 1985, Series A no. 91, [22]; *YY v Turkey*, no. 14793/08, ECHR 2015 (extracts), [56]; *Dudgeon v. the United Kingdom*, 22 October 1981, Series A no. 45, [41]; *Schlumpf v Switzerland*, no. 29002/06, 8 January 2009, [77]; *X Y and Z v the United Kingdom*, 22 April 1997, Reports of Judgments and Decisions 1997-II, [37]

⁵⁹ ICCPR, art 19(1).

⁶⁰ ICESCR, arts 6, 7(b), 13 and 12.

⁶¹ ICCPR, art 26.

⁶² See UNHRC, *Toonen v Australia*, Communication No 488/1992 (1992); UNHRC, *Young v Australia*, Communication No 941/2000 (2003) [10.4]. See also the gloss on the terms ‘other status’ in art 2(2) of the ICESCR provided by the Committee on Economic, Social and Cultural Rights, which considers the phrase to encompass sexual orientation and gender identity (including transgender, transsexual and intersex status): see *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009 (E/C.12/GC/20).

⁶³ See *G v. Australia*, CCPR/C/119/D/2172/2012, 2 December 2017.

60. Moreover, under article 2(1) of the ICCPR States parties undertake to respect and to ensure to individuals within their territory and subject to their jurisdiction the rights recognised in the Covenant, without distinction of any kind, including on the basis, relevantly, of sex or other status. The UNHRC has stressed that States parties must not only refrain from violating individuals' rights but are also under a positive duty to guarantee human rights, including through legislation, judicial or administrative action and education.⁶⁴
61. Rights to equal and non-discriminatory treatment are arguably the most clearly engaged by measures that limit access to education and to employment to preserve the religious freedoms of others, as the UNHRC has observed:
- [In interpreting the scope of permissible limitation clauses [in art 18 of the ICCPR], States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination].*⁶⁵
62. In the context of the provision of educational services, the special status of, and rights accorded to, children must also be borne in mind. Children have special rights under human rights law, taking into account their particular vulnerabilities. Under a number of treaties, particularly the *Convention on the Rights of the Child (CRC)*, the core principles include that:
- rights of children are to be applied without discrimination;⁶⁶ and
 - the best interests of the child are to be a primary consideration.⁶⁷
63. Children are recognised as have their own rights to freedom of thought, conscience and religion, rights which may only be subject to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.⁶⁸ States are additionally under duties to ensure that children are 'informed' and 'have access to education'⁶⁹ while also respecting the 'rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child'.⁷⁰
64. Of relevance to the employment of staff at educational institutions are rights to work and in work contained in articles 6 and 7 of the ICESCR, which respectively require that Australia:
- recognises 'the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts' and to 'take appropriate steps to safeguard this right'; and
 - respects 'the right of everyone to the enjoyment of just and favourable conditions of work' and to ensure, amongst other matters, 'equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence'.

⁶⁴ UNHRC, *General Comment No 31: The Nature of the General Legal Obligations Imposed on States Parties of the Covenant*, UN Doc CCPR/C/21/Rev.1/Add. 13, 80th session (29 March 2004), [6] and [7].

⁶⁵ General Comment No 22, [8].

⁶⁶ CRC, art 2.

⁶⁷ CRC, art 3(1).

⁶⁸ CRC, art 14(1) and (3).

⁶⁹ CRC, art 24(2)(e). Rights to education are also enshrined in ICESCR, art 13.

⁷⁰ CRC, art 14(2).

65. The right to work and individuals' rights when in work may only be subject 'to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society [emphasis added]'.⁷¹
66. Significantly, article 1(1)(a) of *International Labour Organization Convention No 111: Discrimination (Employment and Occupation) Convention (ILO 111)* also prohibits any 'distinction, exclusion or preference' made on the basis of, inter alia, 'sex, religion [and] political opinion ... which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation'.⁷² Australia has voluntarily declared that it considers, relevantly, 'marital status' and 'sexual preference' as protected characteristics for the purposes of ILO 111.⁷³
67. ILO 111 provides that any 'distinction, exclusion or preference in respect of a particular job based on the *inherent requirements* thereof shall not be deemed to be discrimination [emphasis added]'.⁷⁴
68. As the Sex Discrimination Act gives effect to provisions of the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*,⁷⁵ it should also be noted that that treaty affirms women's and girls' rights to non-discrimination in education, employment and economic and social activities.⁷⁶

Balancing rights

69. Human rights are universally applicable, operate interdependently and are indivisible from one another.⁷⁷
70. Measures that encroach on human rights must be provided for under the law,⁷⁸ should not be arbitrary in their application,⁷⁹ and ought to be objectively necessary and proportionate means to achieving a legitimate aim.⁸⁰ Any limitation placed on a fundamental right must be 'no more restrictive' than is required for the achievement of the aim pursued by the provision.⁸¹
71. Relevant factors to consider when assessing the necessity and proportionality of an encroachment on the fundamental rights of others include:
- *whether the measure provides sufficient flexibility to treat different cases differently;*
 - *whether it imposes a blanket policy without regard to the merits of an individual case;*
 - *what the extent of any interference with human rights is—the greater the interference the less likely it is to be considered proportionate; and*

⁷¹ ICESCR, art 4.

⁷² 'Employment and occupation' include 'vocational training, access to employment and to particular occupations, and terms and conditions of employment': ILO 111, art 1(3).

⁷³ See ILO 111, art 1(2); *Australian Human Rights Commission Regulations 2019* (Cth).

⁷⁴ ILO 111, art 1(2).

⁷⁵ Sex Discrimination Act, s 3(1).

⁷⁶ CEDAW, arts 10, 11 and 13.

⁷⁷ *Vienna Declaration and Programme of Action*, as adopted by the World Conference on Human Rights in Vienna on 25 June 1993, [5]. See also AHRC Act, s 10A(1)(a)(i).

⁷⁸ American Association for the International Commission of Jurists, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, April 1985, I.A.6.

⁷⁹ *Ibid.*, I.A.7.

⁸⁰ *Ibid.*, I.A.10.

⁸¹ *Ibid.*, I.A.11.

- whether any affected groups are particularly vulnerable.⁸²

Conflicting human rights and the exemptions granted to religious educational institutions

72. In brief, the Law Council considers that general propositions and technical proposals raise the need to balance (where applicable):
- a. the individual and communal rights of religious believers (including students and staff),⁸³ the institutional autonomy of religious institutions and liberty of parents to determine the form of moral and religious education their child receives; and
 - b. the broader rights of:
 - i. students, regardless of their age, to be treated equally and without discrimination and to privacy, family life, free expression, education;
 - ii. children, particularly with regard to the principle that the best interests of children should be a primary consideration when decisions are made about them;
 - iii. employees and contract workers, to be treated equally and without discrimination and to privacy, family life, free expression and work.

Domestic law

The protection of religious freedom and religious discrimination protections under Commonwealth law

73. The High Court has described freedom of religion as the 'essence of a free society', and the concept of religion as being 'of fundamental importance to the law'.⁸⁴ Freedom of religion has long been recognised as a fundamental human right, as discussed above.
74. Unlike the law in the Territories and four of the six States, Commonwealth legislation does not, however, currently provide individuals with comprehensive protection from being discriminated against on the basis of their religious beliefs or activities.⁸⁵
75. Relevant Commonwealth statutory provisions include:
- a. the Racial Discrimination Act, under which ethno-religious groups, such as Jewish people,⁸⁶ may fall within the aegis of the Act;
 - b. the Australian Human Rights Commission (**AHRC's**) powers to inquire into, and to attempt to settle disputes about, acts or practices that may be inconsistent with or contrary to any human right (including the freedom of religion) or may constitute

⁸² Parliamentary Joint Committee on Human Rights, *Guidance note 1 – Expectations for statements of compatibility*, November 2021, p 3.

⁸³ Including the rights of prospective and current students, employees and contract workers of religious institutions who wish to pursue their own religious beliefs in communion with others.

⁸⁴ *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)* (1983), 154 CLR 120, 130.

⁸⁵ See Religious Discrimination Bill 2022 (Cth).

⁸⁶ See *Jones v Scully* (2002) 120 FCR 243. See also *Jones v Tohen* [2002] FCA 1150, [69] (the issue was not contested on appeal: see *Toben v Jones* (2003) 129 FCR 515. See also *Miller v Wertheim* [2002] FC AFC 156.

discrimination on, amongst other grounds, a person's religious beliefs or manifestation of those beliefs;⁸⁷ and

- c. the protections provided to employees by the Fair Work Act from discrimination and from termination of their employment on the basis of, amongst other attributes, their religion.⁸⁸

Current exemptions granted to religious educational institutions under Commonwealth law

76. Federal legislation also protects what may be termed '**institutional religious freedoms**' through the express exemptions from anti-discrimination laws permitted to institutions 'conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed' ('**religious institutions**') under the Fair Work and AHRC Acts and 'religious educational institutions' under the Sex Discrimination Act.
77. While most educational institutions and employers must comply with obligations not to discriminate against individuals on the basis of the protected attributes, religious institutions and religious educational institutions are currently granted permanent exemptions from those duties. The relevant exceptions are outlined below:
 - a. the AHRC may not inquire into discriminatory acts or practices that amount to distinctions, exclusions or preferences in connection with employment as a member of the staff of religious institutions that are made in good faith in order to avoid injury to the religious susceptibilities of adherents of the relevant religion or creed;⁸⁹
 - b. the Fair Work Act does not prohibit employers from discriminating against a person in the terms of enterprise agreements or modern awards, taking 'adverse action' against an employee or terminating an individual's employment on the grounds of that person's race, colour, sex, sex, sexual orientation, breastfeeding, gender identity, intersex status, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin if:
 - i. the relevant discriminatory act is taken against a staff member of a religious institution or the employment is terminated by a religious institution:
 - ii. in good faith; and
 - iii. to avoid injury to the religious susceptibilities of adherents of that religion or creed;⁹⁰ and
 - c. the Sex Discrimination Act, which:
 - i. clarifies that Divisions 1 and 2 of Part II of that Act, which otherwise render unlawful a range of discriminatory conduct, do not apply to the ordination or appointment of members of a religious order, the training or education of such persons, the selection or appointment of persons to perform duties or functions related to religious observance or

⁸⁷ AHRC Act, ss 11(1)(f) and s 31(1)(b).

⁸⁸ Fair Work Act, ss 351(1) and 772(1)(f).

⁸⁹ AHRC Act, ss 3 and 31.

⁹⁰ Fair Work Act, ss 153(2)(b), 195(2)(b), 351(2)(c) and 772(2)(d).

practice, or any other act or practice of a body established for religious purposes;⁹¹ and

- ii. does not prohibit, amongst other matters, discrimination in employment, in the engagement of contract workers and the provision of education or training on the basis of a person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding,⁹² if:
 - A. the discrimination was on the grounds of the relevant attributes;
 - B. the discriminator was a religious educational institution; and
 - C. the discrimination was in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.⁹³

78. Taken together, these statutory exceptions allow religious institutions to engage in actions which may otherwise have constituted unlawful discrimination against individuals when conducting themselves in accordance with their religious doctrines and tenets or as otherwise necessary in order to avoid injury to the religious susceptibilities of adherents of a religion or creed.

The general propositions and technical proposals

- 79. In responding to the Consultation Paper, the Law Council will respond primarily to the technical proposals and, will comment only where relevant on the general propositions that have informed, in particular, the suggested amendments to the Sex Discrimination Act, Fair Work Act and AHRC Act.
- 80. It is noted that the following technical proposals 11 to 14 do not give effect to a general proposition.

Technical proposal 1: repeal of subsection 38(3) of the Sex Discrimination Act

Overview of the proposal

81. General proposition A.1 is:

Religious educational institutions should not be allowed to discriminate against students (current or prospective) on the grounds of their sexual orientation, gender identity, marital or relationship status, or pregnancy, or on the grounds that a family member or carer has one of those attributes.

82. The Law Council supports this proposition. It has a longstanding position that children should not be discriminated against, which is developed below. To be clear, the Law Council's view is that both 'educational authorities' and 'educational institutions'—as discussed above, defined differently and regulated inconsistently in

⁹¹ Sex Discrimination Act s 37.

⁹² Ibid ss 14, 16 and 21.

⁹³ Ibid s 38.

the present Sex Discrimination Act—should be subject to the prohibition set out in general propositions A.1.

83. Technical proposal 1 seeks to implement general proposition A.1 by repealing subsection 38(3) of the Sex Discrimination Act in order to ensure that religious educational institutions are no longer permitted to discriminate against students (current or prospective) on the grounds of their possession of the relevant attributes.
84. Subsections 21(1) and (2) of the Sex Discrimination Act are to the effect that it is unlawful for an educational authority to discriminate against a student on the ground of a person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding in a number of respects including by refusing the person's application for admission as a student or by expelling the student or subjecting the student to any other detriment.⁹⁴
85. Under subsection 38(3) of the Sex Discrimination Act, an educational institution may discriminate against any person (regardless of their age) in the provision of education or training on the grounds of sexual orientation, gender identity, marital or relationship status or pregnancy if three criteria (the '**religious-exemption criteria**') are met:
 - a. the institution is conducted in accordance with the specific doctrines, tenets, belief or teachings of a religion or creed ;
 - b. the relevant discriminatory action (e.g. the refusal to admit a student) is in good faith; and
 - c. the relevant action is for the purpose of avoiding injury to the religious susceptibilities of adherents to the religion or creed .⁹⁵
86. The effect of the provision is to allow religious educational institutions to discriminate against an individual by, for instance, refusing to admit an individual to, or to expelling an individual from, a school, college or university or other educational or training centre or by subjecting him or her to any other form of 'detriment'⁹⁶ on the basis of that person's sex, gender identity, marital relationship/status, pregnancy and sexual orientation.

The effect of discrimination on students

87. The Law Council has long advocated for the repeal of subsection 38(3) of the Sex Discrimination Act,⁹⁷ and considers discrimination against students on the grounds that they possess one or more of the protected attributes to be unjustified.

⁹⁴ Subsection 21(3) provides exceptions to subsections 21(1) and (2) of the Sex Discrimination Act, including refusing to accept a person's application as a student at an educational institution conducted solely for students of a different sex from the sex of the applicant.

⁹⁵ The religious-exemption criteria will be considered in more detail in response to technical proposal 2 (below).

⁹⁶ See Sex Discrimination Act, s 21(2)(c).

⁹⁷ See, for instance, Law Council, *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018*, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, 23 January 2019, [5] <<https://www.lawcouncil.asn.au/publicassets/55fe0a9d-bb29-e911-93fc-005056be13b5/3570%20-%20Sex%20Discrimination%20Amendment%20Removing%20Discrimination%20Against%20Students%20Bill%202018.pdf>>; Law Council, *Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff*, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, 21 November 2018, [49]-[55] <<https://www.lawcouncil.asn.au/docs/f446c5d2-cbf2-e811-93fc-005056be13b5/3550%20-%20Legislative%20exemptions%20that%20allow%20faith-based%20educational%20institutions%20to%20discriminate%20against%20students,%20teachers%20and%20staff.pdf>>.

88. In reaching its position on the repeal of subsection 38(3), the Law Council is particularly concerned that LGBTQIA+ students in religious educational institutions are highly vulnerable. Research clearly shows that LGBTQIA+ people generally,⁹⁸ and LGBTQIA+ young people in particular,⁹⁹ are vulnerable to psychological distress and mental health conditions due to discrimination experienced by them.
89. In its Justice Project Final Report, the Law Council summarised the findings of studies, which indicated that LGBTIQ+ people:
- generally experience high levels of discrimination and harassment (including threats of, and actual incidents of, physical violence);
 - hide their sexual orientation and gender identity in public as a result of discrimination;
 - deal with homophobia and/or transphobia in every facet of public life, and within their families and social groups;
 - face a higher prevalence of a range of risk factors that increase disadvantage, a reality that is sometimes referred to as ‘secondary victimisation’, as a result of experiences of discrimination and social exclusion; and
 - have very poor levels of mental health generally, including higher rates of suicide than their heterosexual and cisgender peers.¹⁰⁰

The special status of children and their rights

90. Subsection 38(3) of the Sex Discrimination Act in its current form does not take account of the special status of children in international and domestic law and of the rights of the child, particularly the rights of children not to be discriminated against, to receive education and to have their private lives and rights to health respected.¹⁰¹
91. Article 3(1) of the CRC provides that the best interests of the child shall be a primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. Placing too great an emphasis on matters of parental choice and communal dimension of religious practices risks encroaching on this paramount principle.

⁹⁸ Law Council, *Justice Project – Final Report* (August 2018), LGBTI+ Chapter, 8-10; 14-17 (**Justice Project Final Report**).

⁹⁹ Summarised in the ALRC’s Consultation Paper at [A.33]. See O Hill, A, et al, ‘Writing Themselves’ In 4: *The Health and Wellbeing of LGBTQIA+ Young People in Australia* (Australian Research Centre in Sex, Health and Society, La Trobe University, 2021) 16; Strauss, P, et al, *Trans Pathways: The Mental Health Experiences and Care Pathways of Trans Young People. Summary of Results*. (Telethon Kids Institute, 2017) 34; Ezzy, D, et al, ‘LGBTQ+ Non-Discrimination and Religious Freedom in the Context of Government-Funded Faith-Based Education, Social Welfare, Health Care, and Aged Care’ (2022) 58(3) *Journal of Sociology* 1, 6–7; Lytle, M C, et al, ‘Association of Religiosity with Sexual Minority Suicide Ideation and Attempt’ (2018) 54(5) *American Journal of Preventative Medicine* 644.

¹⁰⁰ Justice Project Final Report, LGBTI+ Chapter, 8-10; 14-17.

¹⁰¹ CRC, arts 2, 16, 23 and 24.

92. As noted by the Parliamentary Joint Committee on Human Rights (**PJCHR**) in its former guidance on human rights:

Human rights law requires that in all actions concerning children the best interests of the child must be a primary consideration. This must be assessed from the child's perspective rather than that of their parents or the state.

It not only requires that the rights of the child be taken as a primary consideration when different interests are being considered, it also provides that any laws that are open to interpretation are interpreted in a way which most effectively serves the child's best interest and any decision that will affect a specific child or children generally must evaluate any possible impact on the child.

What is in the best interests of the child should be able to be adjusted according to the specific situation of the child or children affected and consider their personal context and needs.

While the best interests of the child may not be the only relevant consideration, it is to be given high priority, and is not to be considered as just one of several considerations; larger weight should be given to what serves the child best.¹⁰²

93. Subsection 38(3) of the Sex Discrimination Act, however, is silent on the rights of prospective and enrolled students and does not reflect the need for the best interests of the child to be a primary consideration. It is unlikely that being expelled, refused entry to an educational institution, or subjected to another detriment on the basis of, for example, a child's sex or sexual orientation would be in the child's best interests.
94. The CRC also places States parties under obligations to prevent discrimination against children because of, *inter alia*, their sex or 'other status'.¹⁰³ As noted above, 'other status' has been interpreted flexibly to include, for instance, 'sexual orientation' and 'transgender identity'.¹⁰⁴
95. States are additionally under duties to ensure that children are 'informed' and 'have access to education'¹⁰⁵ and agree that the education of children should be directed to, amongst other matters:
- the development of the child's personality, talents and mental and physical abilities to their fullest potential;
 - the development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations; and,
 - the preparation of the child for responsible life in a free society.¹⁰⁶

¹⁰² PJCHR, *Guide to Human Rights* (June 2015), 47.

¹⁰³ CRC, art 2(1).

¹⁰⁴ See, for instance, UNHRC, *Toonen v Australia*, Communication No 488/1992 (1992); UNHRC, *G v. Australia*, CCPR/C/119/D/2172/2012, 2 December 2017.

¹⁰⁵ CRC, art 24(2)(e). Rights to education are also enshrined in ICESCR, art 13.

¹⁰⁶ See CRC, art 29(1)(a), (b) and (d).

96. In 2016, the United Nations Committee on the Rights of the Child commented that:

*Adolescents who are lesbian, gay, bisexual, transgender and intersex commonly face persecution, including abuse and violence, stigmatization, **discrimination, bullying, exclusion from education and training**, as well as a lack of family and social support, or access to sexual and reproductive health services and information. In extreme cases, they face sexual assault, rape and even death. These experiences have been linked to low self esteem, higher rates of depression, suicide and homelessness.*

*The Committee emphasizes the rights of all adolescents to freedom of expression and respect for their physical and psychological integrity, gender identity and emerging autonomy. ... It urges States to ... repeal all laws criminalizing or **otherwise discriminating** against individuals on the basis of their sexual orientation, gender identity or intersex status and adopt laws prohibiting discrimination on those grounds. States should also take effective action to protect all lesbian, gay, bisexual, transgender and intersex adolescents from all forms of violence, discrimination or bullying by raising public awareness and implementing safety and support measures [emphasis added and citations removed].¹⁰⁷*

97. Repeal of subsection 38(3) of the Sex Discrimination Act to remove the ability of religious educational institutions to discriminate on the basis of sex, sexual orientation, gender identity or pregnancy appears to be a necessary measure to protect the fundamental rights and freedoms of students.
98. Other than anecdotal evidence regarding the use of the exemption,¹⁰⁸ the Law Council is unaware of the frequency with which religious educational institutions rely on subsection 38(3) of the Sex Discrimination Act. Even if infrequently relied upon, such exemptions are, by their very nature, harmful because of the important symbolic role played by legislation in defining what is acceptable behaviour in the community.¹⁰⁹

Inconsistency with the law in the majority of Australian jurisdictions

99. Significantly, anti-discrimination laws in the Australian Capital Territory, Northern Territory, Queensland, South Australia, Tasmania and Victoria do not permit discrimination against students by any educational institution on the basis of sexual orientation, gender identity, marital/relationship status or pregnancy.¹¹⁰

¹⁰⁷ United Nations Committee on the Rights of the Child, *General comment No. 20 (2016) on the implementation of the rights of the child during adolescence*, CRC/C/GC/20, 6 December 2016, [33]-[34].

¹⁰⁸ See, for instance, Office of the Children's Advocate, *Voices of LGBTQIA+ Young People in NSW Report (2022)*, p 70.

¹⁰⁹ See Law Council, *Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff*, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, 21 November 2018, [54].

¹¹⁰ *Discrimination Act 1991 (ACT)*, s 32; *Anti-Discrimination Act 1992 (NT)*, s 30; *Anti-Discrimination Act 1991 (Qld)*, s 41; *Equal Opportunity Act 1984 (SA)*, ss 37 and s 85ZE; *Anti-Discrimination Act 1998 (Tas)*, s 51A; *Equal Opportunity Act 2010 (Vic)*, s 83. Conversely, as the ALRC notes in its Consultation Paper at page 16, the *Anti-Discrimination Act 1977 (NSW)* expressly does not apply to a 'private educational authority': s 31A(3)(a), as defined in subsection 4(1).

Recommendation

- **The Law Council recommends, consistent with technical proposal 1, the repeal of subsection 38(3) of the Sex Discrimination Act on the basis that it discriminates unjustifiably against students based on particular attributes.**

100. The Law Council observes the repeal of subsection 38(3) of the Sex Discrimination Act would not prohibit educational institutions (including religious educational institutions) from being able to select prospective students on the grounds of sex to be enrolled in single-sex schools and to provide accommodation solely for students of one sex.¹¹¹

Technical proposal 2: repeal of subsections 38(1) and (2) of the Sex Discrimination Act

101. General proposition B.1 is:

Religious educational institutions should not be allowed to discriminate against any staff (current or prospective) on the grounds of sex, sexual orientation, gender identity, marital or relationship status, or pregnancy.

102. Technical proposal 2 seeks to implement general proposition B.1 by repealing subsections 38(1) and (2) of the Sex Discrimination Act .

The operation of subsections 38(1) and (2)

103. Paragraphs 14(1)(a) and (b) and 14(2)(c) of the Sex Discrimination Act provide that it is unlawful for an employer to discriminate against a person on the ground of that person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities:

- in the arrangements made for the purpose of determining who should be offered employment;
- in determining who should be offered employment; or,
- if the person is an employee, by dismissing that person from his or her employment.

104. Paragraph 16(b) of the Sex Discrimination Act prohibits a principal from discriminating against a contract worker on the ground of that person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities by not allowing the contract worker to work or continue to work.

105. Subsections 38(1) and (2) of the Sex Discrimination Act allow religious educational institutions to discriminate against current and prospective employees and contract workers on the grounds of a subset of the above attributes (sex, sexual orientation, gender identity, marital or relationship status or pregnancy) by

¹¹¹ Sex Discrimination Act, ss 21(3) and 34(2).

disapplying the protections within paragraphs 14(1)(a) and (b), 14(2)(c) and 16(b) of the Act if the religious-exemption criteria are satisfied.

106. The Law Council has previously queried whether existing exceptions in the Sex Discrimination Act which in effect permit religious educational institutions to discriminate against prospective and current employees and contract workers on the basis of the relevant attributes strike the appropriate balance between the freedom to manifest one's religion and protections for other rights in this area.¹¹² It submitted that, if discrimination against people employed or contracted by religious schools was to be maintained, there needed to be consideration by Parliament as to whether this is justified, necessary and proportionate to the interests that schools and other educational institutions are trying to protect.¹¹³
107. Allowing discrimination against prospective and current employees and contract workers on the basis of sex, sexual orientation, gender identity, marital or relationship status or pregnancy by religious educational institutions could arguably, depending on the circumstances, be considered to uphold:
- a. the institutional autonomy of such bodies to act in accordance with the tenets and doctrines of their religion or creed;
 - b. the right of religious believers to manifest their beliefs individually and communally through selecting staff whose attributes conform to the tenets and doctrines of that religion; and
 - c. the freedom of parents to determine the moral and religious education of their children.
108. However, subsections 38(1) and (2) of the Sex Discrimination uphold those rights at the expense of the rights of individuals, particularly the right to be treated equally and in a non-discriminatory manner.
109. The limitation on the freedom for religious educational institutions to select staff is necessary to protect the rights and freedoms of students and staff in educational settings, given the significant burden on rights (including interference with a person's dignity) that arises from discrimination of this nature.
110. While in most cases, staff have greater choice about where they decide to work than students attending a school, exclusionary policies relating to staff can impact not only on the dignity and mental health of the staff members themselves, but on vulnerable students as well. As has been previously noted by the New South Wales Bar Association, there is a:

*transferred impact on students when teachers/staff are discriminated against, or when there are no teachers/staff like them; that is when there is a transferred denial of who they are, or the absence of any affirmation of who they are.*¹¹⁴

¹¹² Law Council of Australia, *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018*, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, 23 January 2019, [8]; Law Council, *Religious Discrimination Bill 2021 (Cth) and related bills*, Submission of to the Parliamentary Joint Committee on Human Rights, 17 December 2021, [163].

¹¹³ *Ibid.*, [164].

¹¹⁴ [52].

111. For the reasons provided by the ALRC at A.42 to A.44 of the Consultation Paper, the Law Council supports the repeal of subsections 38(1)-(2) of the Sex Discrimination Act. It notes in this context that this measure is intended to work in conjunction with broader measures which enable the preferencing of staff involved in the teaching, observance or practice of religion on religious grounds, and requirements on all staff to respect the religious ethos of the educational institution.

Recommendation

- **The Law Council recommends, consistent with technical proposal 2, that subsections 38(1) and (2) of the Sex Discrimination Act be repealed.**

112. It is noted that discrimination against employees on the basis of the relevant attributes is also prohibited by any educational institution in the Australian Capital Territory, Tasmania and Victoria and will also, as soon as recently enacted amendments come into force, apply shortly in the Northern Territory.¹¹⁵
113. With regard to the Law Council's overarching recommendations, the repeal of subsections 38(1) and (2) would, consequently, represent a strengthening of Commonwealth anti-discrimination legislation that is consistent with developments within Australia.

Technical proposal 3: amendment of subsection 37(1)(d) of the Sex Discrimination Act

114. Technical proposal 3 is to amend paragraph 37(1)(d) of the Sex Discrimination Act to specify that the exception for religious bodies in that provision does not apply to educational institutions.
115. Technical proposal 3 would implement general propositions A.1 and B.1, which stipulate that religious educational institutions should not be allowed to discriminate against students (current or prospective) or staff (current or prospective) on the grounds of their possession of the relevant attributes.

The operation of paragraph 37(1)(d)

116. Paragraph 37(1)(d) of the Sex Discrimination Act provides that none of the protections against discrimination in Divisions 1 and 2 of Part II of the Act, which include the protections provided to students, employees and contract workers, affect:

any ... 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.

¹¹⁵ *Discrimination Act 1991 (ACT)*, s 32; *Anti-Discrimination Act 1998 (Tas)*, s 51; *Equal Opportunity Act 2010 (Vic)*, s 83A. See the *Anti-Discrimination Act 1992 (NT)*, s 37A (inserted by s 22 of the *Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003 (NT)*). The law in the Northern Territory will soon change after the passage of the *Anti-Discrimination Amendment Bill 2022 (NT)* on 22 November 2022. The provisions of the Bill bring the Northern Territory into line with the Australian Capital Territory, Tasmanian and Victoria in prohibiting discrimination against employees on the basis of the relevant attributes.

117. Unlike the exemptions under section 38 of the Sex Discrimination Act, the paragraph 37(1)(d) exemption:
- a. requires that the body in question is ‘established for religious purposes’ rather than merely ‘conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion’; and
 - b. stipulates that the (discriminatory) act must either:
 - i. conform to the doctrines, tenets or beliefs of the religion upon which the body was established; or
 - ii. be ‘necessary’ to avoid injury to the religious susceptibilities of adherents of that religion.¹¹⁶
118. The Law Council agrees with the ALRC’s proposal to amend section 37(1)(d) to ensure that it would not, in the absence of section 38, be read to apply to religious educational institutions. This would otherwise, as noted by the ALRC, make the reforms proposed in technical proposals 1 and 2 redundant.¹¹⁷

Concerns about paragraph 37(1)(c) of the Sex Discrimination Act

119. General proposition A.2 is, relevantly:

Religious educational institutions should be permitted to train religious ministers and members of religious orders, and regulate participation in religious observances or practices, unfettered by sex discrimination laws.

120. No technical proposal goes directly to this part of general proposition A.2. Indeed, the proposition merely describes the effect of paragraph 37(1)(c) of the Sex Discrimination Act, which frees bodies established for religious purposes from the Sex Discrimination Act’s prohibitions on discrimination in Divisions 1 and 2 with regard to:

... 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 [emphasis added]

121. The Law Council received mixed views in relation to general proposition A.2. The Law Society of New South Wales has expressed concerns about paragraph 37(1)(c). While agreeing that it is important for religious educational institutions to manifest religious belief through worship and practice in the community, including through the training of ministers and members of religious orders, the Law Society of New South Wales has suggested that any discriminatory conduct should be permissible only when in good faith and in the interests of ‘avoiding injury to adherents of the relevant religious beliefs’ [understood to be injury to the religious susceptibilities of such adherents].
122. The Victorian Bar has also raised an issue with paragraph 37(1)(c). It notes that the training of religious ministers and members of religious orders and the regulation of the conduct of religious observances within those institutions in accordance with

¹¹⁶ Unlike the exemptions in section 38 of the Sex Discrimination Act, the paragraph 37(1)(d) exemption does not cover the religious sensibilities of adherents to a ‘creed’.

¹¹⁷ ALRC Discussion Paper, 30.

religious doctrine are essential to the free exercise of religious belief through religious institutions.

123. However, in relation to the conduct of religious observances and practices by schools, the Victorian Bar recommends, pursuant to general proposition A.1, that paragraph 37(1)(c) should not be allowed to operate so as to allow a religious educational institution that is also 'a body established for a religious purpose' to exclude students from participating in religious observances or practices on any of the prohibited grounds, as this would amount to discrimination. To the extent that that would limit the free exercise of religious belief by other individuals within the school community, it would be justified in the best interests of the child.
124. In the time available, the Law Council has not resolved a position in relation to the issues raised by the Law Society of New South Wales and Victorian Bar. However, for present purposes, it suggests that the ALRC consider whether retaining paragraph 37(1)(c) in its present form, would permit conduct which would unreasonably limit the fundamental rights of staff or students, thus undermining the objective of general propositions A.1 and B.1. The Law Council would be happy to give further consideration to this.

Recommendation

- **The ALRC should consider whether retaining paragraph 37(1)(c) in its present form would unreasonably limit the fundamental rights of staff or students.**

Technical proposal 4: accommodation provided by educational institutions

125. Technical proposal 4 is:

The Sex Discrimination Act should be amended to specify that the exception for religious bodies in s 23(3)(b) does not apply to accommodation provided by an educational institution.

126. The expressed purpose of the amendment is to implement general propositions A and B, which would:
- a. disallow religious educational institutions from discriminating against students and staff on the basis of the relevant attributes; and
 - b. allow religious educational institutions to continue to benefit from the exception available to charities in relation to the provision of accommodation.
127. Subsections 23(1) and (2) of the Sex Discrimination Act are to the effect that it is unlawful for a person to discriminate against another person in connection with the provision of accommodation on the ground of the other person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding.
128. Paragraph 23(3)(b) provides an exception to subsections 23(1) and (2) for accommodation provided by a religious body.

129. The Law Council has received support for these changes on the basis that if the proposed amendment of paragraph 23(3)(b) were enacted:
- a. educational institutions with charitable status would still be able to rely on a general exception for charities contained in paragraph 23(c) of the Act in relation to sex or marital status, thus allowing charities to continue:
 - i. to provide accommodation solely for persons of one sex or solely for persons of a particular marital or relationship status; and
 - ii. in the case of boarding schools administered by a charity, to restrict the provision of accommodation, for example, to only staff members who are single.
 - b. the provisions in the Sex Discrimination Act regarding accommodation provided by educational institutions would be more closely aligned with provisions in the Act concerning accommodation provided by religious bodies in connection with ‘Commonwealth-funded aged care’.¹¹⁸
130. The Law Council notes as an aside that the ALRC may wish to consider, if it has not already, whether there are educational institutions with charitable status which provide accommodation, noting, for example, the kinds of arrangements discussed in *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256.¹¹⁹

Technical proposal 5: amendment of paragraphs 153(2)(b), 195(2)(b), 351(2)(c) and 772(2)(d) of the Fair Work Act

Technical proposal 5—removing the exceptions for religious bodies in the Fair Work Act

131. Technical proposal 5 is:

The Fair Work Act should be amended to specify that the exceptions for religious bodies in ss 153(2)(b), 195(2)(b), 351(2)(c) and 772(1)(f) do not apply to educational institutions except as otherwise provided in the Sex Discrimination Act and Age Discrimination Act.

132. Like technical proposals 2 and 3, technical proposal 5 will implement general proposition B.1 so as to prevent religious educational institutions from discriminating against prospective and current employees and contract workers on the basis of the relevant attributes.
133. Sections 153, 195, 351 and 772 of the Fair Work Act prohibit (subject to exceptions) discrimination, in certain circumstances, on the grounds of an employee’s race, colour, sex, sexual orientation, breastfeeding, gender identity, intersex status, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin (**protected Fair Work attributes**).

¹¹⁸ Sex Discrimination Act, s 23(3)(b) and (3A).

¹¹⁹ *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256 [267]-[269].

134. Specifically:

- subsection 153(1) provides that a modern award must not include terms that discriminate against an employee because of, or for reasons including the employee's protected Fair Work attributes;
- subsection 195(1) provides that a term of an enterprise agreement is a discriminatory term, and thus an unlawful term,¹²⁰ the extent that it discriminates against an employee covered by the agreement because of, or for reasons including, the employee's protected Fair Work attributes;
- subsection 351(1) provides that an employer must not take adverse action¹²¹ against a person who is an employee, or prospective employee, of the employer because of the person's protected Fair Work attributes; and
- paragraph 772(1)(f) provides that employer must not terminate an employee's employment for reasons or, or including, the protected Fair Work attributes.

135. Paragraphs 153(2)(b), 195(2)(b), 351(2)(c) and 772(2)(d) of the Fair Work Act provide that those prohibitions do not apply if:

- the relevant discriminatory act is taken against a staff member of a religious institution or the employment is terminated by a religious institution:
- in good faith; and
- to avoid injury to the religious susceptibilities of adherents of that religion or creed.

136. Technical proposal 5, if brought into effect, would result in the amendment of paragraphs 153(2)(b), 195(2)(b), 351(2)(c) and 772(2)(d)¹²² of the Fair Work Act so those exceptions do not apply to religious educational institutions except as specified in Commonwealth anti-discrimination laws, thus making it consistent with ILO 111.

137. The Law Council **supports** technical proposal 5 insofar as it aims to implement general proposition B.1, namely that religious educational institutions should not be allowed to discriminate against any staff (current or prospective) on the relevant grounds.

Separate issue—certain Fair Work Act prohibitions do not apply to indirect discrimination

138. The Law Council draws a separate issue to the attention of the ALRC for consideration.

139. The effect of technical proposal 5, if implemented, would be that the prohibitions on discriminatory terms in modern awards and enterprise agreements, and adverse action or termination on discriminatory grounds, imposed by subsections 153(1), 195(1), and 351(1) and paragraph 772(1)(f) respectively would apply to religious educational institutions (subject to the Sex Discrimination Act).

¹²⁰ Under paragraph 194(a) of the Fair Work Act.

¹²¹ Ibid section 342.

¹²² The Law Council observes that there appears to be an error in the Consultation Paper: references to paragraph 772(1)(f) appear, in fact, to be references to paragraph 772(2)(b).

140. However, the extent of this protection in relation to terms of modern agreements and enterprise agreements is limited.
141. Specifically, there is authority which determines or opines that sections 153 and 195 of the Fair Work Act, which prohibit discriminatory terms in awards and enterprise agreements respectively, only provide protection against *direct discrimination* and do not protect against *indirect discrimination*.¹²³ This may be contrasted with the protections against adverse action in section 351, which have been interpreted as providing protection against direct *and* indirect discrimination.¹²⁴
142. While the proposed amendments are not directed to the meaning of discriminatory terms, the Law Council observes that the effectiveness of technical proposal 5, insofar as it aims to prevent discrimination against staff, is undermined if the prohibition on discriminatory terms in modern awards and enterprise agreements imposed by in sections 153 and 195 are limited to direct discrimination only. The Law Council recommends that further consideration be given to the definition of discriminatory terms in the Fair Work Act, and the meaning of discrimination and cognate expressions used throughout the Act more generally.

Recommendation

- **Consistently with technical proposal 5, the Fair Work Act should be amended to specify that the exceptions for religious bodies in ss 153(2)(b), 195(2)(b), 351(2)(c) and 772(1)(f) do not apply to educational institutions, except as otherwise provided in the Sex Discrimination Act and Age Discrimination Act.**
- **The ALRC should consider the definition of discriminatory terms in the Fair Work Act, and the meaning of discrimination and cognate expressions used throughout the Act more generally, with a view to determining whether further amendments are required to ensure the intention of technical proposal 5 is given full effect.**

Technical proposal 6: prohibiting discrimination on the grounds of the protected attributes of students' family members and carers

143. Technical proposal 6 is to amend the Sex Discrimination Act so as 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 relevant attribute.
144. This proposal would implement general proposition A.
145. The absence of explicit protections for prospective and enrolled students against discrimination by religious educational institutions on the grounds of the protected attributes of their parents, legal guardians or family members (**discrimination by association**) arguably places Australia in breach of its international obligations under, for example, the CRC.

¹²³ In relation to s 153 of the Fair Work Act, see *Shop, Distributive and Allied Employees' Association v National Retail Association (No 2)* (2012) 205 FCR 227 at [51]-[59]; in relation to s 195 see *The Hon. Christian Porter MP, Attorney General and Minister for Industrial Relations v Metropolitan Fire and Emergency Services Board; United Firefighters' Union of Australia* (2019) 291 IR 1 at [68]-[73]

¹²⁴ *Klein v Metropolitan Fire and Emergency Services Board* (2012) 208 FCR 178 at [97]; *Sayed v Construction, Forestry, Mining and Energy Union* (2015) 327 ALR 460 at [161]

146. Article 2(2) of the CRC requires at a minimum that:

States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

147. The Law Council observes that:

- a. the anti-discrimination laws in the Australian Capital Territory, Northern Territory, Queensland, Tasmania and Victoria all protect individuals (regardless of their age) from discrimination on the basis of an individual's association with a person who possesses any form of protected attribute;¹²⁵
- b. Western Australia also protects individuals (regardless of their age) against discrimination by association, but limits this protection to cover a relative's or associate's sexual orientation, race, age or impairment;¹²⁶ and
- c. Commonwealth law also prohibits discrimination by association in:
 - i. the Disability Discrimination Act which prohibits discrimination in relation to associates with a disability, with 'associates' including one's spouse, a cohabitee, a relative, a carer or another person with whom one is 'in a business, sporting or recreational relationship';¹²⁷
 - ii. the Racial Discrimination Act which, by way of example, prohibits discrimination in the context of employment on the basis of 'race, colour or national or ethnic origin of [a] person or of *any relative or associate* of that ... person [emphasis added]'.¹²⁸

148. For the above reasons, the Law Council, therefore, **supports** the proposed prohibition on discrimination by association on the grounds of sexual orientation, gender identity, marital relationship and pregnancy.

149. The Law Council also makes the following **recommendations** that:

- a. the scope of the proposed prohibition includes not only parents, carers and family members but also broader associates to enhance protections under the Sex Discrimination Act in line with the law in the Australian Capital Territory, Northern Territory, Queensland, Tasmania, Victoria, Western Australia and both the Disability Discrimination Act and Racial Discrimination Act;

¹²⁵ *Discrimination Act 1991* (ACT), s 7(1)(c); *Anti-Discrimination Act 1992* (NT), s 19(1)(r); *Anti-Discrimination Act 1991* (Qld), s 7(q); *Anti-Discrimination Act 1998* (Tas), 16(s); and *Equal Opportunity Act 2010* (Vic), s 6(q).

¹²⁶ *Equal Opportunity Act 1984* (WA), ss 35O(2), 36(1)(a) 66A(1)(a) and 66V(2). It is worth noting that the Western Australian Government has 'broadly accepted' the recommendations of the Law Reform Commission of Western Australia as set out in its final report, Law Reform Commission of Western Australia, *Report on Project 111: Review of the Equal Opportunity Act 1984*, August 2022. See Hon John Quigley LLB JP MLA, Attorney General; Minister for Electoral Affairs, 'WA's anti-discrimination laws set for overhaul' (media release, 16 August 2022), <<https://www.mediastatements.wa.gov.au/Pages/McGowan/2022/08/WAs-anti-discrimination-laws-set-for-overhaul.aspx#:~:text=%22The%20new%20Equal%20Opportunity%20Act,complaint%20resolution%20and%20community%20education.>>>.

¹²⁷ Disability Discrimination Act, ss 4(1) and 7.

¹²⁸ Racial Discrimination Act, s 15(1).

- b. consideration be given to whether to expand the scope of the Sex Discrimination Act to cover 'discrimination by association on the basis of protected attributes under that Act in all circumstances, including the employment of persons in religious educational institutions, in line with similar protections in the Racial Discrimination Act and Disability Discrimination Act.

Recommendations

- **The Sex Discrimination Act should be amended, consistently with technical proposal 6 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 relevant attribute.**
- **Consideration should be given to:**
 - **expanding the scope of the proposed prohibition on discrimination by association (technical proposal 6) to broader associates;**
 - **during the technical proposal 14's 'stage 1' review,¹²⁹ whether to expand the scope of the Sex Discrimination Act to cover 'discrimination by association' on the basis of protected attributes under that Act in all circumstances, including the employment of persons in religious educational institutions, in line with similar protections in the Racial Discrimination Act.**

Propositions and proposals relating to teaching religious doctrine or belief on sex or sexuality

General proposition B.3

The interaction between general proposition B.1 and general proposition B.3

150. Read together, general propositions B.1 and B.3 provide that religious educational institutions:
- **should not** be allowed to discriminate against any staff (current or prospective) on the grounds of sex, sexual orientation, gender identity, marital or relationship status, or pregnancy (**general proposition B.1**); and
 - **should** be able to require staff involved in the teaching of religious doctrine or belief to teach religious doctrine or belief on sex or sexuality as set out by that institution and in accordance with their duty of care to students and staff, and requirements of the curriculum (**general proposition B.3**).
151. The Law Council understands that general proposition B.3 effectively operates as a carve out, or alongside, general proposition B.1. That is, that the institution has discretion to determine, or impose requirements, in relation to the manner of teaching of 'religious doctrine or belief on sex or sexuality' by its staff, without

¹²⁹ Consultation Paper, [160].

concern about the possibility that the requirement may amount to discrimination, particularly indirect discrimination.¹³⁰

152. The Law Council understands that general proposition B.3 is intended to apply in classes directed towards teaching the content of a particular religious doctrine and belief—a religious education class. That is, to classes the purpose of which is to educate the students about the position of that religious doctrine or belief system on sex or sexuality, as a matter of fact.

The scope of ‘teaching of religious doctrine or belief on sex or sexuality’

153. There is a potential question however, about the scope of the term ‘teaching of religious doctrine or belief on sex or sexuality’ and what teaching contexts it extends to. In particular general proposition B.3 does not expressly address the *purpose* of the class or teaching in question. The phrase ‘staff involved in the teaching of religious doctrine or belief’ might be intended to apply only to a religious education class. However, ‘involved in’ could have a reasonably wide ambit. It may be, depending on the institution, that religious doctrine or belief could form part of the teaching in a broader range of classes, beyond a religious education class. If this is true, it may be that the institution could impose requirements on staff in relation to ‘teaching of religious doctrine or belief on sex or sexuality’ in such other classes—for example, a class about physical education, health, biology, English or politics. In those contexts, the proposition may not have its intended operation.
154. If the ALRC’s intention is as described in [142], it may be worth considering circumscribing general proposition B.3. For example, to replace ‘should be able to require staff *involved in the teaching of religious doctrine or belief*’ with ‘should be able to require staff *teaching a class the purpose of which is to educate students about the content of the relevant religious doctrine and belief*’ [difference in italics].

The issue of ‘alternative viewpoints’

155. The Victorian Bar is of the view that no LGBTQIA+ staff member should be *required* to teach religious doctrine in a manner which is inconsistent with his or her own sexual orientation. It suggests that ideally, religious doctrine should instead be taught by particular staff members whose beliefs are consistent with the doctrinal content of the curriculum.
156. However, the Victorian Bar recognises that it may not always be possible for a school to employ a dedicated religious education staff member and, where it is not such a staff member, there is a need to balance respect for the rights of LGBTQIA+ staff members with the reasonable expectation that staff members are able to fulfil all of the requirements of the role for which they are employed, having regard to the religious ethos of the institution.
157. The Victorian Bar notes that the ALRC suggests that the aims of proposition B.3 could be achieved in a balanced manner because:

*a school could require a LGBTQI[A]+ staff member involved in the teaching of religious doctrine or beliefs to teach the school’s position on those religious doctrines or beliefs, as long as they were able to provide objective information about alternative viewpoints if they wished.*¹³¹

¹³⁰ Sex Discrimination Act section 5B.

¹³¹ Consultation Paper, [54].

158. However, the Victorian Bar's view is that the way in which general proposition B.3 is worded does not achieve this balance, and it suggests that general proposition B.3 should be amended to 'recognise that any staff member involved in the teaching of religious doctrine or belief should be able to provide objective information about alternative viewpoints if they wish to do so'.
159. The Law Council makes the following points about issues raised by the Victorian Bar.
160. Firstly, it agrees that if the ALRC's intention is to circumscribe the institution's discretion to set requirements on the manner in which religious doctrine or belief on sex or sexuality is taught by permitting a teacher 'to provide objective information about alternative viewpoints if they wished', this intention is not reflected in the terms of general proposition B.3. If the ALRC intends that proviso, it is suggested that it should be included expressly in general proposition B.3.
161. However, the Law Council queries how such a proviso could be enforced. For example, whether the 'requirements' formally set down by a religious education institution need include an exception to allow 'objective information about alternative viewpoints' to be expressed. There may be contention about whether the information was objective.
162. Secondly, if the above analysis is correct, and if an institution could set requirements in relation to teaching 'religious doctrine or belief on sex or sexuality' in classes other than classes dedicated to religious education, then without that 'proviso', LGBTQIA+ staff (or an unwed pregnant mother, for example), may feel excluded from and not wish to teach in a broad range of classes on the basis of holding those attributes.

Technical proposal 7

The proposal and its purported operation and purpose

163. There are two express elements set out in general proposition B.3 which potentially limit the scope of the discretion of a religious educational institution to set out requirements about the religious doctrine or belief on sex or sexuality is taught: the duty of care to students and staff and the requirements of the curriculum.
164. Technical proposal 7 addresses the latter, the curriculum:
- Amend the Sex Discrimination Act 1984 (Cth) to clarify that the content of the curriculum is not subject to the Act.*
165. That is, in the context of general proposition B.3, to the extent that a religious educational institution has discretion to determine the content of the curriculum, and that curriculum affects or relates to any requirement set out by the religious education institution in relation to religious doctrine or belief on sex or sexuality, the Sex Discrimination Act does not apply.
166. Further, technical proposal 7 is informed by general proposition A.3, namely that religious educational institutions 'should be permitted to teach religious doctrines or beliefs on sex or sexual orientation in a way that accords with their duty of care to students and requirements of the curriculum'.

167. The ALRC makes clear the purpose:

Proposal 7 responds to concerns that have been raised by some stakeholders about the potential consequences of? Proposal 1 [to repeal subsection 38(3) of the Sex Discrimination Act to cease the exception that allows discrimination against students on the grounds of sexual orientation, gender equality etc] could have on the ability of religious schools to teach their religious beliefs. Some stakeholders are concerned that teaching of their doctrine or beliefs on human sexuality and relationships could be held to be discriminatory to, for example, LGBTQ+ students.

168. The ALRC explains that this approach adopts a model from the *Equality Act 2010* (UK) which excludes the content of the curriculum from the scope of the Act, but includes the way that it is taught. According to Department of Education (UK) guidance quoted by the ALRC 'if a school conveyed its belief in a way that involved haranguing, harassing or berating a particular pupil or group of pupils the this would be unacceptable in any circumstances and is likely to constitute unlawful discrimination.'¹³²

Constituent body views

169. The Law Council has received mixed views about this approach. The New South Wales Bar Association 'supports the proposal as reflecting a necessary and appropriate balance of competing human rights'. The Law Society of New South Wales considers 'it may be appropriate to clarify the content of the curriculum (as opposed to the way it is delivered) is not subject to the SDA to allay concerns that the teaching of doctrine/beliefs on human sexuality and relationships could be held to be discriminatory', but queries its necessity.

170. The Victorian Bar does not support technical proposal 7. It is worth setting out its views in full:

Expressly carving out the curriculum from the scope of the Act does not reflect the school's obligation to deliver such teaching in a way that accords with its duty of care. Rather, this can be achieved by ensuring that the teaching of religious doctrine and beliefs is subject to the obligation not to discriminate on the prohibited grounds. This could be achieved in practice by, for example, providing objective information about alternative viewpoints (consistently with proposition B.3, [above]).

Discussion

171. As a preliminary point, it is worth noting that it is not abundantly clear to the Law Council how much discretion a school may have to determine its 'curriculum'.

172. The ALRC emphasises that:

The content of the curriculum will still be subject to the requirements of state and territory educational authorities, which may include requirements around how curriculum in relation to sexuality or protected attributes is taught. Schools will also

¹³² ALRC Discussion Paper, 32, citing *Equality Act 2010* (UK), ss 89(2) and 94(2) and Department for Education (UK), *The Equality Act 2010 and Schools: Departmental Advice for School Leaders, School Staff, Governing Bodies and Local Authorities* (May 2014).

*remain bound by their duty of care to students and staff and other accreditation requirements.*¹³³

173. It is not clear how much space sits between those requirements and what is actually taught, which makes it difficult to assess the ambit of technical proposal 7. It suggests that care be taken in defining the term ‘curriculum’, which may encompass for example, the ‘Australian Curriculum’, as developed by the Australian Curriculum, Assessment and Reporting Authority (**ACARA**), and any matter taught to children or students by an educational institution.
174. Secondly, more substantively, the Law Council emphasises that as a matter of principle, it has no issue with religious educational institutions being able to determine the content of the lessons taught to students on the doctrine/beliefs on human sexuality and relationships in their religious education classes. That is, in lessons directed to the content of the relevant religious belief. It understands this to be the intended purpose of technical proposition 7.
175. However, it queries whether technical proposition 7 will be limited to that kind of educational context. While the intention of technical proposition 7 appears to be permit schools to freely teach the content of religious doctrine and belief *in classes directed to that purpose*, it would also appear to permit the institutions to determine the content of the lessons taught in other classes, such as physical education, health, biology, English or politics, which would amount to sex discrimination (for example), but for the operation of the amendment giving effect to general proposition 7. This would appear a much broader ambit than is understood to be intended and could in effect largely unpick the intended operation of technical proposal 1—that is, the repeal of subsection 38(3).

Recommendations

- **Consideration should be given to whether general proposition B.3 should be amended to make clear it applies to setting out requirements for the teaching of ‘religious doctrine or belief on sex or sexuality’ in a ‘religious education class’ or for the ‘purpose of religious education’.**
- **Consideration should be given to:**
 - **whether general proposition B.3 should be amended to provide for the ‘objective alternative viewpoints’ exception;**
 - **in any event, whether that exception is enforceable; and**
 - **if it is not enforceable, whether general proposition B.3 should be otherwise amended to confine it to its intended scope.**

¹³³ ARC Discussion Paper, 32.

- **In relation to technical proposal 7, consideration should be given to:**
 - **defining ‘curriculum’;**
 - **making clear to the Australian Government in the final report how much discretion a religious educational institution may have to determine a curriculum; and**
 - **confining the ability of a religious education institution to the determine the content ‘curriculum’ without breach of the Sex Discrimination Act so far as it relates to religious education.**

Technical proposal 8: preferencing on the basis of religion in selection of employees

176. Technical proposal 8 is to amend the Fair Work Act so as to ensure that a term of a modern award or enterprise agreement does not **discriminate** against a person merely because more favourable treatment is given on the ground of religion to an employee of a religious educational institution in circumstances where:

- *the treatment relates to the selection 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 subsections 153(1) or 195(1), respectively; and*
- *the treatment is proportionate in all the circumstances.*¹³⁴

177. The proposed amendment of the Fair Work Act:

- a. would implement general propositions C.1 and C.2, which are framed in almost the same terms as technical proposal 8;
- b. is a corollary of the implementation of technical proposals 5 and the proposed amendments to paragraphs 153(2)(b) and 195(2)(b) of the Fair Work Act, which would, if given effect to, prohibit religious educational institution discriminating against a person on the basis of, amongst other things, their religion; and
- c. anticipates future legislation to prohibit discrimination on the basis of religious belief or activity, as raised in technical proposal 10.

178. The Law Council’s constituent bodies have not arrived at a consensus on technical proposal 8, as discussed further below. The Law Council has received support for the proposition from its constituent bodies, subject to the following discussion and the concerns raised below by the Queensland Law Society. However, it will be important to see how these principles have been articulated in draft legislation before adopting a final view.

179. As an ancillary point, the Law Council notes that the proviso that the treatment ‘does not constitute discrimination on any other ground prohibited by ss 153(1) or 195(1), respectively’, is limited by the fact that, as discussed above, those subsections only protect against direct discrimination, and not indirect discrimination.

¹³⁴ Consultation Paper, 33.

180. The Law Council makes preliminary observations on technical proposal 8 and general propositions C.1 and C.2 relating to:
- a. relevant international jurisprudence and law;
 - b. limitations on what amounts to a 'genuine occupational requirement'; and
 - c. the definitions of 'nature' and 'ethos' in the context of religious educational institutions under Commonwealth law.

Relevant international law and jurisprudence: the UNHRC

181. The Law Council has considered relevant international jurisprudence and law on discrimination against staff in religious educational institutions on the basis of religion.
182. An example of the UNHRC's balancing of the competing rights of an employer is provided by *Delgado Páez v Colombia*,¹³⁵ in which it was determined that the differential treatment and suspension of a teacher of religion and ethics working in a Catholic secondary school who espoused liberation theology, which was at odds with the doctrines of the Church, did not violate the employee's rights to religious freedom and to free expression or the prohibition against discriminatory treatment. Colombia could, without violating the religious teacher's rights, 'allow the Church authorities to decide *who may teach religion and in what manner it should be taught* [emphasis added]'.¹³⁶
183. The determination in *Delgado Páez* as it applies to teachers of religion in religious schools accords with the UNHRC's *General Comment No 22*, where it is observed that the right to practise and teach religion are:
- acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers* [emphasis added].¹³⁷
184. The UNHRC appears not to have considered the dismissal of non-religious staff (i.e. educators whose role is not to teach the tenets or doctrines of a particular religion or creed) by religious institutions. An indication of the treaty bodies' response to a complaint by non-religious staff (and indeed students) against discriminatory conduct is given by the Committee on Economic, Social and Cultural Rights (CESCR), which in 2018 expressed concern about 'repeated reports of discrimination on grounds of religious belief, sexual orientation or gender identity in employment in non-ecclesiastic positions in church-run institutions, such as schools and hospitals' in Germany and recommended that the country review its laws to ensure that 'no discrimination is permitted against non-ecclesiastical employees on grounds of religious belief, sexual orientation or gender identity'.¹³⁸
185. *Delgado Páez* and the CESCR's comments in 2018 would tend to indicate that discrimination on the grounds of religion in an educational setting should be confined to roles closely entwined with the religion concerned, namely religious teachers.

¹³⁵ *Delgado Páez v Colombia*, Communication No. 195/1985, CCPR/C/39/D/195/1985 (1990) (*'Delgado Páez'*).

¹³⁶ *Delgado Páez*, [5.7], [5.8] and [5.10].

¹³⁷ General Comment No 22, [4].

¹³⁸ Economic and Social Council Concluding observations on the sixth periodic report of Germany, UN Doc E/C.12/DEU/CO/6 (27 November 2018), [22]-[23].

Relevant international law and jurisprudence: the European Union

186. European Union (EU) law is also illustrative of the limitations that may be placed on religious organisations' ability to discriminate against prospective and current employees on religious grounds.
187. The ALRC has modelled technical proposal 8, in part,¹³⁹ on article 4(2) of the Council Directive 2000/78/EC (**the Equal Treatment Directive**).¹⁴⁰ Article 4(2) provides that EU Member States may enact laws that allow churches and religious organisations to discriminate against a prospective or current employee on the basis of that person's 'religion or belief' where 'a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos'.¹⁴¹
188. It may be that article 4(2) of the Equal Treatment Directive provides an appropriate model for the Fair Work Act. The Consultation Paper footnotes the Equal Treatment Directive.¹⁴² Further analysis of the Equal Treatment Directive's implementation under the principle of subsidiarity in EU Member States and case law in those jurisdictions that would clarify the operation of implementing legislation in this regard.

'Genuine occupational requirement'

189. As with the notions of 'ethos' and 'nature',¹⁴³ technical proposal 8 would import into Commonwealth anti-discrimination law the concept of 'genuine occupational requirement'—a phrase that does not appear in the corpus of Commonwealth law but is used in, for instance, article 4(2) of the Equal Treatment Directive.
190. Exceptions to Commonwealth anti-discrimination law currently include the phrase 'inherent requirement(s)', words taken from article 1(2) of ILO 111, which stipulates that: '[a]ny distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination'. The phrase 'inherent requirement(s)' is found in exceptions contained within the AHRC Act,¹⁴⁴ Age Discrimination Act¹⁴⁵ and Disability Discrimination Act,¹⁴⁶ and is significantly used in the Fair Work Act in exemptions from anti-discrimination obligations concerning the terms of modern awards and enterprise agreements, 'adverse action' and the termination of employment.¹⁴⁷
191. It is noted that the Sex Discrimination Act contains a provision that refers 'genuine occupational qualification' in the context of an exception from obligations not to discriminate on the grounds of sex.
192. The Law Council notes that the phrase 'genuine occupational requirement' is used in the *Anti-Discrimination Act 1991* (Qld), which gives as an example of such a requirement being 'employing persons of a particular religion to teach in a school

¹³⁹ Consultation Paper [96].

¹⁴⁰ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

¹⁴¹ Article 4(2) of the Equal Treatment Directive was considered in *IR v JQ*, European Court of Justice, Grand Chamber, Case C-68/17 (11 September 2018).

¹⁴² Consultation Paper, f/ns 76, 87, 92, 103 and 106.

¹⁴³ Discussed below.

¹⁴⁴ AHRC Act, s 3(1) (definition of 'discrimination').

¹⁴⁵ Age Discrimination Act, ss 18(4), 19(3), 20(2), 21(4) and 22(2).

¹⁴⁶ Disability Discrimination Act, s 21A.

¹⁴⁷ Fair Work Act, ss 153(2)(a), 195(2)(a), 351(2)(b) and 772(2)(a).

established for students of the particular religion'.¹⁴⁸ The phrase is also included in proposed amendments to the Queensland law,¹⁴⁹ and also appears in Tasmania's religious bodies exemption.¹⁵⁰ However, the law in Victoria (as amended in 2022) reads as follows:

Religious bodies—employment

(1) A person may discriminate against another person in relation to the employment of the other person in a particular position by a religious body if—

- (a) conformity with the doctrines, beliefs or principles of the religious body's religion is an **inherent requirement** of the position; and
- (b) the other person cannot meet that **inherent requirement** because of their religious belief or activity; and
- (c) the discrimination is reasonable and proportionate in the circumstances [emphasis added].¹⁵¹

193. The Law Reform Commission of Western Australia last year proposed that the employment exemption granted to religious educational institutions under Western Australian anti-discrimination law should be amended in line with the Victorian legislation.¹⁵²
194. The High Court has interpreted 'inherent requirements' as 'something that is essential to the position' that are not limited to being able physically to perform the job but also whether one has the capacity to comply, for instance, with a roster and allocation of duties.¹⁵³ In *QANTAS*, Gaudron J reduced the inherent requirements test to a single question: 'ask whether the position would be essentially the same if that requirement were dispensed with'.¹⁵⁴
195. Consideration may need to be given to whether 'genuine occupational requirement' or 'genuine occupational qualification' is preferable to 'inherent requirement'. The terms have been held to be essentially similar, with the *QANTAS* test applied in matters involving a genuine occupational requirement test.¹⁵⁵
196. Generally speaking, the 'inherent requirement' test may be viewed as requiring more specific attention to what a particular employee needs to do for the particular job.

¹⁴⁸ *Anti-Discrimination Act 1991* (Qld), s 25.

¹⁴⁹ Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (July 2022) Recommendation 39.

¹⁵⁰ *Anti-Discrimination Act* (Tas), s 51(1).

¹⁵¹ *Equal Opportunity Act 2010* (Vic), s 82A (as inserted by *Equal Opportunity (Religious Exceptions) Amendment Act 2021* (Vic), s 8, in effect since 14 June 2022).

¹⁵² Law Reform Commission of Western Australia, *Report on Project 111: Review of the Equal Opportunity Act 1984*, August 2022, Recommendation 79.

¹⁵³ *QANTAS Airways Limited v Christie* (1998) 193 CLR 280 ('**QANTAS**'), 294 per Gaudron J; 318 per Gummow J; *X v Commonwealth* (1999) 200 CLR 177, [100] per Gummow and Hayne JJ (Gleeson CJ, McHugh J and Callinan J agreeing at [8], [30]-[37] and [170], respectively).

¹⁵⁴ *QANTAS Airways Limited v Christie* (1998) 193 CLR 280, 295 per Gaudron J (with whom Brennan CJ agreed). 184. The case law on 'inherent requirements' and the Fair Work Act and its predecessor the *Workplace Relations Act 1996* (Cth) has mainly concerned age, disabilities and medical conditions: see, for example, *Shizas v Commissioner of Police* [2017] FCA 61 (inability to perform certain functions required of an AFP officer due to this chronic back condition (ankylosing spondylosis)); *Keys v Department of Disability and Community Services* (2011) 215 IR 452 (long absence from work due to a psychiatric condition); *X v Commonwealth* (1999) 200 CLR 177 (defence personnel needed to be free of HIV infection); *QANTAS* (age for airline pilots fixed by international regulations); *Cramer v Smithkline Beecham* (1997) 73 IR 470 (two employees of a pharmaceutical plant dismissed because of their sensitivity to penicillin, tolerance to which was considered an inherent requirement of working in the pharmaceutical plant).

¹⁵⁵ *Chivers v State of Queensland (Queensland Health)* [2014] QCA 141 [39]-[42]. See also, for example, *Re: Leidos Australia Pty Ltd* [2021] QIRC 229 [72].

The Law Council would be happy to provide more detailed analysis on this point given additional time.

197. The ALRC is working from an understanding that ‘genuine occupational qualifications’ means ‘a way of identifying the character of the work ‘such that it is better or preferably done by someone with a particular attribute, for reasons of, say, modesty, empathy, or authenticity’’.¹⁵⁶ It alludes to the terms having a ‘similar, but not identical’ meaning,¹⁵⁷ but it is not clear why the slightly broader term is used.
198. The Queensland Law Society is concerned that, if given effect to, technical proposal 8 might be used by religious educational institutions as a ‘loophole’ to discriminate against staff in circumstances where their role does not genuinely require teaching, observing or practising the religion, for example, where a teacher is employed to teach subjects that do not relate to the institution’s religious doctrine. The Law Council notes that the proportionality test included by the ALRC may go some way to addressing this concern.
199. Careful consideration may need to be given, therefore, to defining more strictly the circumstances under which the teaching, observance or practice of religion may be considered a genuine requirement of a role in an educational institution. Any uncertainty in drafting may create ‘loopholes’ for discrimination and lead to disputes about the interpretation of the exemption. A genuine requirement of a role might be, for example, where a staff member is employed to teach religion classes, or is a chaplain, or is in a key leadership position which is critical to the school’s religious ethos.

The meaning of ‘ethos’ and ‘nature’

200. The influence of the Equal Treatment Directive on technical proposal 8 is also evident in the use of the terms ‘ethos’ and ‘nature’.
201. Both terms are wide in their application. The Oxford English Dictionary’s definition of ‘ethos’ indicates that the term has a very wide ambit:

*The characteristic spirit of a people, community, culture, or era as manifested in its attitudes and aspirations; the prevailing character of an institution or system.*¹⁵⁸

202. ‘Nature’ is perhaps vaguer still in its denotation, relating as it does to ‘character’ and to the

*... inherent or essential quality or constitution of a thing; the inherent and inseparable combination of properties giving any object, event, quality, emotion, etc., its fundamental character. In later use also more generally: kind, type.*¹⁵⁹

203. The Law Council also notes that technical proposals 8, 9 and 10 refer to the religious ‘nature’ or ‘ethos’ of an educational institution rather than referring to the ‘doctrines, tenets, beliefs or teachings of a particular religion or creed’, the terms which are currently used in the AHRC Act, Fair Work Act and Sex Discrimination Act.

¹⁵⁶ Consultation Paper 23, citing Neil Rees, Simon Rice and Dominique Allen, Australian Anti-Discrimination Law and Equal Opportunity Law (The Federation Press, 3rd ed, 2018) 69–70.

¹⁵⁷ Ibid [96].

¹⁵⁸ ‘Ethos, n.’, OED Online. Oxford University Press, December 2022, Web, 4 March 2023.

¹⁵⁹ ‘Nature, n.’, OED Online. Oxford University Press, December 2022, Web, 4 March 2023.

204. Care will need to be taken to ensure that these provisions do not create uncertainty and subjective application.
205. The Law Council is unaware of any judicial consideration of the terms ‘doctrines, tenets, beliefs or teachings of a particular religion’ as they appear, for instance, in section 38 of the Sex Discrimination Act. A literal reading of the terms, however, indicates that they have a greater specificity than ‘ethos’ or ‘nature’ and refer directly to the core elements of a religion.¹⁶⁰
206. The Law Council cautions against the importation of terms such as ‘ethos’ and ‘nature’ from the Equal Treatment Directive, particularly when the terms ‘doctrines, tenets, beliefs or teachings of a particular religion’ appear in three relevant statutes: the Sex Discrimination, Fair Work and AHRC Acts.

Technical proposal 9: terminating employment and an educational institution’s religious ethos

207. If implemented, technical proposal 9 would amend the Fair Work Act so as to ensure that any term of a modern award or enterprise agreement (as applicable) does not discriminate against an individual merely because it allows an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed to **terminate** an employee’s employment where:
- a. the termination is necessary to prevent an employee from actively undermining the ethos of the institution;
 - b. the treatment does not constitute discrimination on any other ground prohibited by, respectively, subsections 153(1) or 195(1), which would include discrimination on the basis, *inter alia*, of the relevant attributes; and
 - c. the termination is proportionate to the conduct of the employee—including by reference to:
 - i. the damage caused to the ethos of the educational institution;
 - ii. the genuine occupational requirements of the role, having regard to the nature and ethos of the educational institution;
 - iii. alternative action the employer could instead reasonably take in the circumstances;
 - iv. the consequences of termination for the employee; and
 - v. the employee’s right to privacy.
208. Technical proposal 9 would also amend the Fair Work Act so as to allow for a person’s employment to be terminated, despite paragraph 772(1)(f), in the circumstances set out above.
209. The ALRC has based technical proposal 9 on general proposition D.1, which posits that religious educational institutions should be able ‘to expect all staff to respect

¹⁶⁰ The ALRC is here referred to *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256 for discussion of the phrase ‘established for a religious purpose’ in *Equal Opportunity Act 1995* (Vic), s 75(5) (since repealed).

their institutional ethos' and 'to take action to prevent any staff member from actively undermining the institutional ethos of their employer'.

210. The Law Council has received some support for this proposal from its constituent bodies from the Law Society of New South Wales; however, as with proposal 3 it considers that any action should be limited to that which is in good faith and in the interests of avoiding injury to adherents of the relevant religious beliefs. However, the New South Wales Bar Association has expressed that rigid adherence to the limitations on the exceptions in technical proposals 8 and 9 may prove to be unnecessarily restrictive or confining to an incumbent government when pursuing its legislative reform objectives. Its view is that any future legislation must strike a necessary and appropriate balance of human rights considerations.
211. Further, the Law Council's general comments regarding proposal 8 apply where relevant to proposal 9, particularly those comments regarding the terms 'nature' and 'ethos'. These are loosely framed terms and it may be difficult to apply them in context. This may be exacerbated by the addition of a test of 'actively undermining', which may be uncertain and somewhat subjective in its application.
212. With specific reference to proposal 9, the Law Council observes that the question of whether the termination is proportionate would require regard to be had to all relevant rights, rather than only the right to privacy (the only other right cited in the proposal). While the list is not exhaustive, other rights engaged by this provision could include, for example, freedom of expression, freedom of assembly and freedom of association.
213. For the reasons given above, the Law Council reserves its position on technical proposal 9.

Technical proposal 10: Exceptions for religious educational institutions in future legislation

214. The ALRC proposes in technical proposal 10 that future legislation to prohibit discrimination on the basis of religious belief or activity should contain exceptions in relation to employment and engagement of contract workers with the same effect as technical proposals 8 and 9.
215. Technical proposal 10 is contingent upon the terms of a future religious discrimination bill.
216. The Law Council indicates its support for a religious discrimination act to protect individuals against discrimination on the basis of their religious belief or activity.
217. The Law Council considers it premature to form a view now about the wording of an exemption to religious discrimination provisions that are not themselves presented in draft form for comment. It understands, however, the need for a consistent approach between any such Bill and the Fair Work Act on these points.
218. Notwithstanding its reluctance to comment on technical proposal 10, the Law Council's general comments regarding proposals 8 and 9 apply to technical proposal 10.

Technical proposal 11: religious educational institutions to be subject to the AHRC Act

219. Technical proposal 11 is for the AHRC Act to be amended so that religious educational institutions are subject to the Act. The proposal does not implement one of the ALRC's four general propositions.
220. To give effect to technical proposal 11, the exemption in paragraph (d) of the definition of 'discrimination' in subsection 3(1) of the AHRC Act would need to be amended so as no longer to apply to religious educational institutions.
221. The AHRC currently has no power to inquire into the discriminatory acts or practices of, or systemic unlawful discrimination by, religious educational institutions on the grounds of the relevant attributes in the employment of staff.¹⁶¹
222. Were technical proposal 11 not implemented alongside, for instance, technical proposal 2, an inconsistency would exist between the terms of the Sex Discrimination Act and the AHRC Act, with the latter being unable to inquire into, or attempt to conciliate disputes, relating to discrimination concerning the relevant attributes.
223. The Law Council, therefore, **supports** the proposed amendment of the AHRC Act to ensure that the AHRC's powers of inquiry and its conciliation function extend to religious educational bodies.
224. The Law Council further notes that technical proposal 11 would create an inconsistency between religious educational institutions and other religious institutions, with the latter still falling outside the AHRC's powers to inquire into, and conciliate disputes about, discrimination. However, exceptions such as section 37(1)(d) of the Sex Discrimination Act would still continue to apply to these institutions, which in practice may reduce the basis for inquiry.

Technical proposal 12: revision of the guidelines on temporary exemptions

225. Technical proposal 12 is:

The [AHRC] should review the 'Commission Guidelines' for 'Temporary exemptions under the Sex Discrimination Act 1984 (Cth)' in light of the legislative changes proposed.

226. The Discussion Paper explains that the current guidelines do not contemplate religious educational institutions because those institutions currently benefit from the very broad exceptions under s 38. Further, that individual exemption may be an important safety net to assist particularly vulnerable minority groups by providing additional time to comply with the proposed Sex Discrimination Act reforms.¹⁶²
227. Under section 44 of the AHRC Act, a temporary exemption may be granted to an entity by the AHRC to permit the applicant to discriminate against individuals on the basis of the relevant attributes for a specific purpose and for a fixed period.
228. Technical proposal 12 is dependent on the implementation of technical proposal 2 but is not itself based on a general proposition.

¹⁶¹ AHRC Act, ss 3(1), 31 and 35L.

¹⁶² ALRC Discussion Paper, 36.

229. The Law Council observes that:

- a. the AHRC's *Temporary exemptions under the Sex Discrimination Act—Commission Guidelines* (2009) appear not to have been revised since 16 February 2010; and
- b. only two applications for temporary exemptions under subsection 44(1) of the Sex Discrimination Act that relate to religious schools have been published by the AHRC:
 - i. an application made by Catholic, all-girls boarding school, Lourdes Hill College that was rejected in 2005 on the basis that the temporary exemption sought (to advertise for female-only posts of dean of boarding, assistant dean of boarding and boarding supervisors) was unnecessary because of the operation of the statutory exemption relating to the residential care of children contained in subsection 35(1) of the Sex Discrimination Act;¹⁶³ and
 - ii. an application made by the Catholic Education Office, Archdiocese of Sydney, that was rejected in 2003 because the discriminatory effect of requested exemption to create a male-only scholarship scheme to encourage male applicants for posts in primary schools outweighed the aim of recruiting more men to become teachers, particularly where less discriminatory methods potentially existed.¹⁶⁴

230. The Law Council **supports** revision of the AHRC guidelines as is necessary:

- a. to reflect the purposes set out by the ALRC above;
- b. to reflect the changes to the law ushered in by the amendment of the Sex Discrimination Act in line with key technical proposals above; and
- c. to address adequately the conflicting rights engaged when applications for temporary exemptions are made under section 44 of the Act.

Technical proposal 13: the development of guidance on the proposed reforms

231. The Law Council **supports** the proposed development of guidance material to promote understanding of and compliance with anti-discrimination and employment law and would be happy to assist the AHRC and the Attorney-General's Department in the preparation of such guidance material.

232. The Law Council **recommends** that guidance material should:

- a. be prepared for different readerships, including school principals and administrators, teaching and other staff, students (of all ages), parents and legal guardians to ensure all persons are made aware of the obligations of religious educational institutions;
- b. be easily accessible, with any guidance material developed for students and parents/legal guardians to be made available by the Commonwealth and religious educational institutions themselves;

¹⁶³ AHRC, *Notice of Rejection of Application for Exemption*, applicant: Lourdes Hill College (12 May 2005).

¹⁶⁴ AHRC, *Notice of Rejection of Application for Exemption*, applicant: Catholic Education Office, Archdiocese of Sydney (27 February 2003).

- c. written in plain English and available in translation (to meet the needs of those from culturally and linguistically diverse backgrounds) and in 'Easy English' (for);¹⁶⁵ and students and their families living with disability
- d. contain concrete examples and case studies.

233. The Law Council also encourages consultation with the people with lived experience who may be directly affected by these laws and involvement of such people in the co-design of the guidance material. There is also merit in including the schools who may seek to rely on the exceptions.

Technical proposal 14: consultations on further reforms

234. In technical proposal 14, the ALRC proposes a future two-stage consultation paper on reforms to Commonwealth anti-discrimination laws and protections of rights, including the enactment of a Commonwealth Human Rights Act.
235. The Law Council observes that the implementation of technical proposals 4, 5, 8, 9 and 11 would result in inconsistencies between the treatment of religious educational institutions and other religious institutions. Any future consultation on reforms to anti-discrimination laws should include a review of the exemptions that apply to religious institutions that are not religious educational institutions to ensure that the distinctions between the two categories of entity that would be ushered in by the ALRC's proposed statutory amendments are justifiable.
236. In line with its overarching recommendations, the Law Council **supports** further consideration of, and consultation on, Australia's anti-discrimination laws and protections of human rights with a view to:
- a. Commonwealth anti-discrimination laws being consolidated in a single act¹⁶⁶ or in the alternative, consideration of the measures recently proposed by the AHRC to simplify and improve these laws' operation as previously noted;
 - b. the assessment of Australia's and comparator States' anti-discrimination and equality laws with a view to developing a comprehensive model anti-discrimination and equality law to harmonise the entities and areas covered by attributes protected under, and exemptions from, Commonwealth, State and Territory anti-discrimination statutes;
 - c. ensuring that individuals' religious beliefs are comprehensively protected under Commonwealth anti-discrimination law in an appropriate manner; and
 - d. the protection of minority rights ultimately being based on the enactment of a Federal Human Rights Act that operates alongside State and Territory bills of rights.¹⁶⁷

¹⁶⁵ See Centre for Inclusive Design, *Easy English versus Plain English* (2020) <https://centreforinclusivedesign.org.au/wp-content/uploads/2020/04/Easy-English-vs-Plain-English_accessible.pdf>

¹⁶⁶ See Law Council, Submission, *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018 Senate Legal and Constitutional Affairs Legislation Committee*, (23 January 2019), [31] <<https://www.lawcouncil.asn.au/publicassets/55fe0a9d-bb29-e911-93fc-005056be13b5/3570%20-%20Sex%20Discrimination%20Amendment%20Removing%20Discrimination%20Against%20Students%20Bill%202018.pdf>>

¹⁶⁷ See, for instance, Law Council, *Federal Human Rights Charter – Policy Position* (November 2020) <<https://www.lawcouncil.asn.au/publicassets/c517fdbd-9a28-eb11-9436-005056be13b5/Law%20Council%20of%20Australia%20-%20Federal%20Human%20Rights%20Charter.pdf>>

Conclusion

237. The Law Council thanks the ALRC for the opportunity to provide a submission on the Consultation Paper and welcomes the prospect of future consultations on the development of anti-discrimination law in Australia and the terms of a Commonwealth Human Rights Act.