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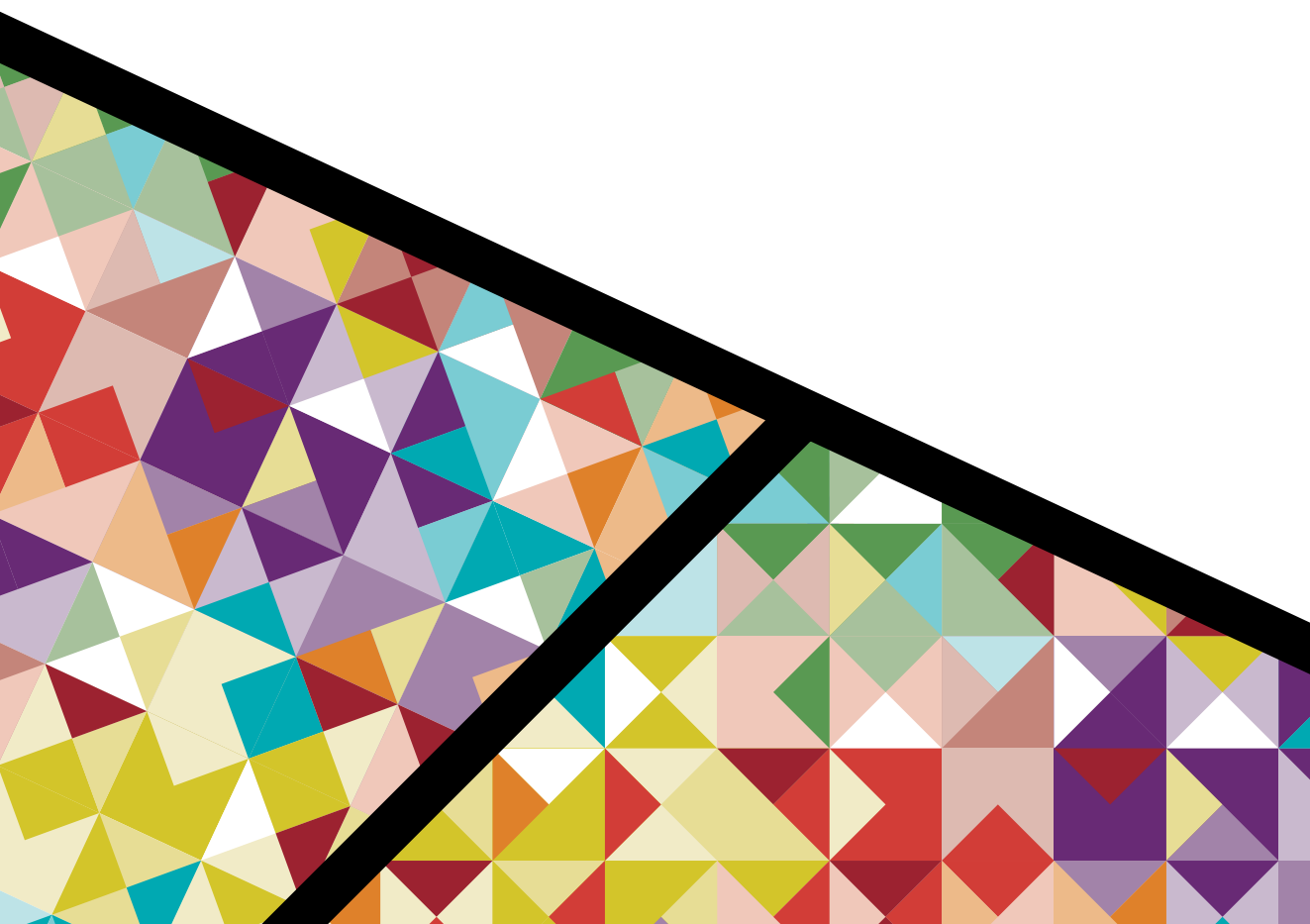
Australian Law Reform Commission

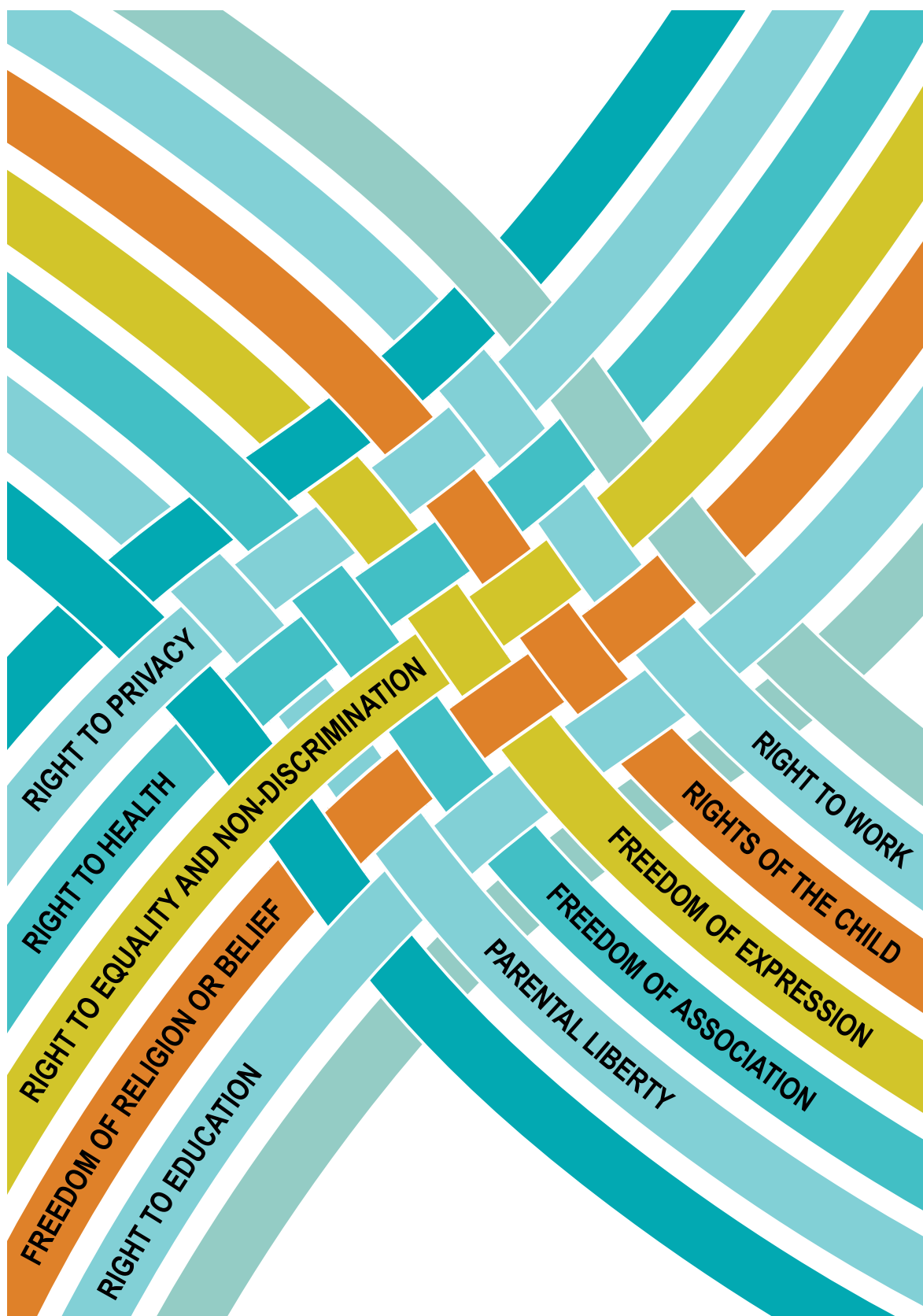
FINAL REPORT

# **MAXIMISING THE REALISATION OF HUMAN RIGHTS: RELIGIOUS EDUCATIONAL INSTITUTIONS AND ANTI-DISCRIMINATION LAWS**

ALRC Report 142

December 2023





*Human rights are indivisible and interdependent in nature. Woven together, human rights reinforce each other and promote the enjoyment of all rights and human flourishing.*



Australian Government

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Australian Law Reform Commission

FINAL REPORT

**MAXIMISING THE REALISATION  
OF HUMAN RIGHTS:  
RELIGIOUS EDUCATIONAL INSTITUTIONS AND  
ANTI-DISCRIMINATION LAWS**

**This Report reflects the law as at 1 November 2023.**

The Australian Law Reform Commission ('ALRC') was established on 1 January 1975 and operates in accordance with the *Australian Law Reform Commission Act 1996* (Cth).

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**Acknowledgement of Country**

The ALRC acknowledges the Traditional Owners and Custodians of Country throughout Australia and acknowledges their continuing connection to land, sea and community. We pay our respects to Aboriginal and Torres Strait Islander cultures, and to Elders past and present.



**Australian Government**  
**Australian Law Reform Commission**

**The Hon Justice Mordecai Bromberg**  
**President**

15 December 2023

The Hon Mark Dreyfus KC MP  
Attorney-General of Australia  
Parliament House  
Canberra ACT 2600

Dear Attorney-General

**Australian Law Reform Commission Review into Exemptions for Religious Educational Institutions in Federal Anti-Discrimination Law**

On 4 November 2022, the Australian Law Reform Commission received Terms of Reference to undertake an inquiry into exemptions for religious educational institutions in Federal anti-discrimination law. On 19 April 2023, the Terms of Reference were amended to extend the reporting deadline to 31 December 2023. On behalf of the Members of the Commission, and in accordance with the *Australian Law Reform Commission Act 1996* (Cth), I am pleased to present you with the Final Report on this reference (ALRC Report 142, 2023).

Yours sincerely

A handwritten signature in blue ink, appearing to read 'M. Bromberg', with a long, sweeping line extending downwards from the end of the signature.

**Justice Mordecai Bromberg**  
President  
Australian Law Reform Commission



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# Terms of Reference

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## **Australian Law Reform Commission Review into Exemptions for Religious Educational Institutions in Federal Anti-Discrimination Law**

I, the Hon Mark Dreyfus KC MP, Attorney-General of Australia, having regard to the Government's commitment to amend the *Sex Discrimination Act 1984* (Cth) and other Federal anti-discrimination laws (as necessary), including the *Fair Work Act 2009* (Cth), to ensure that an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed:

- must not discriminate against a student on the basis of sexual orientation, gender identity, marital or relationship status or pregnancy;
- must not discriminate against a member of staff on the basis of sex, sexual orientation, gender identity, marital or relationship status or pregnancy;
- can continue to build a community of faith by giving preference, in good faith, to persons of the same religion as the educational institution in the selection of staff.

REFER to the Australian Law Reform Commission (ALRC) for inquiry and report, pursuant to subsection 20(1) of the *Australian Law Reform Commission Act 1996* (Cth), a consideration of what reforms to Federal anti-discrimination laws (including section 38 of the *Sex Discrimination Act 1984* (Cth) and the *Fair Work Act 2009* (Cth)) should be made in order to ensure, to the extent practicable, Federal anti-discrimination laws reflect the Government's commitments (as set out above) in a manner that is consistent with the rights and freedoms recognised in the international agreements to which Australia is a party including the *International Covenant on Civil and Political Rights*.

### **Scope of the reference**

In undertaking this reference, the ALRC should have regard to existing reports and inquiries, including state and territory inquiries or reviews, that it considers relevant.

The ALRC should also have regard to the Government's commitment to introduce legislation to (among other things) prohibit discrimination on the basis of religious belief or activity, subject to a number of appropriate exemptions. In doing so, the ALRC should consider whether some or all of the reforms recommended as a result of this inquiry could be included in that legislation.

### **Consultation**

The ALRC should have regard to the extensive consultations previously undertaken on these issues. In particular, the ALRC should review submissions to previous inquiries and tailor consultations accordingly. The ALRC should also undertake targeted consultation with religious organisations, the education sector, unions, legal experts and other civil society representatives.

In conducting targeted consultation, to the extent possible, the ALRC should be sensitive to the availability of individuals and organisations over the school holiday period and – in particular – on or around periods of religious observance.

**Timeframe for reporting**

The ALRC should provide its report to the Attorney-General by 21 April 2023.

On 19 April 2023, the Terms of Reference were amended to extend the reporting deadline to 31 December 2023.

# Participants

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## Australian Law Reform Commission

### Presidents

The Hon Justice Mordecai Bromberg, Federal Court of Australia (from July 2023)

The Hon Justice Sarah Derrington AM, Federal Court of Australia (until January 2023)

### Part-time Commissioners

The Hon Justice Mark Moshinsky, Federal Court of Australia (from January 2023, including as Acting President until July 2023)

The Hon Justice Stephen Rothman AM, Supreme Court of New South Wales

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Professor Rufus Black, University of Tasmania

The Hon Justice Susan Brown, Supreme Court of Queensland

Dr Christopher Duncan, Association of Heads of Independent Schools of Australia

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Professor Adam Bourne

Professor Sarah Joseph

Dr Christopher Duncan

Associate Professor Jacqueline Mowbray

Ms Kate Eastman AM SC

Ms Chris Ronalds SC





# Acknowledgements

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The ALRC gratefully acknowledges the generous contribution of time and expertise by Professor Carolyn Evans, Professor Heiner Bielefeldt, and Professor Lucy Vickers who participated in the Inquiry webinar in August 2023. The ALRC also appreciates the support of Wolters Kluwer in co-hosting and making arrangements for the Inquiry webinar.

In addition, the ALRC expresses its gratitude to Katherine Moroney, Nicole Foster, and Grace Devery in the Chambers of Justice Rothman, Supreme Court of New South Wales for their cheerful, reliable, and valuable support over the course of this Inquiry.



# List of Recommendations

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## 4. Exceptions in Anti-Discrimination Law – Sex Discrimination Act Grounds

**Recommendation 1** The Australian Government's policy, as expressed in the Terms of Reference, to ensure that an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed (a 'religious educational institution'):

- must not discriminate against a student on the basis of sexual orientation, gender identity, marital or relationship status or pregnancy;
- must not discriminate against a member of staff on the basis of sex, sexual orientation, gender identity, marital or relationship status or pregnancy;

is best implemented in a manner that is consistent with the rights and freedoms recognised in the international agreements to which Australia is a party, by amending the *Sex Discrimination Act 1984* (Cth), so that:

- section 38 is repealed;
- section 37 is amended to specify that s 37(1)(d) does not apply to an act or practice in relation to an educational institution; and
- section 23 is amended to specify that s 23(3)(b) does not apply to accommodation provided by an educational institution.

All other exceptions in the *Sex Discrimination Act 1984* (Cth) that are relevant to religious educational institutions should continue to apply.

Like all persons, and in accordance with s 7B of the *Sex Discrimination Act 1984* (Cth) ('Indirect discrimination: reasonableness test'), religious educational institutions should continue to be able to impose on another person, or propose to impose on another person, a condition, requirement or practice which has or is likely to have a disadvantaging effect, if the condition, requirement or practice is reasonable in the circumstances.

## 6. Scope of Protection

**Recommendation 2** Further to Recommendation 1, existing exceptions in s 37(1)(b) of the *Sex Discrimination Act 1984* (Cth) regarding the training of certain religious leaders should be retained and amended to incorporate language that encompasses the diversity of descriptions of religious leaders across the broad range of religions. Extrinsic materials accompanying the amending Bill should clarify that the amendment is not intended to effect any substantive change regarding the nature of the positions covered, but rather to be more inclusive of the diversity of descriptions of religious leaders across the broad range of religions.

**Recommendation 3** Further to Recommendation 1, the *Sex Discrimination Act 1984* (Cth) should be amended to extend protection against discrimination beyond employees and ‘contract workers’ working for or at religious educational institutions, to all persons employed, engaged, or otherwise utilised by a religious educational institution who fall within the definition of ‘worker’ as provided in s 4 of that Act.

**Recommendation 4** Further to Recommendation 1, the *Sex Discrimination Act 1984* (Cth) should be amended in relation to a religious educational institution, such that Part II of the Act applies in relation to discrimination against a person who:

- associates with (whether as a relative or otherwise); or
- is believed to associate with;

another person who has or is believed to have a particular protected attribute in the same way as it applies in relation to discrimination against a person on the ground of that protected attribute.

## 7. Consequential Amendments

**Recommendation 5** Further to Recommendation 1, s 153, s 195, s 351, and s 772 of the *Fair Work Act 2009* (Cth) should be amended such that, in relation to a religious educational institution, insofar as the exceptions in sub-s (2) of each provision provide for a broader exception than that provided for under the *Sex Discrimination Act 1984* (Cth), the broader aspect of the relevant exception has no effect.

**Recommendation 6** Further to Recommendation 1, the definition of the phrase ‘objectionable term’ in s 12 of the *Fair Work Act 2009* (Cth) should be amended such that, in relation to a religious educational institution, it incorporates reference to a contravention of Part II of the *Sex Discrimination Act 1984* (Cth) in respect of a term that imposes a requirement that an employee abide by, or comply with, a code of practice or other condition dealing with the personal beliefs or private life of the employee.

## 8. Exceptions in Anti-Discrimination Law — Religious Grounds

**Recommendation 7** The Australian Government’s policy commitment, as expressed in the Terms of Reference, that a religious educational institution

- 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,

is best implemented in a manner that is consistent with the rights and freedoms recognised in the international agreements to which Australia is a party by amending the *Fair Work Act 2009* (Cth) so that:

- A. religious educational institutions are excluded from the exceptions contained in s 153(2)(b), s 195(2)(b), s 351(2)(a), s 351(2)(c), and s 772(2)(b) of the *Fair Work Act 2009* (Cth) as they apply in relation to the protected attribute of religion; and

- B. in relation to the selection of staff for employment at a religious educational institution, it is not contrary to s 153(1), s 195(1), or s 351(1) to give preference, in good faith, to a person of the same religion, where the giving of such preference:
- is reasonably necessary to build or maintain a community of faith;
  - is proportionate to the aim of building or maintaining a community of faith, including in light of any disadvantage or harm that may be caused to any person or persons not preferred; and
  - does not amount to conduct that is unlawful under the *Sex Discrimination Act 1984* (Cth).

An equivalent exception for religious educational institutions to that set out in B should be included in a future Religious Discrimination Act.

The exceptions in s 153(2)(a), s 195(2)(a), s 351(2)(b), and s 772(2)(a) of the *Fair Work Act 2009* (Cth) (relating to inherent requirements) should, subject to Recommendation 5, continue to apply to religious educational institutions in relation to both prospective and existing employees.

**Recommendation 8** Further to Recommendation 7, the definition of ‘discrimination’ in s 3 of the *Australian Human Rights Commission Act 1986* (Cth) should be amended such that, in the context of employment as a member of the staff of a religious educational institution, and in relation to discrimination on the basis of religion, the exception in paragraph (d) of the definition in s 3 aligns with the exception set out in paragraph B of Recommendation 7.

## 9. Further Reforms

**Recommendation 9** The Australian Human Rights Commission should review its ‘Commission Guidelines’ for ‘Temporary exemptions under the *Sex Discrimination Act 1984* (Cth)’ in light of any legislative amendments made in response to this Inquiry.

**Recommendation 10** The Australian Human Rights Commission, in consultation with the Attorney-General’s Department (Cth), the Fair Work Commission, the Fair Work Ombudsman, and non-government stakeholders, should develop detailed guidance to assist:

- educational institution administrators to understand and comply with the *Sex Discrimination Act 1984* (Cth) and anti-discrimination provisions in the *Fair Work Act 2009* (Cth); and
- the public to understand relevant protections from discrimination under those Acts.

**Recommendation 11** The Australian Government should conduct further reviews to consider and consult on reforms to simplify, consolidate, and strengthen Commonwealth anti-discrimination law.



# List of Background Papers

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Number	Title	Date
ADL1	<u>International Comparisons</u>	November 2023
ADL2	<u>What We Heard</u>	December 2023





# Glossary

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<b>ACT</b>	Australian Capital Territory
<b><i>Age Discrimination Act</i></b>	<i>Age Discrimination Act 2004</i> (Cth)
<b>ALRC</b>	Australian Law Reform Commission
<b><i>Australian Human Rights Commission Act</i></b>	<i>Australian Human Rights Commission Act 1986</i> (Cth)
<b>CADE</b>	<i>Convention against Discrimination in Education</i>
<b>CEDAW</b>	<i>Convention on the Elimination of All Forms of Discrimination Against Women</i>
<b>CERD</b>	<i>International Convention on the Elimination of All Forms of Racial Discrimination</i>
<b><i>Consultation Paper</i></b>	Australian Law Reform Commission, <i>Religious Educational Institutions and Anti-Discrimination Laws</i> (Consultation Paper, January 2023)
<b>CRPD</b>	<i>Convention on the Rights of Persons with Disabilities</i>
<b>CRC</b>	<i>Convention on the Rights of the Child</i>
<b><i>Disability Discrimination Act</i></b>	<i>Disability Discrimination Act 1992</i> (Cth)
<b>ecclesiastical</b>	Relating to the church or clergy
<b>ECHR</b>	<i>European Convention on Human Rights</i>
<b>ECtHR</b>	European Court of Human Rights
<b>educational authority</b>	A body or person administering an educational institution, as defined in s 4 of the <i>Sex Discrimination Act</i>
<b>educational institution</b>	A school, college, university, or other institution at which education or training is provided, as defined in s 4 of the <i>Sex Discrimination Act</i>
<b><i>Fair Work Act</i></b>	<i>Fair Work Act 2009</i> (Cth)
<b>Federal Court</b>	Federal Court of Australia
<b>High Court</b>	High Court of Australia
<b>IACtHR</b>	Inter-American Court of Human Rights
<b>ICCPR</b>	<i>International Covenant on Civil and Political Rights</i>

<b>ICESCR</b>	<i>International Covenant on Economic, Social and Cultural Rights</i>
<b>ILO 111</b>	<i>Discrimination (Employment and Occupation) Convention</i> , International Labour Organisation
<b>ILO 155</b>	<i>Occupational Safety and Health Convention</i> , International Labour Organisation
<b>ILO Committee</b>	International Labour Organisation, Committee of Experts on the Application of Conventions and Recommendations
<b>LGBTQ+</b>	People who identify as lesbian, gay, bisexual, transgender, queer, or questioning. The initial 'I' for intersex has been omitted because s 38 of the <i>Sex Discrimination Act</i> does not currently provide any exception in relation to intersex status
<b>NSW</b>	New South Wales
<b>NT</b>	Northern Territory
<b>OHCHR</b>	Office of the United Nations High Commissioner for Human Rights
<b><i>Racial Discrimination Act</i></b>	<i>Racial Discrimination Act 1975</i> (Cth)
<b>Religious Discrimination Act</b>	The Australian Government has committed to introduce legislation to (among other things) prohibit discrimination on the basis of religious belief or activity. No such Act currently exists
<b>religious educational institutions</b>	Educational institutions conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, per s 38 of the <i>Sex Discrimination Act</i>
<b>Religious Freedom Review</b>	<i>Religious Freedom Review: Report of the Expert Panel</i> (Report, 18 May 2018)
<b>SA</b>	South Australia
<b><i>Sex Discrimination Act</i></b>	<i>Sex Discrimination Act 1984</i> (Cth)
<b>Siracusa Principles</b>	<i>Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights</i>
<b>UDHR</b>	<i>Universal Declaration on Human Rights</i>
<b>UN</b>	United Nations
<b>UNESCO</b>	United Nations Educational, Scientific and Cultural Organization
<b>WA</b>	Western Australia

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# **PART ONE: FRAMING**



# 1. Introduction

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## The Inquiry

1.1 On 4 November 2022, the Attorney-General asked the ALRC to consider reforms to Commonwealth anti-discrimination laws (including s 38 of the *Sex Discrimination Act* and the *Fair Work Act*). According to the Terms of Reference for this Inquiry, the purpose of the reforms is to ensure, to the extent practicable, that Commonwealth anti-discrimination laws reflect the Australian Government's commitment in respect of religious educational institutions and anti-discrimination laws in a manner consistent with the rights and freedoms recognised in the international agreements to which Australia is a party, including the ICCPR.

1.2 As stated in the Terms of Reference, the Australian Government's commitment is that an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed:

- must not discriminate against a student on the basis of sexual orientation, gender identity, marital or relationship status or pregnancy;
- must not discriminate against a member of staff on the basis of sex, sexual orientation, gender identity, marital or relationship status or pregnancy; 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.

1.3 The ALRC was also asked to have regard to the Australian Government's commitment to introduce legislation to (among other things) prohibit discrimination on the basis of religious belief or activity, subject to a number of appropriate exemptions, and to consider whether some or all of the reforms recommended as a result of this Inquiry could be included in that legislation.

1.4 In addition to asking the ALRC to undertake targeted consultation with various stakeholders, the Terms of Reference asked the ALRC to have regard to previous consultations undertaken on the issues covered by this Inquiry. Accordingly, the ALRC has had regard to consultations relating to several relevant previous inquiries (listed below at [\[1.12\]](#)), and to consultations undertaken in the previous *Review into the Framework of Religious Exemptions in Anti-Discrimination Legislation* referred to the ALRC on 10 April 2019. The Terms of Reference for this earlier inquiry were withdrawn by the Attorney-General on 3 November 2022.

1.5 The original timeframe for this Inquiry required that a complete report be provided to the Attorney-General by 21 April 2023. On 19 April 2023, the Attorney-General announced an extension of the reporting deadline to 31 December 2023. This extension came after the ALRC received 428 submissions and 41,057 survey responses.

## Overview of key findings

1.6 Since 1984, Australia's anti-discrimination laws have been the subject of over 25 inquiries or law reform proposals. Each instance has offered Australian society an opportunity to re-examine the application of anti-discrimination laws and the attributes that should be protected. As with previous national consultations focused on the protection of religious freedom, this Inquiry has elicited an overwhelming response from the Australian public. Organisations and individuals alike have expressed strong views about the protection of LGBTQ+ students and staff in religious educational institutions from discrimination, and the need for religious freedom to be protected under Commonwealth anti-discrimination law.

1.7 As discussed further below, the responses to this Inquiry from stakeholders have revealed shared values. While each of these shared values represents 'common ground', there is a diversity of views on **how** the law should best reflect these shared values.

1.8 A key finding of the Inquiry is that the Australian Government's policy commitments, as reflected in the Terms of Reference, are able to be implemented in a manner that is consistent with the rights and freedoms recognised in the international agreements to which Australia is a party. This Report contains recommendations on how these policy commitments should be implemented. Two recommendations in particular respond specifically to core aspects of the Terms of Reference and are an integral part of this Inquiry: [Recommendation 1](#) and [Recommendation 7](#). The other recommendations deal with related and consequential amendments. Implementation of the recommendations requires amendments to be made to



the following legislation: the *Sex Discrimination Act*; the *Fair Work Act*; and the *Australian Human Rights Commission Act*.

1.9 The ALRC recognises the time and effort invested by organisations and individuals in contributing to this Inquiry, together with the many previous public consultations on related issues over the past four decades. The ALRC also acknowledges the lived experiences shared by students, parents, and staff from religious educational institutions. The ALRC is grateful to all stakeholders for their contributions to this Inquiry. Their participation has contributed to a greater understanding of the role of religious educational institutions in Australian society, the communities that grow around these institutions, community member experiences within these institutions, and the benefits of reform to anti-discrimination laws in these contexts.

## Key concepts

1.10 **Table 1.1** below sets out a number of key concepts in this Inquiry, and the terminology that has been used in this Report in relation to each.

**Table 1.1: Key concepts and terminology**

Term	How the term is used in this Report
anti-discrimination laws	The collection of legislation that defines discrimination, determines the circumstances in which it is prohibited, and provides for exceptions. Some sources instead describe this body of law as ‘discrimination law’. However, in this Report the phrase ‘anti-discrimination laws’ is used, for consistency with the Terms of Reference for this Inquiry and the terminology used in legislation such as the <i>Fair Work Act</i> .
discrimination	<p>The word ‘discrimination’ has at least two meanings. For example, it can mean a difference in treatment that is unjust, immoral, or unlawful (a pejorative meaning). Alternatively, it can simply mean making a distinction between different options (a non-pejorative meaning).</p> <p>It appears that across existing domestic law, foreign law, international law, and associated commentary, the word is sometimes used in one sense, and sometimes in the other sense. Throughout this Report, the ALRC has endeavoured to use the word in a manner consistent with the terminology that is used in the particular law being discussed at the time.</p>

educational institution	<p>The ALRC has used this term consistently with its broad definition in s 4 of the <i>Sex Discrimination Act</i> to denote 'a school, college, university or other institution at which education or training is provided'.</p> <p>When appropriate, the ALRC has referred more specifically to particular categories of educational institutions, such as schools or tertiary institutions.</p>
exception	<p>Circumstances specified in legislation in which particular obligations do not apply. For example, s 38 of the <i>Sex Discrimination Act</i> is described in this Report as providing 'exceptions' to particular prohibitions on discrimination.<sup>1</sup></p>
exemption	<p>Relief from an obligation that may be granted to a specific individual or group. For example, s 44 of the <i>Sex Discrimination Act</i> provides for applications to the Australian Human Rights Commission for an exemption from particular prohibitions under that Act.</p>
giving preference	<p>A form of differential treatment in which a particular attribute (for example, adherence to a particular religion) is the basis of more favourable treatment for a particular person in a given situation. International law provides that giving preference can, in some circumstances, constitute unlawful discrimination.<sup>2</sup></p>
LGBTQ+	<p>The ALRC has used this term to refer to some people who may be affected by the existing exceptions in s 38 of the <i>Sex Discrimination Act</i> relating to sexual orientation and gender identity in particular. The initialism includes reference to people who identify as lesbian, gay, bisexual, transgender, queer, or questioning. The ALRC has not included the initial 'I' for intersex, because s 38 does not currently provide any exception in relation to intersex status. Some literature cited in this Report relates only to some of these attributes and not others, in which case a shorter abbreviation (such as 'LGB') has been used.</p>

1 See Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination Law and Equal Opportunity Law* (The Federation Press, 3rd ed, 2018) 161–62.

2 See, eg, Human Rights Committee, *General Comment No 18: Non-discrimination*, 37th sess, UN Doc HRI/GEN/1/Rev.9 (Vol I) (10 November 1989) [7]. See also *Discrimination (Employment and Occupation) Convention*, opened for signature 25 June 1958, ILO No. 111 (entered into force 15 June 1960) art 1 ('ILO 111'). See further [Chapter 8](#) and [Chapter 11](#).

religion	The ALRC has not attempted to define the concept of 'religion' for the purposes of this Inquiry. The term is not defined in the <i>Sex Discrimination Act</i> or <i>Fair Work Act</i> , for example. The High Court has set out some frequently cited 'indicia' of religion generally, including 'belief in a supernatural Being, Thing or Principle [and] the acceptance of canons of conduct in order to give effect to that belief'. <sup>3</sup> The UN Human Rights Committee has stated that references to religion in the ICCPR 'are to be broadly construed' and not limited to religions with 'institutional characteristics or practices analogous to those of traditional religions'. <sup>4</sup>
Religious Discrimination Act	The ALRC has used this term as shorthand for the Australian Government's expressed commitment to introduce dedicated legislation to prohibit discrimination on the basis of religious belief or activity. At the time of this Report, no Religious Discrimination Act exists.
religious educational institution	The ALRC has used this term as shorthand for an educational institution that is 'conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed'. The longer phrase appears in the Inquiry Terms of Reference, and also in s 38 of the <i>Sex Discrimination Act</i> .
selection of staff	The ALRC has used this term to refer to the initial recruitment of staff, and also any change in a staff member's position that constitutes 'new employment' under employment law, but not a promotion within existing employment. <sup>5</sup>

<sup>3</sup> *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 136.

<sup>4</sup> Human Rights Committee, *General Comment No 22: Article 18 (Right to freedom of thought, conscience and religion)*, CCPR/C/21/Rev.1/Add.4 (27 September 1993, adopted 30 July 1993) [2].

<sup>5</sup> See, eg, *Quinn v Jack Chia (Australia) Ltd* (1991) 1 VR 567, 576–7. See further [Chapter 8](#).

## Context for the Inquiry

1.11 This part sets out some of the context for this Inquiry, noting, in particular, a number of previous Commonwealth inquiries on related topics, trends in relevant state and territory legislation, and several previous ALRC inquiries that examined related issues.

### Previous Commonwealth inquiries and reports

1.12 Over the last 15 years, there have been a series of Commonwealth inquiries and reviews into issues relating to each of religious freedom and discrimination. A selection includes:

- Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (Report, December 2008)
- Australian Human Rights Commission, *Freedom of Religion and Belief in 21st Century Australia: A Research Report for the Australian Human Rights Commission* (Report, 2011)
- Attorney-General's Department (Cth), *Consolidation of Commonwealth Anti-Discrimination Laws* (Discussion Paper, September 2011)
- Australian Human Rights Commission, *Addressing Sexual Orientation and Sex and/or Gender Identity Discrimination* (Consultation Report, 2011)
- Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (February 2013)
- House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013* (Advisory Report, May 2013)
- Australian Human Rights Commission, *Religious Freedom Roundtable* (Issues Paper, 22 October 2015)
- Senate Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill, Parliament of Australia, *Report on the Commonwealth Government's Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill* (Report, February 2017)
- Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Legal Foundations of Religious Freedom in Australia* (Interim Report, November 2017)
- *Religious Freedom Review: Report of the Expert Panel* (Report, May 2018) ('Religious Freedom Review')
- Senate Legal and Constitutional Affairs Reference Committee, Parliament of Australia, *Legislative Exemptions that Allow Faith-Based Educational*

*Institutions to Discriminate Against Students, Teachers and Staff* (Report, November 2018)

- Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018* (February 2019)
- House of Representatives Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Freedom of Religion and Belief, the Australian Experience: Inquiry into the Status of the Human Right to Freedom of Religion or Belief* (Second Interim Report, April 2019)

1.13 In terms of general enjoyment of religious freedom, the Religious Freedom Review reported in 2018: ‘Most stakeholders of faith acknowledged that, by and large, they have been free to observe their religious beliefs’.<sup>6</sup> The Expert Panel saw their task as determining how Australia might best continue preserving religious freedom.<sup>7</sup> Some of the recommendations made by the Religious Freedom Review were relevant to religious schools in particular. For example (in summary):

- The *Sex Discrimination Act* should be amended to provide that religious schools can discriminate against students and staff on the basis of sexual orientation, gender identity, or relationship status, if: the discrimination is founded in the precepts of the religion; the school has a publicly available policy outlining its position that is provided to students and staff; and (in relation to students) the school has regard to the best interests of the child as the primary consideration.<sup>8</sup>
- Religious schools should not be permitted to discriminate against an existing employee solely on the basis that the employee has entered into a marriage.<sup>9</sup>

1.14 A selection of recommendations made by the Religious Freedom Review were referred to the ALRC in 2019 for consideration as to how they should be implemented. However, the Terms of Reference for that ALRC Inquiry were subsequently amended, deferring the ALRC’s reporting date until after the anticipated passage of the Religious Discrimination Bill 2019 (Cth). The ALRC did not publish any reports in response before those Terms of Reference were ultimately formally withdrawn in November 2022, and were superseded by the Terms of Reference for this Inquiry.

1.15 In 2018, a Senate Committee rejected the Religious Freedom Review recommendations regarding discrimination in religiously affiliated schools on the basis that they ‘would carve out and entrench discrimination against certain groups’.<sup>10</sup> In contrast, a separate report by members who dissented from that majority report

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6 *Religious Freedom Review: Report of the Expert Panel* (Report, 18 May 2018) [1.13].

7 Ibid.

8 Ibid rec 5, rec 7.

9 Ibid rec 6.

10 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Legislative Exemptions That Allow Faith-Based Educational Institutions to Discriminate against Students, Teachers and Staff* (Report, November 2018) [2.125], rec 1.

argued that existing legislative exceptions ‘should not be eroded unless adequate protections for religious freedom are afforded in their place’.<sup>11</sup>

## Trends in state and territory legislation

1.16 Since the release of the Religious Freedom Review report, a number of states and territories have made significant changes to their laws that differ from the recommendations of the Religious Freedom Review.<sup>12</sup> Consequently, the legal landscape across Australia has changed significantly since those recommendations were made. In addition, the Terms of Reference for this Inquiry are significantly different from those provided for the Religious Freedom Review.

1.17 Alongside Commonwealth inquiries and reviews, most states and territories have conducted reviews of their anti-discrimination laws over the last decade.<sup>13</sup> A trend emerging from these reviews is a move toward positive duties to eliminate discrimination and sexual harassment. For example, a new positive duty to ‘take reasonable and proportionate measures to eliminate ... discrimination, sexual harassment or victimisation as far as possible’ has been introduced into Victorian legislation.<sup>14</sup> In 2022, the NT and ACT Governments committed to implementing similar positive duties,<sup>15</sup> while recent reviews in Queensland and WA have recommended that their respective governments take similar action.<sup>16</sup> This trend toward positive duties is also present at the Commonwealth level: in late 2022, the *Sex Discrimination Act* was amended to include a positive duty to take reasonable and proportionate measures to eliminate, so far as is possible, unlawful sex discrimination.<sup>17</sup>

11 Dissenting Report to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Legislative Exemptions That Allow Faith-Based Educational Institutions to Discriminate against Students, Teachers and Staff* (Report, November 2018) 49 [99].

12 See [Chapter 12](#).

13 NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Report No 92, November 1999); Equal Opportunity Review, *An Equality Act for a Fairer Victoria* (Final Report, June 2008); ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)* (Final Report, 2015); South Australian Law Reform Institute, ‘*Lawful Discrimination*’: *The Effect of Exceptions under the Equal Opportunity Act 1984 (SA) on Lesbian, Gay, Bisexual, Trans, Intersex and Queer (LGBTIQ) South Australians* (Report, June 2016); Northern Territory Government, *Achieving Equality in the Northern Territory* (February 2022); Law Reform Commission of Western Australia, *Project 111: Review of the Equal Opportunity Act 1984 (WA)* (Final Report, May 2022); Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (Report, July 2022).

14 *Equal Opportunity Act 2010* (Vic) s 15(2).

15 Northern Territory Government (n 13); Exposure Draft, *Discrimination Amendment Bill 2022 (ACT)* cl 75(1).

16 Queensland Human Rights Commission (n 13) rec 15; Law Reform Commission of Western Australia (n 13) recs 121–32.

17 *Sex Discrimination Act 1984* (Cth) pt IIA, as amended by *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) sch 2.

## Previous ALRC reports

1.18 As set out in [Chapter 11](#), this Inquiry relates to a wide range of human rights, and the intersection between them. Several previous ALRC reports have dealt with related issues. This section briefly summarises the most relevant principles for managing such intersections, as identified in those reports.

1.19 In its 1986 report on the *Recognition of Aboriginal Customary Law*, the ALRC set out relevant international legal materials that supported protection of minority practices 'in order to preserve basic characteristics which [minorities] possess and which distinguish them from the majority of the population'.<sup>18</sup> Those materials further set out that protections extended to minority groups (which would include religious freedom) must apply 'equally to individuals belonging to such groups'.<sup>19</sup> The ALRC described the effect of those materials as requiring that protections for minorities must not 'deprive individual members of the minority group of basic rights'.<sup>20</sup>

1.20 Similarly, in the ALRC's 1992 report on *Multiculturalism and the Law*, a basic principle guiding the inquiry was that 'within the limits necessary in a free and democratic society, each individual should be free to choose, to maintain and to express his or her cultural or religious values'.<sup>21</sup> Moreover, in relation to the challenge of accommodating minority values without prejudicing the basis of social cohesion, the report stated:

Cohesion is better advanced when people have the greatest possible freedom to express individual cultural values in a way which is compatible with respect for the same freedom of others and for common social goals. The problem is to differentiate between those values which are necessary for cohesion and those which may be adjusted to allow for diversity.<sup>22</sup>

1.21 Subsequently, in its 1994 report, *Equality Before the Law*, the ALRC recommended the removal of the exception in s 38 of the *Sex Discrimination Act*.<sup>23</sup> The ALRC stated that s 38 'prefers one right over another and precludes any consideration of where the balance between the rights should be'.<sup>24</sup> Relevantly, the ALRC noted that it had not received any submissions on this issue from religious organisations or schools.<sup>25</sup>

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18 Joseph Nisot, *Sub-Commission on the Prevention of Discrimination and the Protection of Minorities*, UN Doc E/C.N.4/52 (6 December 1947) 13, quoted in Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (Report No 31, 1986) [148].

19 Ibid.

20 Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (n 18) [148], [193], [221].

21 Australian Law Reform Commission, *Multiculturalism and the Law* (Report No 57, 1992) [1.29].

22 Ibid [1.23].

23 Australian Law Reform Commission, *Equality before the Law: Justice for Women* (Report No 69, 1994) rec 3.11.

24 Ibid [3.81].

25 Ibid [3.78].

1.22 Later, in its 2015 *Traditional Rights and Freedoms* report, the ALRC found

no obvious evidence that Commonwealth anti-discrimination laws significantly encroach on freedom of religion in Australia, especially given the existing exemptions for religious organisation.<sup>26</sup>

1.23 The ALRC observed that ‘there is nevertheless a degree of community concern’.<sup>27</sup> It concluded that

in future initiatives directed towards the consolidation of Commonwealth anti-discrimination laws ... further consideration should be given to whether freedom of religion should be protected through a general limitations clause rather than exemptions.<sup>28</sup>

1.24 For example, a general limitations clause could provide that actions that would otherwise be discriminatory are lawful by reference to relevant general principles under international law, rather than by reference to particular prescriptive circumstances.<sup>29</sup>

## Scope of Inquiry

1.25 The scope of an ALRC inquiry is determined by the relevant Terms of Reference issued by the Attorney-General of Australia. The Terms of Reference for this Inquiry specify a number of important parameters.

1.26 Importantly, and as previously noted, the Terms of Reference contain an explicit statement of the Australian Government’s relevant policy commitments, and ask the ALRC to consider reforms in light of those commitments. The Terms of Reference do not ask the ALRC to conduct an inquiry into the optimal policy position to be adopted by the Government. Instead, the ALRC has been asked to assess how the policy commitments might be implemented in a way that is consistent with Australia’s international obligations.

1.27 Further, the ALRC has been asked to have regard to the Australian Government’s commitment to introduce legislation to prohibit discrimination on the basis of religious belief or activity. For convenience, in this Report the ALRC has referred to such legislation as a Religious Discrimination Act. At the time of publishing this Report, no draft Bill has been made public, and the ALRC is not aware of the status of any draft Bill, nor its anticipated content. Accordingly, recommendations relevant to aspects of a future Religious Discrimination Act (such as **Recommendation 7** and **Recommendation 11**) are expressed in general terms.

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26 Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws* (Report No 129, December 2015) [1.30], [5.154].

27 Ibid [5.123].

28 Ibid [5.124], [5.154].

29 Ibid [5.108]–[5.114].



1.28 In addition, the ALRC has been asked to recommend reforms in relation to Commonwealth legislation only, and not in relation to state or territory legislation. As set out in more detail in [Chapter 12](#), there are anti-discrimination Acts in force in each state and territory. The ALRC has taken into account the content of relevant state and territory laws in considering options for reform, and in assessing coherence in the laws applicable across Australia. However, the recommendations in this Report relate to Commonwealth legislation only.

1.29 The Terms of Reference relate only to religious educational institutions. In the course of this Inquiry, a number of issues have arisen with implications beyond their application to religious educational institutions. Consistent with the Terms of Reference, the ALRC has considered reforms by reference to the position of religious educational institutions, but has noted a number of instances in which the Australian Government should consider broader reform.

1.30 Finally, the Terms of Reference focus on issues of discrimination on particular grounds. Discrimination can be a broad concept. For example, the *Sex Discrimination Act* describes each of sexual harassment, harassment on the ground of sex, and workplace environments that are hostile on the ground of sex, as forms of discrimination.<sup>30</sup> However, there are no existing exceptions for religious educational institutions in relation to such conduct, and therefore such conduct has not been a focus in this Inquiry. In addition, vilification is sometimes considered a form of discrimination, and some anti-discrimination legislation expressly prohibits vilification.<sup>31</sup> However, the *Sex Discrimination Act* does not currently prohibit vilification, and the ALRC has not assessed whether it should do so, beyond raising the issue for further consideration by the Australian Government (see [Chapter 9](#)).

## Guiding Principles

1.31 The Guiding Principles set out in [Figure 1.1](#) below were included in the *Consultation Paper* to indicate the fundamental approach that the ALRC took to the issues in this Inquiry. These Principles underpinned the propositions and proposals made in the *Consultation Paper*. These Principles have continued to inform the approach of the ALRC in preparing this Report, and have been reinforced by ongoing research and consultations conducted by the ALRC. Some stakeholders made comments in submissions regarding the Principles, which have further informed the ALRC's understanding and application of the Principles. A summary of these submissions, and the ALRC's response, is set out in the paragraphs following [Figure 1.1](#).

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30 *Sex Discrimination Act 1984* (Cth) s 3(c)–(ca).

31 See, eg, *Racial Discrimination Act 1975* (Cth) s 18C.

Figure 1.1: Guiding Principles

Principle 1:	Human dignity is central to the expression and protection of all human rights.
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The recognition and protection of human dignity underlies and holds unconditional status in the international human rights framework. All of the human rights at issue in this Inquiry are important to human dignity. Although people may hold differing views about how difficult issues should be resolved, the methods used to resolve them should promote respect.

Principle 2:	All human rights engaged by this Inquiry are fundamentally important.
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All human rights are universal, inalienable, indivisible, interdependent, and interrelated. This Inquiry engages with a broad range of human rights. Respect for, and the protection and fulfilment of, each of these rights is fundamentally important.

Principle 3:	Human rights should be considered holistically. In managing intersections between human rights, the substance of the rights at issue should be preserved to the maximum degree possible.
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The broad range of rights relevant to education within religious educational institutions must be considered holistically. International human rights law provides a framework for managing the intersection of these rights. In situations where human rights appear to be in tension, ‘pragmatic elasticity’ is required to produce ‘practical concordance’ of all human rights involved, to the maximum degree possible.<sup>32</sup> Application of a competing or hierarchical lens, or engaging in a balancing act that produces ‘trade-offs’, should be avoided.

Principle 4:	Education performs a key role in maintaining a pluralist and socially cohesive society.
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Australian society is diverse, with many different ethnic, racial, religious, and social groups all living together. The *Alice Springs (Mparntwe) Education Declaration*, agreed on by all Australian Education Ministers in 2019, commits Australian governments to ensuring ‘education promotes and contributes to a socially cohesive society that values, respects and appreciates different points of view and cultural, social, linguistic and religious diversity’.

32 Ahmed Shaheed, Special Rapporteur, *Gender-Based Violence and Discrimination in the Name of Religion or Belief*, 43rd sess, UN Doc A/HRC/43/48 (24 August 2020) [52], citing Heiner Bielefeldt and Michael Wiener, *Religious Freedom Under Scrutiny* (University of Pennsylvania Press, 2019) 99.

**Principle 5:**

Students are at the centre of this Inquiry.

Students are the direct beneficiaries of education and are owed a duty of care by all institutions that deliver that education. The design of policy that impacts students must place at its heart the best interests of those students. Parents, carers, and religious educational institutions and their staff, including teachers, perform an important role in supporting the educational and spiritual development, and wellbeing, of students.

1.32 Several submissions expressed positive support for the Guiding Principles. For example, some religious organisations indicated that the Principles reflect their own approach.<sup>33</sup> In addition, one submission supported generally the concept of clearly setting out relevant principles, to communicate 'legislative rationales' and to move beyond 'position-based' dialogues.<sup>34</sup>

1.33 Some organisations expressed support for aspects of the Guiding Principles, but queried the extent to which the Principles were appropriately reflected in the proposals in the *Consultation Paper*.<sup>35</sup> For example, some suggested that, despite the first three Principles highlighting the importance of human rights, the proposals paid insufficient regard to particular aspects of human rights, such as parental rights, or collective rights to freedom of religion.<sup>36</sup> In addition, some submissions emphasised that human rights belong to individuals, rather than to institutions.<sup>37</sup> In this Report, the ALRC has endeavoured to demonstrate careful consideration of all relevant human rights, and the compatibility of the recommendations it has made with international law.

1.34 Some submissions focused on Principle 5, regarding the central place of students in this Inquiry. For example, some submissions were concerned that aspects of the proposals in the *Consultation Paper* did not sufficiently prioritise the wellbeing of students, who would remain exposed to potential harm.<sup>38</sup> Furthermore, some submissions suggested that the Guiding Principles should also refer specifically to staff.<sup>39</sup> The ALRC acknowledges that a number of elements of the Inquiry Terms of

33 Anglican Social Responsibilities Commission (Diocese of Perth), *Submission 98*; Uniting Church in Australia Assembly, *Submission 425*.

34 N Francis, *Submission 284*.

35 See, eg, L van Leent, M Jeffries, N Barnes and S Jowett, *Submission 158*; Liberty Victoria, *Submission 253*.

36 Healinglife Church and Ministries, *Submission 9*; Anglican Youthworks, *Submission 176*; Islamic Society of South Australia, *Submission 389*; Lutheran Education Australia, *Submission 402*; National Catholic Education Commission, *Submission 409*.

37 N Francis, *Submission 284*; Australian Council of Trade Unions, *Submission 411*.

38 L van Leent, M Jeffries, N Barnes and S Jowett, *Submission 158*; Thorne Harbour Health, Brave Network and SOGICE Survivors, *Submission 213*.

39 Healinglife Church and Ministries, *Submission 9*; Australian Discrimination Law Experts Group, *Submission 75*; N Francis, *Submission 284*.

Reference relate directly to staff, and the Principles do generally apply to staff as well as students.

1.35 Some submissions made suggestions for additional, more specific, principles that should inform the ALRC's considerations. For example, some submissions focused on the fundamental importance of equal opportunity in relation to children's rights or workers' rights.<sup>40</sup> Other submissions noted that religious communities should not be characterised by default as harmful or dangerous, and that religious concepts of human dignity should be understood and respected.<sup>41</sup>

## What we heard

1.36 Over the course of the Inquiry, the ALRC spoke with 131 consultees, received 428 formal submissions, and received over 41,000 survey responses. The organisations and individuals who contributed to the Inquiry shared with the ALRC diverse perspectives on religious educational institutions based on their experience, and provided a range of views on the appropriate application of anti-discrimination laws.

1.37 A high-level analysis of key themes and interrelated issues that emerged from consultations, submissions, and survey responses is presented below. A comprehensive analysis and discussion of stakeholder perspectives in relation to these themes and issues is available in Background Paper ADL2. Implications of the issues identified here and in Background Paper ADL2 are examined in the context of each recommendation in [Chapters 4–9](#).

## Key themes and issues

1.38 Many stakeholders highlighted aspects of education that were important to them. For example, people told the ALRC that concepts of dignity and respect are important to them. In addition, people stated that religious educational institutions are important to them. People described feeling a strong sense of community within those institutions, and that the institutions are genuinely committed to caring for students and staff. For many people connected with religious educational institutions, their care and concern are driven by their religious belief.

1.39 The ALRC found that there is significant diversity between and within religious educational institutions. Issues covered by the *Sex Discrimination Act* can be difficult terrain for some institutions because of (in some cases) longstanding norms in religious communities regarding the roles of men and women, gender, and sexual ethics. In contrast, some religious educational institutions are supportive and inclusive of different religious beliefs and people who identify as LGBTQ+, or who may be divorced or living in a de facto relationship.

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40 Australian Council of Trade Unions, *Submission 411*; Just.Equal Australia, *Submission 422*.

41 National Catholic Education Commission, *Submission 409*; Australian Muslim Advocacy Network, *Submission 416*.

1.40 The ALRC heard that religious educational institutions have no intention or desire to discriminate against students or staff. However, some people within religious institutions described reform to the *Sex Discrimination Act* as a threat to the existence and operation of religious educational institutions. For instance, the proposed repeal of exceptions for religious educational institutions was seen by some as interfering with key aspects of the manifestation of religion, such as deciding membership practices and the teaching of religion.

1.41 The ALRC heard from some people that, in the context of religious educational institutions, different treatment of individuals may be necessary to maintain a harmonious community of faith, or to support the transmission of values and beliefs. Some people were concerned that changes in the law might impact the ability of religious educational institutions to maintain their religious character, authenticity as a faith community (for example, through appropriate role modelling), and their role as sheltered spaces from secular society. For some, the proposed reforms were seen as unnecessary, because people have a choice to study or work at a different educational institution.

1.42 In contrast, some people (including people connected with religious educational institutions) considered the reforms to be necessary. The ALRC heard that exclusion and discrimination can cause serious harm, in part because of the nature of community ties within institutions. Some people described how a lack of protection in the law means that even though some institutions are supportive and inclusive, things can change quickly with a change in leadership. Protection in the law was seen as providing certainty for community members by setting minimum expectations. Some challenged the idea that people can or should simply leave their communities of faith and noted that the right to freedom of religion or belief belongs to all people. Some people highlighted the impact on their religious freedom of not being able to express an alternative view within a religious educational institution. Others pointed to differences between the views of parents or staff and the views of some religious leaders.

1.43 Some people highlighted the public good of religious educational institutions. The ALRC heard that most institutions have open enrolments and function in a societal context of compulsory education with public funding. Given the size of the sector, these institutions were identified as serving an important function in society. Acknowledging the right to education and the importance of developing respect for different viewpoints, some people submitted that religious educational institutions should be recognised as being different from purely religious spaces.

## Shared values and diverging views

1.44 The ALRC's analysis of consultations, submissions, and survey responses revealed several values and concerns that were shared by a large majority of stakeholders. This 'common ground' is represented in [Figure 1.2](#).

Figure 1.2: Shared values and concerns



1.45 In contrast, a greater diversity of views was expressed on how the law should best reflect these shared values. The main issues identified by the ALRC on which stakeholders expressed diverging views are represented in [Figure 1.3](#).

Figure 1.3: Issues with strong diverging views



1.46 Six interrelated themes emerged from consultations, submissions, and survey responses, as reflected in [Figure 1.4](#).

**Figure 1.4: Interrelated themes emerging from stakeholder engagement**



## Process of reform

1.47 To inform the development of recommendations, the ALRC undertook extensive legal research regarding relevant international laws, domestic Australian laws, and laws in select overseas jurisdictions.

1.48 In addition, the ALRC obtained input from a wide range of stakeholders in this Inquiry, including in the form of consultations, formal submissions, responses to a dedicated online survey, and comments submitted to a public webinar.

1.49 The ALRC spoke with 131 individuals and organisations in consultation sessions between November 2022 and September 2023 (see [Appendix A](#)). Consultations were held in person in Brisbane, Sydney, Canberra, and Melbourne, as well as online. Consultees were located across all Australian states and territories, and the United Kingdom, Canada, Germany, and New Zealand.

1.50 The ALRC received 428 formal submissions in response to the *Consultation Paper*, which was released in January 2023 (see [Appendix B](#)). Of these submissions, 301 were made by individuals and 127 were made by organisations. Submissions provided the ALRC with feedback on the law reform propositions and proposals set

out in the *Consultation Paper*. Submissions made to the Inquiry are published on the [ALRC website](#), with the exception of submissions made confidentially.

1.51 The ALRC created a public survey to capture the views and experiences of students, parents, staff, and others involved in religious educational institutions on key issues in the Inquiry. The ALRC received 41,057 responses. Survey results were anonymous, and respondents had the option to choose whether to share any demographic data. The survey was not designed to reflect a representative sample of the population. For this reason, sampling was not undertaken, and quantitative data has not been generated from survey responses.

1.52 On 24 August 2023, the ALRC hosted a public webinar that focused on international perspectives on issues relevant to the Inquiry. The webinar was an opportunity to hear from some eminent experts on how best to maximise the realisation of all human rights in the context of religious educational institutions. Professor Carolyn Evans moderated an informed and thoughtful discussion with Professor Heiner Bielefeldt and Professor Lucy Vickers, and the panel responded to a number of questions and comments from audience members. Professor Evans is Vice-Chancellor and President of Griffith University in Australia, and has published extensively on law and religion. Professor Bielefeldt holds a Chair in Human Rights and Human Rights Politics at the University of Erlangen in Germany, and is a former UN Special Rapporteur on freedom of religion or belief. Professor Vickers is a Professor of Law at Oxford Brookes University in England, and is the United Kingdom expert on non-discrimination for the European Equality Law Network.

1.53 The ALRC was greatly assisted by the formation of an Advisory Committee comprised of experts in the law, human rights, religion, and education. The members of the Advisory Committee are listed under 'Participants' on [page 9](#). Advisory Committee members contributed throughout the duration of the Inquiry with analysis and feedback on options for reform, themes arising in submissions and consultations, and some draft material.

1.54 In preparing Background Papers and the Final Report for publication, the ALRC received valuable feedback and guidance from reviewers with particular expertise in relevant areas. These reviewers are listed under 'Participants' on [page 9](#).

1.55 Some submissions expressed concern regarding the timeframe for this Inquiry, and in particular the period of four weeks at the beginning of the educational year in which stakeholders were invited to make submissions after the release of the *Consultation Paper*.<sup>42</sup> The date of commencing and completing an ALRC inquiry are set by the Terms of Reference issued by the Attorney-General. This Inquiry commenced shortly before the end of the educational year in 2022 and was originally scheduled to be completed by April 2023. In addition, the Terms of Reference for this Inquiry provided specific guidance regarding the timing

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42 Australian Christian Lobby, *Submission 299*; S Lamont, *Submission 302*; Australian Association for Religious Education, *Submission 306*; St Paul's Lutheran Congregation Henty NSW, *Submission 317*; Uniting Network Australia, *Submission 408*.



of consultations, requesting the ALRC to take into account the school holiday period and periods of religious observance. Accordingly, the four-week period in February was the only time available for the ALRC to seek submissions. A large number of submissions and survey responses were received in any event. When the Attorney-General granted an extension of time for the ALRC to consider all stakeholder input and complete this Report, the ALRC conducted further consultations to ensure that stakeholders had sufficient opportunity to express their views and raise further issues.

1.56 Further detail regarding stakeholder input obtained, and the methodologies employed by the ALRC, is provided in Background Paper ADL2 and [Appendix D](#).

## Navigating this Report

1.57 This Report is divided into four parts. Each part is summarised below.

1.58 **Part One** addresses the overall framing of the Inquiry. It consists of three chapters (Chapters 1–3). The matters canvassed in these chapters highlight the importance of the religious educational sector in Australia, and the critical significance of the issues in this Inquiry for a large proportion of people involved in some way in religious educational institutions.

1.59 **Chapter 2** briefly outlines fundamental issues underpinning this Inquiry. It examines some perspectives on the value of religious diversity, the relationship between religion and the state, the role of anti-discrimination laws, and the role of education in society. It also considers legislative and other guidance in respect of the delivery of education in Australia.

1.60 **Chapter 3** outlines relevant context for the Inquiry, including statistics and background information relating to: religiously affiliated educational institutions in Australia; segments of Australian society likely affected by existing exceptions in the *Sex Discrimination Act*; reported public sentiment on issues relevant to the Inquiry; and reported experiences of religious communities, and of people likely affected by existing legislative exceptions.

1.61 **Part Two** sets out the ALRC's recommendations. It consists of six chapters (Chapters 4–9).

1.62 **Chapter 4** contains **Recommendation 1**, identifying existing exceptions in the *Sex Discrimination Act* relevant to religious educational institutions that should be narrowed. The focus of **Chapter 4** is an examination of Australia's international legal obligations regarding a range of relevant human rights, to assess how the Australian Government's policy positions might best be given effect consistently with those obligations. The chapter also analyses views expressed in submissions, constitutional issues, trends in state and territory law, and the approach in some overseas jurisdictions.

1.63 **Chapter 5** further sets out anticipated implications of the reform contemplated in **Recommendation 1**. It addresses a number of more specific issues raised by stakeholders during the course of the Inquiry, such as maintaining a distinct religious identity, teaching religious doctrine, and applying codes of conduct. The chapter then discusses some of the alternative reforms that were suggested by stakeholders, but not recommended by the ALRC.

1.64 **Chapter 6** contains three recommendations on issues that relate to the scope of protection from discrimination provided under the *Sex Discrimination Act*. The aim of these recommendations is to ensure that the provisions of the *Sex Discrimination Act* apply in relation to an appropriately broad range of people involved in religious educational institutions. **Recommendation 2** relates to the training of certain religious leaders, and aims to reflect a more inclusive range of religious groups and traditions. **Recommendation 3** relates to protection from discrimination for all ‘workers’ in religious educational institutions, including pre-service teachers and volunteers, and not just those formally classified as employees or ‘contract workers’. **Recommendation 4** relates to protection from discrimination on the basis of a person’s association (or perceived association) with another person who has, or is believed to have, a protected attribute.

1.65 **Chapter 7** contains two technical recommendations to address differences between the *Sex Discrimination Act* and the *Fair Work Act*. The aim of these recommendations is to achieve greater harmony between the Acts in relation to religious educational institutions, and to give effect to the intent of **Recommendation 1**. **Recommendation 5** aims to align existing exceptions in the *Fair Work Act* more closely with the recommended exceptions in the *Sex Discrimination Act*. **Recommendation 6** addresses terms in modern awards and enterprise agreements of religious educational institutions that would be indirectly discriminatory under the *Sex Discrimination Act*, in relation to the personal beliefs or private life of employees.

1.66 **Chapter 8** contains two recommendations relating to differential treatment in employment on the basis of religion. **Recommendation 7** relates to the appropriate form of exceptions in the *Fair Work Act*, and in a future Religious Discrimination Act, to allow religious educational institutions to build a community of faith by giving preference to the employment of staff of the same religion. This chapter has a strong focus on Australia’s international obligations in this regard, and how to make Australian law more consistent with those obligations. **Recommendation 8** relates to a consequential amendment to the definition of ‘discrimination’ in the *Australian Human Rights Commission Act*, to make relevant exceptions more consistent with recommended exceptions under the *Fair Work Act*.

1.67 **Chapter 9** contains three recommendations. **Recommendations 9** and **10** relate to clarifications and guidance materials regarding the law. The aim is to offer greater clarity and certainty for people involved in religious educational institutions as to how relevant aspects of the law apply to them. **Recommendation 11** relates to a number of further reviews of anti-discrimination law that would be beneficial in

light of the issues that have come to the ALRC's attention during the course of this Inquiry, but which are beyond the Terms of Reference.

1.68 **Part Three** sets out, in some detail, relevant aspects of existing international and Australian domestic law. It consists of four chapters (Chapters 10–13). This material underpins the analysis supporting the ALRC's recommendations.

1.69 **Chapters 10** and **11** set out relevant aspects of international law, including the nature of Australia's international legal obligations generally, and some more specific human rights obligations which are relevant in the context of this Inquiry.

1.70 **Chapters 12** and **13** set out relevant aspects of Australian domestic law, including the *Australian Constitution*, dedicated anti-discrimination legislation, other relevant Commonwealth legislation, and common law duties.

1.71 **Part Four** contains a number of Appendices. The Appendices include, for example, lists of consultees and submissions, and various relevant legislative provisions.



## 2. Fundamental Issues

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### Introduction

2.1 This chapter sets out some of the fundamental issues that underpin aspects of the ALRC's analysis in this Inquiry. [Chapter 3](#) outlines relevant context for the Inquiry.

2.2 This chapter proceeds in five parts by considering:

- the value of religion and religious diversity in society;
- the relationship between religion and the state;
- the role that anti-discrimination laws play in society;
- the role that education plays in society; and
- legislative and other guidance in respect of the delivery of education in Australia.

### The value of religion and religious diversity

2.3 Religion — and religious diversity — are of great value in society. 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'.<sup>1</sup>

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<sup>1</sup> *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 130, cited in Law Council of Australia, *Submission 428*. See [Chapter 13](#) for a discussion of how the High Court has defined 'religion'.

2.4 Many submissions and survey responses emphasised the value of religion (and religious organisations) in society generally, and argued that religious organisations should be promoted, rather than restrained, by the law.<sup>2</sup> This can be justified by reference to the importance of faith in many people's lives.

2.5 Further, Professor Ghanea has recently noted that religion has the capacity to advance human rights, although she cautioned that it should not be used as a 'tool of discrimination'.<sup>3</sup> Indeed, human rights themselves are often acknowledged to have theoretical roots in religious conceptions of human value.<sup>4</sup> One submission by a religious organisation emphasised that the law should recognise that religious organisations and their members are 'moral leaders capable of managing sensitive situations to safeguard the dignity of individuals'.<sup>5</sup>

2.6 Dr Pearson has suggested that the most powerful argument in favour of protecting religious freedom is the great importance of religion in the lives of religious believers or people who are culturally religious.<sup>6</sup> Religion often involves a 'search for the ultimate meaning of life', can form a core aspect of a person's 'sense of self and purpose in the world', and may constitute a person's 'normative universe'.<sup>7</sup> The prominence of rights protecting religious freedom consequently reflects the 'identity-shaping existential significance' that religion has for many people.<sup>8</sup> Conversely, interferences with religious practices may be experienced as 'intensely burdensome and disorienting', and may cause serious suffering when individuals are not free to 'live a life of integrity' by acting on the basis of their beliefs.<sup>9</sup>

2.7 In addition, Pearson has noted arguments regarding the value of religious diversity within society, such as facilitating the discovery of 'truth' by permitting the pursuit of many competing lifestyles, and enabling others to assess the relative merits of each.<sup>10</sup> A foundational value of liberal democracies is that all people should be free to live in accordance with their convictions to the extent these are compatible with others' rights: seeking one's convictions has often been argued to be 'an intrinsic part of what it means to live a flourishing life'.<sup>11</sup> Accordingly, even if others do not share

2 See Australian Law Reform Commission, 'What We Heard' (Background Paper ADL2, December 2023).

3 Nazila Ghanea, Special Rapporteur, *Landscape of Freedom of Religion or Belief*, 52nd sess, UN Doc A/HRC/52/38 (30 January 2023) [7].

4 Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart Publishing, 2016) 32; Rowan Cruft, S Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press, 2015) 1–2.

5 Australian Muslim Advocacy Network, *Submission 416*.

6 Megan Pearson, *Proportionality, Equality Laws, and Religion: Conflicts in England, Canada, and the USA* (Routledge, 2017) 4.

7 *Ibid* 4–5.

8 Heiner Bielefeldt, 'Toward a Holistic Human Rights Approach: Religious Freedom and Respect for Sexual Diversity' in United Nations Special Rapporteur on Freedom of Religion or Belief (ed), *Special Rapporteur's Compilation of Articles on Freedom of Religion or Belief and Sexuality* (2017) 8.

9 Pearson (n 6) 5.

10 *Ibid* 4.

11 *Ibid* 5.

particular religious beliefs, there is value in the law protecting freedom of belief for all people. This would encompass ‘the opportunity to develop, and to live in accordance with, their own view of sexual ethics’<sup>12</sup> (a key focus of this Inquiry), as well as other ethical frameworks. A key question for this Inquiry is, therefore, how to maximise the ability of all people to live in accordance with their convictions.

2.8 The Law Council of Australia also emphasised the importance of religious diversity by suggesting, more specifically, that the terms ‘religion’, ‘religious belief’, and ‘religious freedom’ should encompass the traditional religious beliefs and practices of Aboriginal and Torres Strait Islander peoples.<sup>13</sup>

## Religion and the state

2.9 Professor Durham has observed that there is a diverse configuration of relationships between religion and the state in different countries around the world. He has posited the following spectrum of approaches:

- Absolute theocracies — a particular religion has a ‘strictly enforced monopoly in religious affairs’.
- Established religion — a ‘strong positive identification’ with one particular religion, with some level of tolerance for divergent beliefs.
- Endorsed religion — a particular religion has ‘a special place in the country’s traditions’, but other groups are entitled to equal protection.
- Cooperationist regimes — no particular religion has formal status in the country, but the state cooperates closely with dominant denominations (for example, by funding religious education).
- Accommodationist regimes — state and religion are formally separate, but the state retains ‘a posture of benevolent neutrality toward religion’ by tolerating religion in public spaces and providing some level of religiously based exemptions from general public laws (such as laws relating to taxes and holidays), without supporting or endorsing any religion (for example, by not providing financial subsidies to religious education).
- Separationist regimes — a more rigid separation of religion and state (for example, religious symbols are not permitted to be publicly displayed, religiously based exemptions from general public laws are not granted, no religious teaching is permitted in public schools, the state makes it difficult for independent religious schools and public services to function).
- Hostility and overt prosecution — smaller religious groups in particular are persecuted, by way of ‘bureaucratic roadblocks’ or by imprisonment or other forms of persecution.<sup>14</sup>

12 Ibid 6.

13 Law Council of Australia, *Submission 428*.

14 Cole Durham, ‘Perspectives on Religious Liberty: A Comparative Framework’ in Johan van der Vyver and John Witte (eds), *Religious Human Rights in Global Perspective* (Brill, 1996) 19–23, quoted in Philip Alston and Ryan Goodman, *International Human Rights* (Oxford University Press, 2nd ed, 2013) 583–8.

2.10 Durham has suggested that ‘accommodationist’ approaches (in the middle of the spectrum) are most likely to maximise freedom of religion or belief, with approaches at each end of the spectrum allowing for little, if any, religious freedom.<sup>15</sup> However, he has noted that the most optimal configuration of the relationship between religion and the state that will maximise religious freedom in a particular country may depend on cultural context, and that local debates about what this configuration should look like should be kept ‘in perspective’ because they are often debates about ‘which of a fairly narrow range of institutional options is optimal’.<sup>16</sup>

2.11 Similarly, Ghanea has urged that debates about appropriate levels of religious freedom should not be framed divisively (but rather that all interested parties should aim for collaboration) and should avoid overstating threats to religious freedom, lest overuse of terms with established meanings under international law (such as ‘persecution’) becomes counterproductive.<sup>17</sup>

2.12 **Appendix I** includes a discussion on the propriety of state interference with institutional autonomy, which further explores the relationship between the state and religion in that context.

## The role of anti-discrimination laws

2.13 Fundamentally, discrimination causes harm to individuals and societies, which is a key reason why societies prohibit discrimination on certain grounds. This point was made clear by Bell J in *Lifestyle Communities (No 3) (Anti-Discrimination)*:

Discrimination is repugnant and has insidious consequences. It demeans people in the humanity and dignity which is their birthright, impairs their personal autonomy and development, damages society and violates the principle of equality on which freedom in democracy ultimately depends. The community looks to the law for equal treatment and protection against discrimination.<sup>18</sup>

2.14 In the context of religious educational institutions, the Supreme Court of Canada has opined that when LGBTQ+ people ‘have fewer opportunities relative to others’, they face a ‘risk of significant harm’:

Substantive equality demands more than just the availability of options and opportunities — it prevents ‘the violation of essential human dignity and freedom’ and ‘eliminate[s] any possibility of a person being treated in substance as “less worthy” than others’ ... it is not possible ‘to condemn a practice so central to the identity of a protected and vulnerable minority without thereby discriminating against its members and affronting their human dignity and personhood’ ...

15 See also Carolyn Evans and Cate Read, ‘Religious Freedom as an Element of the Human Rights Framework’ in Paul T Babie, Neville G Rochow and Brett G Scharffs (eds), *Freedom of Religion or Belief* (Edward Elgar Publishing, 2020) 20, 30.

16 Durham (n 14) 25.

17 Nazila Ghanea, Special Rapporteur, *Landscape of Freedom of Religion or Belief*, 52nd sess, UN Doc A/HRC/52/38 (30 January 2023) [54]–[55].

18 *Lifestyle Communities (No 3) (Anti-Discrimination)* [2009] VCAT 1869 [1].



more is at stake here than simply 'disagreement and discomfort' with views that some will find offensive.<sup>19</sup>

2.15 Well beyond 'feeling insulted', repeated discrimination can result in tangible harm (such as loss of employment, and economic or social disadvantage) as well as intangible harm (such as undermining a person's sense of self-worth, equality, belonging, inclusion, and respect). Stigmatisation (which involves devaluing another person) and resulting attempts by individuals to hide attributes that are protected under the law can also lead to psychological effects such as low self-esteem, mental illness, significant stress, disengagement, and suicide, in addition to the economic consequences of likely exclusion from social and economic participation on the same basis as others.<sup>20</sup> Poor mental health and suicide have devastating effects on individuals, communities, and society generally.<sup>21</sup>

2.16 Pearson has highlighted that the experience of repeated discrimination has a particularly corrosive effect over time, such that legally prohibited discrimination on certain grounds (including race, sex, disability, and religion) routinely reflects (and seeks to rectify) historic oppression and disadvantage suffered by individuals and groups with those attributes.<sup>22</sup>

2.17 Professor Parkinson and Dr Harrison contend that while the original purpose of anti-discrimination laws was to restore access to and participation in public goods by those who have historically been disadvantaged, there has been a shift towards focusing on identity and dignity.<sup>23</sup> Indeed, Professor Waldron has argued that respect for human dignity is 'increasingly understood as a crucial foundation of basic rights and equality'.<sup>24</sup> Furthermore, the Victorian Court of Appeal has affirmed that the essence of anti-discrimination law is 'to recognise the right of people to be who or what they are'.<sup>25</sup> Recognising the important role that anti-discrimination laws play in relation to identity, the Court further stated that to distinguish between a person's

19 *Law Society of British Columbia v Trinity Western University* [2018] 2 SCR 293 [95]–[101] (citations omitted).

20 Pearson (n 6) 8. Iyiola Solanke has reconceptualised anti-discrimination law as fundamentally concerned with stigma: see Iyiola Solanke, *Discrimination as Stigma: A Theory of Anti-Discrimination Law* (Bloomsbury Publishing, 2016).

21 Productivity Commission, *Mental Health* (Report No 95, 30 June 2020) vol 2, 149.

22 Pearson (n 6) 8–10. As explained by the Australian Discrimination Law Experts Group in its submission, over the last 50 years, Australian policymakers have sought to protect individuals and groups with particular attributes, such as sex and sexual orientation, by prohibiting discrimination on those grounds. People and groups with these attributes have a long history of marginalisation and exclusion, on the basis that they are 'fundamentally different and inferior'. Despite such views being deemed as 'unjustified and unacceptable', they are still held and expressed in ways that continue to negatively impact members of certain communities, such as those identifying as LGBTQ+: see Australian Discrimination Law Experts Group, *Submission 75*. See also Australian Lawyers Alliance, *Submission 162*.

23 Patrick Parkinson and Joel Harrison, 'Freedom beyond the Commons: Managing the Tension between Faith and Equality in a Multicultural Society' (2014) 40(2) *Monash University Law Review* 413, 421–6.

24 Jeremy Waldron, 'Dignity and Defamation: The Visibility of Hate' (2010) 123(7) *Harvard Law Review* 1596, 1610–11.

25 *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 308 ALR 615 [57].

identity and the behaviour they put forward as an expression of that identity is to 'deny the right to enjoyment and acceptance of identity'.<sup>26</sup>

2.18 Despite the various justifications for anti-discrimination laws, diverse views have been expressed by religious communities on the place of discrimination. For example, some stakeholders have described a degree of discrimination as necessary and integral to the employment of staff at religious educational institutions, to enable such institutions to foster a culture of faith,<sup>27</sup> while other stakeholders have described discrimination as 'antithetical' to their faith, and discrimination which results in exclusion as 'morally repugnant'.<sup>28</sup> Dr Walsh has suggested that the harm to religious communities, when they are prohibited from incidentally engaging in discrimination, is greater than the harm suffered by those who would be discriminated against.<sup>29</sup> Harms to religious communities have been stated to include 'severe emotional distress from the violation of their religious commitments' and an impaired relationship with one's faith community, and, more broadly, burdens such as threats of protests, boycotts, and complaints to anti-discrimination tribunals.<sup>30</sup> On the other hand, some religious organisations stated in submissions that the greater harm would ordinarily be suffered by the individual person subjected to discrimination.<sup>31</sup>

## The role of education

2.19 Like religion, and like laws prohibiting discrimination, education plays an important role in society. This part briefly explores various theories on the role and function of education (especially in relation to religious educational institutions) as well as the extent to which religious educational institutions should be considered 'public' or 'private' (and why this distinction might matter).

## Theories of education

2.20 There are many theories on the appropriate role and function of education in a society. To some extent, the approach taken to the establishment and management of an educational institution reflects philosophical views about the nature of people, children, and education. For example, some Christian leaders have suggested that parents choose religious schools 'because they expect that this education will be provided by school staff in a manner consistent with the Gospel of Jesus Christ

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26 Ibid.

27 See, eg, H Bootes, *Submission 109*; C Hurt, *Submission 161*; V Hamblin, *Submission 172*; A Sabahat, *Submission 267*; P Crocker, *Submission 340*.

28 Catholic Secondary Principals Australia, *Submission 363*.

29 Greg Walsh, 'Same-Sex Marriage and Religious Liberty' (2016) 35(2) *The University of Tasmania Law Review* 106, 127. See also A Deagon, *Submission 4*; I Benson, *Submission 413*.

30 A Deagon, *Submission 4*, citing Walsh (n 29) 127. Further, one submission argued that removal of exception in the *Sex Discrimination Act* would lead to '[i]ntolerable ethical, legal and psychological burdens on religious education institutions and their communities': D Khlentzos, *Submission 175*.

31 See, eg, Anglican Social Responsibilities Commission (Diocese of Perth), *Submission 98*.

and the teachings of the Church'.<sup>32</sup> Although some research indicates that the religious values of schools are important considerations for parents when choosing a school,<sup>33</sup> other research suggests that the main reasons most parents choose private schools (which, in Australia, are largely religiously affiliated) are not related to religion.<sup>34</sup>

2.21 The nature of and approach to education on issues relevant to this Inquiry may be affected by the stage at which it is delivered (that is, pre-school, primary education, secondary education, or tertiary education). For example, Christian theological education at the tertiary level has been described as having 'a strongly formative ethos, both communal and personal, with small classes and a broad range of ages and life-experience in the student body',<sup>35</sup> and as having a 'strong emphasis ... on the formation of positive communal relationships between executives, academics, staff and students'.<sup>36</sup>

## Schools as public or private spaces

2.22 The extent to which religious schools should be considered 'public' or 'private' spaces is the subject of some controversy and may have significant consequences. In particular, the distinction is central to the debate around state regulation of religious schools and the extent to which such regulation is appropriate.

2.23 As set out in Background Paper ADL2, a number of stakeholders (particularly religious institutions and members of religious educational institution communities) suggested that religious educational institutions should be treated as private spaces under the law, as a clearly demarcated space for a particular community.<sup>37</sup> These stakeholders argued that religious educational institutions should only be subject to a limited degree of regulation or interference by the state. In contrast, other submissions argued that various factors — including the significant public funding for religious educational institutions in Australia and the nature of education as a

32 Australian Catholic Bishops Conference, Submission No 185 to Joint Parliamentary Committee on Human Rights, Parliament of Australia, *Religious Discrimination Bill 2021 and Related Bills* (2021) 8, quoted in Douglas Ezzy, 'Education, Religion, and LGBTQ+ in Australia' [2023] *Journal of Beliefs & Values* 1, 3.

33 Association of Heads of Independent Schools of Australia, *Submission 196*; K Donnelly, *Submission 227*; Christian Schools Australia, *Why Parents Choose Christian Schools: Christian Schools Community Profile Survey* (Report, 2023) 14; Independent Schools Australia, *School Choice: A Research Report* (2021) 3.

34 Australian Human Rights Commission, *Submission 384*; Lorraine Dearden, Chris Ryan and Luke Sibiet, 'What Determines Private School Choice? A Comparison between the United Kingdom and Australia' (2011) 44(3) *The Australian Economic Review* 308, 318–19; Marion Maddox, *Taking God to School: The End of Australia's Egalitarian Education?* (Allen & Unwin, 2014) 114; Independent Schools Australia (n 33) 3; Jennifer Buckingham, *The Rise of Religious Schools* (Report, 2010) 8–10.

35 Charles Sherlock et al, *Uncovering Theology: The Depth, Reach, and Utility of Australian Theological Education* (Australian Catholic University and The Council of Deans of Theology, 2009) 4.

36 Australian Christian Higher Education Alliance, *Submission 208*.

37 Australian Law Reform Commission, 'What We Heard' (Background Paper ADL2, December 2023).

public good (particularly compulsory education for primary and secondary school) — mean that such institutions should be treated as public spaces and, therefore, that significant regulation by the state would be appropriate.

2.24 However, the concepts used to determine whether institutions are properly categorised as public or private are highly contested, with such categorisations criticised for being vague or manipulable to suit a given purpose.<sup>38</sup>

2.25 Professor Vickers has suggested that instead of attempting to draw an exact dividing line between what is public and what is private, it is more helpful to think of these concepts as existing along a continuum or spectrum.<sup>39</sup> She has given examples of ways in which the line between public space and private space may blur — for example, charities may be involved in the delivery of public services (such as services assisting disabled people, child welfare services, and health services).<sup>40</sup>

2.26 In relation to religious schools, Vickers has observed that such schools play an important role in fulfilling the ‘fundamentally public obligation on the state to provide education to children’ and, consequently, such institutions should be treated as ‘clearly a long way along the continuum towards public status and away from purely private status’.<sup>41</sup>

2.27 While Parkinson and Harrison have observed that religious schools are ‘typically oriented towards the public’, they have argued that it is problematic to assume that any ‘public-facing service’<sup>42</sup> should be fully subject to anti-discrimination laws.<sup>43</sup> They have argued that this public-private dichotomy is too ‘blunt and problematically constraining’ because it fails to account for the reality of social involvement by religious bodies that interact with the public, and that anti-discrimination laws should reflect individual contexts rather than an overarching public-private divide.<sup>44</sup>

## The delivery of education in Australia

2.28 The delivery of education in Australia (in relation to both government and non-government schools) is regulated by various legislative requirements, as well as other materials that are intended to guide how students should be treated. Religious educational institutions are subject to a wide range of obligations in relation to their operations, including requirements in relation to accreditation and registration, the

38 Pearson (n 6) 32. See also Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination Law and Equal Opportunity Law* (The Federation Press, 3rd ed, 2018) 50–1, quoting Margaret Thornton, *The Liberal Promise: Anti-Discrimination Law in Australia* (Oxford University Press, 1990) 102–7.

39 Vickers (n 4) 79.

40 Ibid 80.

41 Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart Publishing, 2008) 80.

42 That is, services engaged in shaping what the ‘public’ is, regardless of whether they receive funding from government: Parkinson and Harrison (n 23) 17, 24.

43 Ibid.

44 Ibid 17.

curriculum, and staff and students. These requirements apply irrespective of any exceptions for religious educational institutions under anti-discrimination legislation.

## Accreditation and registration requirements

2.29 In order to operate lawfully, all educational institutions (government and non-government) must satisfy certain accreditation and/or registration requirements.<sup>45</sup> These requirements differ depending on whether the institution is a school or higher education provider.

2.30 Accreditation and registration requirements pertaining to schools are mainly concerned with the accreditation and registration of non-government schools. These requirements differ across the states and territories, but generally they require such schools to comply with certain standards relating to, for example, administration and governance, educational programs and curricula, safety and welfare (including the National Principles for Child Safe Organisations), resources, and other operations.<sup>46</sup> The accreditation and registration of non-government schools is managed by state and territory accreditation bodies.<sup>47</sup> Such schools are also bound by duty of care obligations (see [Chapter 13](#)).

2.31 The registration of higher education institutions is governed across Australia by the *Tertiary Education Quality and Standards Agency Act 2011* (Cth).<sup>48</sup> This Act provides that institutions must meet the Higher Education Threshold Standards ('Threshold Standards') to be registered as a higher education provider.<sup>49</sup> Once registered, higher education providers are required to offer at least one accredited course.<sup>50</sup> Courses will only be accredited where they meet the Threshold Standards.<sup>51</sup>

45 Some states and territories refer to accreditation while others refer to registration. Still others refer to both accreditation and registration as two separate requirements.

46 *Education Act 2004* (ACT) s 93; *Education Regulation 2005* (ACT) sch 2; *Education Act 1990* (NSW) ss 47, 86; *Education Act 2015* (NT) s 125; *Education (Accreditation of Non-State Schools) Act 2017* (Qld) s 11; *Education (Accreditation of Non-State Schools) Regulation 2017* (Qld) pt 2; *Education and Early Childhood Services (Registration and Standards) Act 2011* (SA) s 43(1); *Education and Early Childhood Services (Registration and Standards) Regulations 2011* (SA) reg 36A; Standards for Registration and Review of Registration of Schools in South Australia 2019 (SA); *Education Act 2016* (Tas) ss 150(2), 167(2), 180; *Education Regulations 2017* (Tas) pt 4 div 1, schs 2, 3; *Education and Training Reform Act 2006* (Vic) s 4.3.1(6)(b); *Education and Training Reform Regulations 2017* (Vic) reg 60, sch 4; *School Education Act 1999* (WA) s 159(1); Registration Standards for Non-Government Schools 2020 (WA).

47 The state and territory accreditation bodies are: Registration Standards Advisory Board (ACT), NSW Education Standards Authority, Non-State Schools Accreditation Board (Queensland), Education Standards Board (SA), Non-Government Schools Registration Board (Tasmania), Victorian Registration and Qualifications Authority, and School Curriculum and Standards Authority (WA). In the Northern Territory, accreditation is managed by the Department of Education (NT).

48 National vocational education and training ('VET') providers are regulated by the Australian Skills Quality Authority ('ASQA') under the *National Vocational Education and Training Regulator Act 2011* (Cth). ASQA is also responsible for accrediting VET courses.

49 *Tertiary Education Quality and Standards Agency Act 2011* (Cth) s 21(1); *Higher Education Standards Framework (Threshold Standards) 2021* (Cth) sch 1.

50 *Tertiary Education Quality and Standards Agency Act 2011* (Cth) ss 24, 25.

51 *Ibid* s 49(1).

The Threshold Standards include requirements in relation to student participation and attainment; the learning environment; teaching; research and research training; quality assurance; governance and accountability; and information.

2.32 The National Quality Framework regulates early childhood education and care in Australia.<sup>52</sup> Accreditation requirements are found in the *National Law*<sup>53</sup> and *National Regulations*.<sup>54</sup> To be accredited, early childhood education and care institutions must meet the National Quality Standard.<sup>55</sup> The National Quality Standard provides standards in relation to seven 'Quality Areas': educational program and practice; children's health and safety; the physical environment; staffing arrangements; relationships with children; collaborative partnerships with families and communities; and governance and leadership. The National Quality Framework is administered by state and territory regulatory authorities,<sup>56</sup> although the Australian Children's Education and Care Quality Authority, an independent national authority, supports state and territory authorities to administer the National Quality Framework.<sup>57</sup>

2.33 In addition to the above, all educational institutions that enrol overseas students must follow the registration requirements outlined in the *Education Services for Overseas Students Act 2000* (Cth) and the *National Code of Practice for Providers of Education and Training to Overseas Students 2018* (Cth).

52 Australian Children's Education and Care Quality Authority, 'What is the NQF?' <[www.acecqa.gov.au/nqf/about](http://www.acecqa.gov.au/nqf/about)>.

53 The *National Law* was enacted in Victoria: *Education and Care Services National Law Act 2010* (Vic). Remaining jurisdictions adopted this law through an application Act or other legislation: *Children (Education and Care Services National Law Application) Act 2010* (NSW); *Education and Care Services National Law Act 2011* (ACT); *Education and Care Services (National Uniform Legislation) Act 2011* (NT); *Education and Early Childhood Services (Registration and Standards) Act 2011* (SA); *Education and Care Services National Law (Application) Act 2011* (Tas); *Education and Care Services National Law (Queensland) Act 2011* (Qld); *Education and Care Services National Law (WA) Act 2012* (WA).

54 The *National Regulations* were enacted in NSW but apply in all states and territories except for WA: *Education and Care Services National Regulations 2011* (NSW). WA enacted its own regulations: *Education and Care Services National Regulations 2012* (WA).

55 *Education and Care Services National Regulations 2011* (NSW) sch 1; *Education and Care Services National Regulations 2012* (WA) sch 1.

56 Australian Children's Education and Care Quality Authority, 'Contact Your Regulatory Authority' <[www.acecqa.gov.au/help/contact-your-regulatory-authority](http://www.acecqa.gov.au/help/contact-your-regulatory-authority)>.

57 Australian Children's Education and Care Quality Authority, 'About Us' <[www.acecqa.gov.au/about-us](http://www.acecqa.gov.au/about-us)>.

## Curriculum requirements

2.34 In addition to accreditation and registration requirements, Australian schools (government and non-government) are required to follow a curriculum.<sup>58</sup> For students from kindergarten to year 10, this must be the Australian Curriculum (or another curriculum recognised by the Australian Curriculum and Assessment Reporting Authority as comparable with the Australian Curriculum, such as the International Baccalaureate, Australian Steiner, or Montessori curricula). For early childhood education, relevant curricula include the Early Years Learning Framework. The required curriculum for students in years 11 and 12 depends on the state or territory, but includes those curricula that comply with various Certificates of Education requirements.

2.35 The Australian Curriculum ‘sets the expectations for what all young Australians should be taught, regardless of where they live in Australia or their background’.<sup>59</sup> While the Australian Curriculum has been ‘fully endorsed by State and Territory Education Ministers’, its implementation is the responsibility of state and territory government authorities.<sup>60</sup> As such, it may be implemented differently across states and territories, with state and territory authorities adapting the Australian Curriculum to meet the needs of learners in their schools.<sup>61</sup>

2.36 In relation to the curriculum for Health and Physical Education, the Australian Curriculum describes itself as being ‘designed to allow schools flexibility to meet the learning needs of all young people’ regarding the health focus area of ‘relationships and sexuality’.<sup>62</sup> It emphasises that, in implementing the Health and Physical Education curriculum, all schools must ensure that teaching is ‘inclusive and relevant to the lived experience of all students ... including students who may be same-sex attracted, gender diverse or intersex’.<sup>63</sup>

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58 As explained above, generally non-government schools must satisfy certain curriculum requirements to be accredited: see *Education Regulation 2005* (ACT) sch 2 reg 2.10; *Education Act 1990* (NSW) pt 3, ss 47(1)(j), 86(2); *Education Act 2015* (NT) s 125(k); Northern Territory Board of Studies, ‘Curriculum, Assessment, Reporting and Certification Policy: Early Childhood to Year 12’ <[https://education.nt.gov.au/\\_\\_data/assets/pdf\\_file/0004/1055119/ntbos-curriculum-assessment-reporting-and-certification-policy-early-childhood-to-year-12.pdf](https://education.nt.gov.au/__data/assets/pdf_file/0004/1055119/ntbos-curriculum-assessment-reporting-and-certification-policy-early-childhood-to-year-12.pdf)>; *Education (Accreditation of Non-State Schools) Regulation 2017* (Qld) reg 9; Standards for Registration and Review of Registration of Schools in South Australia 2019 (SA); *Education Regulations 2017* (Tas) sch 3 cl 4; *Education and Training Reform Regulations 2017* (Vic) sch 4 cl 6; Registration Standards for Non-Government Schools 2020 (WA).

59 Australian Curriculum, Assessment and Reporting Authority, ‘About the Australian Curriculum’ <[www.australiancurriculum.edu.au/about-the-australian-curriculum/](http://www.australiancurriculum.edu.au/about-the-australian-curriculum/)>.

60 Ibid.

61 Ibid.

62 Australian Curriculum, Assessment and Reporting Authority, ‘Health and Physical Education: Structure’ <[www.australiancurriculum.edu.au/f-10-curriculum/health-and-physical-education/structure/](http://www.australiancurriculum.edu.au/f-10-curriculum/health-and-physical-education/structure/)>.

63 Ibid.

2.37 In this context, the Australian Curriculum states that ‘it is crucial to acknowledge and affirm diversity in relation to sexuality and gender’, and to ‘acknowledge and respond to the needs of all students’. It also explains that primary and secondary schools should teach students in an age-appropriate way about relationships and sexuality, and states that relevant content includes:

- the development of ‘positive practices in relation to ... the development of their identities’;
- understanding ‘the factors that influence gender and sexual identities’;
- learning about discrimination based on gender and sexuality;
- ‘changing identities and the factors that influence them (including personal, cultural, gender and sexual identities)’; and
- ‘celebrating and respecting difference and diversity in individuals and communities’.<sup>64</sup>

## Guidance on the treatment of students

2.38 In addition to accreditation and curriculum requirements (applicable to all schools), various materials exist that provide guidance for how students should be treated.

2.39 For example, state and territory education legislation frequently refers to one of the objects of education as enabling students to reach their potential, and responding to the needs of individual students.<sup>65</sup> In addition, in 2019 the Education Council (comprising Education Ministers from all Australian jurisdictions) agreed that the education system in Australia should promote ‘excellence and equity’, and committed to work with the education community to (amongst other things):

- provide all young Australians with access to high-quality education that is inclusive and free from any form of discrimination;
- recognise the individual needs of all young Australians;
- ensure that young Australians of all backgrounds are supported to achieve their full educational potential;
- ensure that education promotes and contributes to a socially cohesive society that values, respects, and appreciates different points of view and cultural, social, linguistic, and religious diversity; and
- support all education sectors — government, non-government, secular, and faith-based education.<sup>66</sup>

<sup>64</sup> Ibid.

<sup>65</sup> *Education Act 2004* (ACT) s 7; *Education Act 1990* (NSW) s 6; *Education Act 2015* (NT) ss 3–4; *Education (General Provisions) Act 2006* (Qld) s 5; *Education and Early Childhood Services (Registration and Standards) Act 2011* (SA) s 9; *Education Act 2016* (Tas) s 3; *Education and Training Reform Act 2006* (Vic) ss 1.2.1–1.2.2; *School Education Act 1999* (WA) s 3.

<sup>66</sup> Council of Australian Governments Education Council, *Alice Springs (Mparntwe) Education Declaration* (Report, December 2019) 5.



2.40 The Education Council's vision was for all students to (amongst other things):

- have a sense of self-worth, self-awareness, and personal identity that enables them to manage their emotional, mental, cultural, spiritual, and physical well-being;
- develop personal values and attributes such as honesty, empathy, loyalty, responsibility, and respect for others;
- relate well to others and form and maintain healthy relationships;
- have a sense of belonging, purpose, and meaning that enable them to thrive in their learning environment;
- act with moral and ethical integrity;
- have empathy for the circumstances of others and work for the common good;
- appreciate and respect Australia's rich social, cultural, religious, and linguistic diversity; and
- have an understanding of Australia's system of government, its histories, religions, and culture.<sup>67</sup>

2.41 Furthermore, Australian teachers are expected by their professional standards to provide supportive and inclusive learning environments.<sup>68</sup> The National Principles for Child Safe Organisations also emphasise the importance of 'embracing all children regardless of their ... sex, gender ... or background' (including LGBTQ+ young people), in order to ensure that 'diverse needs [are] respected in policy and practice'.<sup>69</sup> From a more global perspective, Goal 4 of the UN Sustainable Development Goals aims to 'ensure inclusive and equitable quality education' for all, including LGBTQ+ students.<sup>70</sup>

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67 Ibid 6–7.

68 Australian Institute for Teachers and School Leadership, 'The Australian Professional Standards for Teachers' (2022) Standard 4.

69 Australian Human Rights Commission, *National Principles for Child Safe Organisations* (2018) 12.

70 United Nations, '4. Quality Education' <<https://www.undp.org/sustainable-development-goals/quality-education>>; United Nations Educational, Scientific and Cultural Organisation, *Don't Look Away: No Place for Exclusion of LGBTI Students* (Policy Paper 45, May 2021).



## 3. Context

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### Introduction

3.1 This chapter provides context for the recommendations made later in this Report by setting out background information and statistics relating to institutions, communities, and experiences relevant to this Inquiry. In doing so, this chapter briefly summarises the observations and findings of relevant research, published statistics, and feedback provided to the ALRC during this Inquiry.

3.2 This chapter proceeds in five parts. The first part examines the history, nature, and significance of the religious educational sector in Australia. The second part sets out available information regarding communities likely to be affected by existing exceptions in the *Sex Discrimination Act*, noting the difficulties of precisely identifying and describing those communities. The third part examines various statistics regarding public views on issues relevant to this Inquiry. The fourth part focuses on the reported experiences of religious communities and of people in religious educational institutions. The final part explores reported health and wellbeing outcomes for LGBTQ+ people.

### Religious educational institutions in Australia

3.3 This part examines the history, nature, and significance of the religious educational sector in Australia.

## History of Australian religious education

3.4 The first communities to found and engage in religious education in Australia were Aboriginal and Torres Strait Islander peoples. With the arrival of Europeans in Australia, many Aboriginal and Torres Strait Islander forms of religious education were outlawed or prevented in some way.<sup>1</sup> The ALRC heard from some consultees that the people who have had their religious freedoms most seriously violated in Australia are Aboriginal and Torres Strait Islander peoples. Aboriginal and Torres Strait Islander peoples continue to describe their relationship with Country — including land, sea, and sky — as spiritual,<sup>2</sup> and important to the education of their children.<sup>3</sup>

3.5 The first colonial schools in Australia were run by Church of England ‘chaplains’ who were essentially employed by colonial governors.<sup>4</sup> Small private schools appeared before the end of the 18<sup>th</sup> century.<sup>5</sup> There was a significant level of disagreement between Christian denominations regarding aspects of the education system,<sup>6</sup> and from the 1830s there were attempts to establish government schools that were not church-controlled. This ultimately culminated in a series of Education Acts passed in the various colonies around the 1870s. At that time, most primary students were educated in government schools or poorly funded Catholic schools (as colonial funding was withdrawn from church schools).<sup>7</sup> As a consequence, churches focused more on secondary education in ‘collegiate schools for the emerging middle and ruling classes’.<sup>8</sup> This set in place trends that would continue for decades.<sup>9</sup>

3.6 In the first half of the 20<sup>th</sup> century, the average school-leaving age slowly increased (from around 13-years-old) as new kinds of secondary educational institutions were established.<sup>10</sup> In the 1970s, the Australian Schools Commission was established to fund all schools (so that all children could be afforded an ‘equal opportunity’ through formal education), and a range of religious groups began to found partially state-funded schools.<sup>11</sup> In the 1980s, the focus shifted towards

1 Adam Possamai and David Tittensor, *Religion and Change in Australia* (Taylor & Francis, 2022) 1, 4, 33, 36–7.

2 ‘This sovereignty is a spiritual notion: the ancestral tie between the land, or “mother nature”, and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown’: Uluru Statement from the Heart (National Constitutional Convention, 26 May 2017).

3 Yingiya Guyula, ‘The Story Comes Along, and the Children Are Taught’ [2010] (2) *Learning Communities: International Journal of Learning in Social Contexts* 18.

4 Renae Barker, *State and Religion: The Australian Story* (Taylor & Francis, 2018) 229.

5 Craig Campbell and Maxine Stephenson, ‘National Education Systems: Australia and New Zealand’ in John L Rury and Eileen H Tamura (eds), *The Oxford Handbook of the History of Education* (Oxford University Press, 2019) 181, 185.

6 Barker (n 4) 226.

7 Campbell and Stephenson (n 5) 186.

8 Ibid.

9 Ibid.

10 Ibid.

11 Ibid 187.

'parent choice and the creation of school markets', resulting in what Dr Campbell and Dr Stephenson described as 'increasingly well-funded nongovernment schools and a decreased commitment toward public education'.<sup>12</sup>

3.7 In light of these observations, some have said that the trend for approximately the first half of Australia's colonial history was increasing secularisation of school education, while the trend in the second half of Australia's colonial history has been an increase in religiously affiliated school education.<sup>13</sup>

3.8 In relation to pre-school education, the first kindergartens in Australia were established by "philanthropically minded" ... women' at the end of the 19<sup>th</sup> century.<sup>14</sup> The Kindergarten Union of NSW established the first free kindergarten in 1896 in Sydney, and church-based organisations established the first free kindergartens in Victoria shortly before the founding of the Free Kindergarten Union in that state in 1908.<sup>15</sup> Federal government funding for 'Model Child Development Centres' began towards the end of the 1930s.<sup>16</sup>

3.9 Theological education has been delivered in Australia by private religious institutions for over 160 years.<sup>17</sup> Inter-denominational differences contributed to theology being excluded from the topics taught at early Australian public universities in the 1850s, although it has since become increasingly possible to study theological subjects at some universities.<sup>18</sup> Following the 1964 *Tertiary Education in Australia* report, governments began accrediting the conferral of degrees by private providers, including theological institutions.<sup>19</sup> This was in light of the Report's recommendation that, 'to the extent to which theological training deals with the furtherance of religious beliefs, it should be the educational and financial responsibility of the particular body concerned'.<sup>20</sup> Australian universities were 'all public, state-grant-assisted institutions until the founding of private and Catholic universities in the 1970s'.<sup>21</sup>

12 Ibid. See also Douglas Ezzy 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) 59(4) *Journal of Sociology* 931, 935–6.

13 Barker (n 4) 227.

14 Frances Press and Sandie Wong, *A Voice for Young Children: 75 Years of Early Childhood Australia* (Early Childhood Australia, 2013) 7.

15 Ibid 10.

16 Ibid 18.

17 Charles Sherlock et al, *Uncovering Theology: The Depth, Reach, and Utility of Australian Theological Education* (Australian Catholic University and The Council of Deans of Theology, 2009) 3.

18 Robert K McIver, 'Theological Education in Australia: The Past and Present as Possible Indicators of Future Trends' (2018) 50(2) *Colloquium: The Australian and New Zealand Theological Review* 43, 44, 52.

19 Ibid 56.

20 Ibid 56–7.

21 Campbell and Stephenson (n 5) 187.

## Religious educational institutions today

3.10 Reflecting the trend observed above, in recent decades the proportion of students in Australia who attend non-government schools has increased, from around 22% in the 1970s<sup>22</sup> to around 36% in 2022.<sup>23</sup> In its submission to the ALRC, the Association of Heads of Independent Schools Australia identified that over 40% of secondary school students in Australia are enrolled in non-government schools (Catholic or independent).<sup>24</sup> The proportion of students enrolled in non-government secondary schools in Australia is more than double the OECD (Organisation for Economic Co-operation and Development) average, which was 18% in 2018.<sup>25</sup>

3.11 Over 90% of non-government schools in Australia have a religious affiliation.<sup>26</sup> The majority of these are affiliated with the Christian religion, as defined broadly. A minority of schools are affiliated with other religions, including Judaism, Islam, Ananda Marga, and Hare Krishna.

3.12 As discussed above, the number of students attending religiously affiliated schools in Australia has increased in recent decades. However, religious identification amongst Australians (and, in particular, amongst young people) has substantially declined.<sup>27</sup> Nevertheless, almost 72% of students at non-government schools are recorded as having a religious affiliation.<sup>28</sup> In contrast, only around 44% of students at government schools are recorded by the Australian Bureau of Statistics as having a religious affiliation.<sup>29</sup>

22 Senate Employment, Workplace Relations and Education References Committee, Parliament of Australia, *Commonwealth Funding for Schools* (Report, 11 August 2004) 3.

23 Australian Bureau of Statistics, 'Schools' <[www.abs.gov.au/statistics/people/education/schools/latest-release](http://www.abs.gov.au/statistics/people/education/schools/latest-release)>. See also Association of Heads of Independent Schools of Australia, *Submission 196*.

24 Association of Heads of Independent Schools of Australia, *Submission 196*.

25 OECD, *PISA 2018 Results (Volume V): Effective Policies, Successful Schools* (Report, 29 September 2020) 159–60.

26 In 2022 there were 2,915 non-government schools in Australia, comprising 1,766 Catholic systemic schools and 1,149 independent schools: Australian Bureau of Statistics, *Schools* (n 23) Table 35b. Over 80% of independent schools were religiously affiliated: Independent Schools Australia, 'Characteristics of Independent Schools' <[www.isa.edu.au/our-sector/about-independent-schools/characteristics-of-independent-schools/](http://www.isa.edu.au/our-sector/about-independent-schools/characteristics-of-independent-schools/)>. Adding the number of Catholic systemic schools (1,766) to the number of religiously affiliated independent schools (at least 919) creates a total of 2,685 religiously affiliated schools, which is approximately 92% of the 2,915 non-government schools.

27 Douglas Ezzy, 'Education, Religion, and LGBTQ+ in Australia' [2023] *Journal of Beliefs & Values* 1, 5, Table 2. See also N Francis, *Submission 284*.

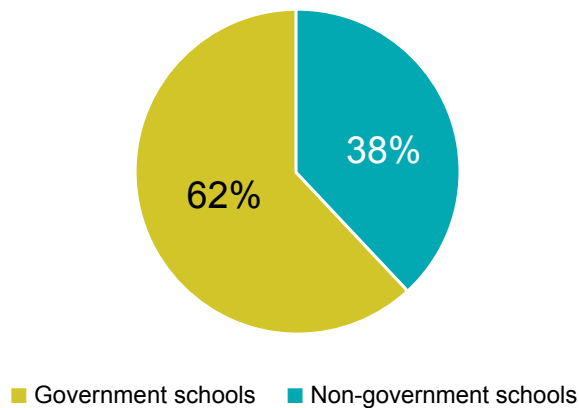
28 Australian Bureau of Statistics, 'Education in Australia - From abc to A's, B's and C's' <[www.abs.gov.au/articles/education-australia-abc-bs-and-cs](http://www.abs.gov.au/articles/education-australia-abc-bs-and-cs)>.

29 Ibid.

3.13 A small number of Australian religious schools have closed enrolment policies, such that they seek to only educate children from particular religious communities.<sup>30</sup> In contrast, the majority of religiously affiliated schools in Australia have open enrolment policies — that is, they accept students from the general population, rather than only from a specific religious community. Religious observance and practice may play less of a role in the daily activities at such schools, although religious traditions may still underpin the approach of the school.<sup>31</sup> Consistent with the statistics noted above, the number of open enrolment, religiously affiliated schools has increased in recent decades, while the proportion of students at such schools who describe themselves as religious has decreased.<sup>32</sup>

3.14 In 2022, approximately 38% of school staff in Australia were employed in non-government schools (see [Figure 3.1](#) below).<sup>33</sup> Between 2006 and 2022, the number of staff working in non-government schools increased by approximately 47%, from around 140,000 people in 2006 to over 205,000 people in 2022 (see [Figure 3.2](#) below).<sup>34</sup>

**Figure 3.1: Proportion of staff working in non-government schools, 2022**



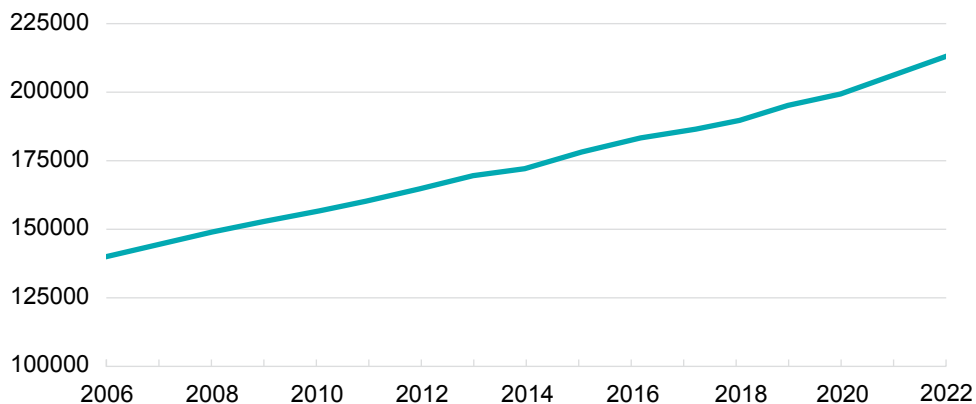
30 Ezzy (n 27) 3, citing Carolyn Evans and Beth Gaze, 'Discrimination by Religious Schools: Views from the Coal Face' (2010) 34(2) *Melbourne University Law Review* 392, 402; Carolyn Evans and Leilani Ujvari, 'Non-Discrimination Laws and Religious Schools in Australia' (2009) 30 *Adelaide Law Review* 31, 33–34. See also Yona Gilead, 'School's Place in Nurturing Students' Jewish Identity within a Broader Social and Cultural World: Stakeholders' Experience' (2020) 86(3) *Journal of Jewish Education* 321.

31 Association of Heads of Independent Schools of Australia, *Submission* 196. See also Ezzy (n 27).

32 Ezzy (n 27) 6–7.

33 Australian Bureau of Statistics (n 23) Table 50a.

34 Ibid.

**Figure 3.2: Number of staff working in non-government schools, 2006–2022**

3.15 In 2018, approximately 55% of teachers at government schools and 76% of teachers at non-government schools identified as Christians (and very low numbers identified as belonging to other religions). Since 2004, these proportions have slowly declined.<sup>35</sup>

3.16 The amount of government funding spent on non-government schools has significantly increased in recent years, for reasons that include increased student enrolments in those schools. For example, government funding of non-government schools totalled over \$11 billion in the 2010–11 financial year and rose to over \$18 billion in the 2019–20 financial year.<sup>36</sup> In 2020, governments contributed approximately 62% of non-government school funding, with the remaining funding obtained from fees and fundraising.<sup>37</sup>

3.17 Professor Drew, Associate Professor Kortt, and Dr Bec have observed that, overall,

Australia's education landscape is almost unique among developed nations in having a high proportion of students taught at non-government schools by a diverse range of religious providers, which receive relatively high levels of government funding.<sup>38</sup>

35 Ezzy (n 27) 7.

36 Productivity Commission, 'Report on Government Services 2022 - 4 School Education' (7 June 2022) Table 4A.10 <[www.pc.gov.au/ongoing/report-on-government-services/2022/child-care-education-and-training/school-education](http://www.pc.gov.au/ongoing/report-on-government-services/2022/child-care-education-and-training/school-education)>.

37 Productivity Commission (n 36), citing unpublished data from the Australian Government Department of Education, Skills and Employment.

38 Joseph Drew, Michael A Kortt and Alexandra Bec, 'Administering Faith: Does the Religious Institution Administering a School Influence Education Achievement?' (2019) 55(2) *Journal of Sociology* 342, 324. See also Carolyn Evans and Cate Read, 'Religious Freedom as an Element of the Human Rights Framework' in Paul T Babie, Neville G Rochow and Brett G Scharffs (eds), *Freedom of Religion or Belief* (Edward Elgar Publishing, 2020) 20, 32.



3.18 In some remote parts of Australia, Aboriginal communities have established homeland schools, in part to retain control over decisions about their children's education.<sup>39</sup> Given the centrality of spirituality to Aboriginal culture, such institutions should be considered to fall within 'religious educational institutions'. In other remote areas, faith-based schools are the only available option for compulsory education.<sup>40</sup>

3.19 The number and proportion of employees working in religiously affiliated pre-school and tertiary institutions is much smaller than religiously affiliated primary and secondary schools. The ALRC is not aware of publicly available data on the number of pre-school institutions with a religious affiliation, nor the number of staff employed in such institutions. Pre-school education is overseen by the Australian Children's Education and Care Quality Authority.<sup>41</sup>

3.20 The Australian Catholic University, the University of Divinity, and the University of Notre Dame Australia together employed approximately 3,500 full-time equivalent staff in 2021.<sup>42</sup> Some religiously affiliated universities offer a much broader range of subjects than just theology, including qualifications in business, nursing, biomedical science, information technology, and law.<sup>43</sup>

3.21 Reverend Dr Sherlock et al have suggested that at Christian theological institutions, around 20% of students may intend to become 'professional ministers', while most study 'to be equipped for life as Christians'.<sup>44</sup> Most theological education continues to be delivered in private colleges, rather than in public universities, but such institutions are still typically regulated by the Tertiary Education Quality and Standards Agency.<sup>45</sup> Institutions that are not universities generally receive less financial support from government, although government assistance for education fees is available for students at all 'approved providers', including several religiously affiliated institutions.<sup>46</sup> Many theological students are eligible for government loans for their fees.<sup>47</sup>

3.22 Educational institutions may demonstrate their religious nature in a myriad of ways. One example is a 'Statement of Faith' (or similar) that may be published on the institution's website, and which staff, students, or families may be asked to sign to confirm their support. During consultations, several stakeholders provided the ALRC

39 See, eg, 'Mapuru History', *Yirralka* <[www.yirralka.nt.edu.au/history.php](http://www.yirralka.nt.edu.au/history.php)>. The homeland schools referred to here are distinct from homeland learning centres that are administered, for example, by the NT Department of Education.

40 Australian Human Rights Commission, *Submission* 384.

41 See [Chapter 2](#).

42 Department of Education (Cth), '2021 Staff Full-Time Equivalence' (9 February 2022) Table 1.6 <[www.education.gov.au/higher-education-statistics/resources/2021-staff-fulltime-equivalence](http://www.education.gov.au/higher-education-statistics/resources/2021-staff-fulltime-equivalence)>.

43 See, eg, Australian Catholic University, 'Find a Course' <[www.acu.edu.au/study-at-acu/find-a-course](http://www.acu.edu.au/study-at-acu/find-a-course)>.

44 Sherlock et al (n 17) 4. See also P Parkinson, *Submission* 95.

45 McIver (n 18) 52, 57–8. See [Chapter 2](#).

46 *Higher Education Support Act 2003* (Cth) ch 3. For a list of approved providers, see StudyAssist, 'Providers That Offer Commonwealth Assistance' <[www.studyassist.gov.au/you-study/providers-offer-commonwealth-assistance](http://www.studyassist.gov.au/you-study/providers-offer-commonwealth-assistance)>.

47 McIver (n 18) 57–8.

with copies of statements of faith. Such statements may be relatively high level or may include detailed statements about particular beliefs. They may also incorporate, by reference, other religious materials (such as the teachings of a particular church as published from time to time). Importantly, institutions generally have the ability to change these statements at any time, such that the beliefs that are set out at the time a student is first enrolled, or when a staff member is first employed, may not remain consistent over time.

## People affected by existing exceptions

3.23 Existing exceptions in the *Sex Discrimination Act* apply in relation to several attributes protected under that Act, including sex, sexual orientation, gender identity, marital or relationship status, and pregnancy. This part briefly outlines statistical information relevant to the various population groups potentially affected by these exceptions. This discussion is not intended to be comprehensive, and there are a number of limitations and difficulties in identifying relevant and precise data in relation to a number of attributes, or the range of ways in which discrimination on the basis of those attributes might occur.

3.24 **Sex and pregnancy:** In relation to the attribute of sex, 50.7% of the population was recorded as female and 49.3% of the population was recorded as male in 2021.<sup>48</sup> In relation to the attribute of pregnancy, 311,360 mothers gave birth in 2021.<sup>49</sup>

3.25 **Marital or relationship status:** In relation to the attribute of marital or relationship status, married couples accounted for approximately 34% of the population in 2021.<sup>50</sup> The rate of marriage in Australia has been declining since around 1970.<sup>51</sup> In contrast, the proportion of the population (aged 15 and over) recorded as living in a de facto relationship has slowly grown over time, from around 5% in 1996<sup>52</sup> to over 11% in 2021.<sup>53</sup>

48 Australian Bureau of Statistics, 'Population: Census, 2021' <[www.abs.gov.au/statistics/people/population/population-census/2021](http://www.abs.gov.au/statistics/people/population/population-census/2021)>.

49 Australian Institute of Health and Welfare, 'Australia's Mothers and Babies' <[www.aihw.gov.au/reports/mothers-babies/australias-mothers-babies/contents/overview-and-demographics/state-and-territory](http://www.aihw.gov.au/reports/mothers-babies/australias-mothers-babies/contents/overview-and-demographics/state-and-territory)>.

50 Australian Bureau of Statistics, 'Household and Families: Census, 2021' <[www.abs.gov.au/statistics/people/people-and-communities/household-and-families-census/2021](http://www.abs.gov.au/statistics/people/people-and-communities/household-and-families-census/2021)>. Over 8.7 million people were recorded as married, and the total population was recorded as over 25.4 million people: *ibid*.

51 Australian Institute of Family Studies, 'Marriages in Australia' <[www.aifs.gov.au/research/facts-and-figures/marriages-australia](http://www.aifs.gov.au/research/facts-and-figures/marriages-australia)>.

52 Australian Bureau of Statistics, *Marriages, De Facto Relationships and Divorces, Year Book Australia 2012* (Catalogue No 1301.0, 24 May 2012).

53 Australian Bureau of Statistics, 'Australia 2021 Census - All Persons, QuickStats' <[www.abs.gov.au/census/find-census-data/quickstats/2021/AUS](http://www.abs.gov.au/census/find-census-data/quickstats/2021/AUS)>.

3.26 In 2021, there were 56,244 divorces granted, an increase of 13.6% compared to 2020.<sup>54</sup> However, the number of divorces per 1,000 Australians has trended downward over the last few decades.<sup>55</sup>

3.27 Around 38% of births occurred outside marriage in 2021.<sup>56</sup> In addition, around 1 million people were recorded as 'lone parents' in the Australian 2021 Census.<sup>57</sup>

3.28 **Sexual orientation and gender identity:** In relation to the grounds of sexual orientation and gender identity, it is challenging to estimate accurately the size of Australia's LGBTQ+ community, particularly given limitations on existing data sources and data collection methods.<sup>58</sup> Researchers have identified a number of limitations, including: the lack of data on gender and sexuality collected in population-based surveys;<sup>59</sup> the evolution of terms and definitions related to sexual identity;<sup>60</sup> that most population estimates focus on gay, lesbian, and bisexual identities (and not other minority groups);<sup>61</sup> and that available data only provides insight into the 'reported' or 'revealed' LGBTQ+ population,<sup>62</sup> excluding those who 'do not wish to disclose their sexuality'.<sup>63</sup> For example, in relation to disclosure of sexuality in the context of employment, around 39% of LGBTQ+ Australians have reported hiding their identity at work.<sup>64</sup>

3.29 Another limitation that has been identified by researchers is that population estimates vary depending on the different 'dimension' of sexuality that is surveyed (such as sexual identity, sexual attraction, or sexual behaviour).<sup>65</sup> For example, the 2014 Second Australian Study of Health and Relationships found that around 9% of male and 19% of female participants had a history of 'same gender experience and

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- 54 Australian Bureau of Statistics, 'Marriages and Divorces, Australia' <[www.abs.gov.au/statistics/people/people-and-communities/marriages-and-divorces-australia/2021](http://www.abs.gov.au/statistics/people/people-and-communities/marriages-and-divorces-australia/2021)>.
  - 55 Australian Institute of Family Studies, 'Divorces in Australia' <[www.aifs.gov.au/research/facts-and-figures/divorces-australia-2023](http://www.aifs.gov.au/research/facts-and-figures/divorces-australia-2023)>.
  - 56 Australian Institute of Family Studies, 'Births in Australia' <[www.aifs.gov.au/research/facts-and-figures/births-australia-2023](http://www.aifs.gov.au/research/facts-and-figures/births-australia-2023)>.
  - 57 Australian Bureau of Statistics (n 50).
  - 58 See, eg, Rainbow Families Queensland, *Submission 127*; Gavriel Ansara, *Making The Count: Addressing Data Integrity Gaps in Australian Standards for Collecting Sex and Gender Information* (White Paper, March 2016); Equality Australia, 'Count Us In' <<https://equalityaustralia.org.au/our-work/countusin/>>.
  - 59 Tom Wilson et al, 'What Is the Size of Australia's Sexual Minority Population?' (2020) 13(1) *BMC Research Notes* 1, 1; Rainbow Health Victoria, *Research Matters: How Many People Are LGBTIQ?* (2020) 2.
  - 60 Rainbow Health Victoria (n 59) 3; Jody McBrien, Alexandre Rutigliano and Adam Sticca, *The Inclusion of LGBTIQ+ Students across Education Systems: An Overview* (OECD Education Working Papers, 22 June 2022) 11.
  - 61 Rainbow Health Victoria (n 59) 2.
  - 62 Wilson et al (n 59) 2, 5.
  - 63 Ibid 5.
  - 64 Australian Human Rights Commission, *Face the Facts: Lesbian, Gay, Bisexual, Trans and Intersex People* (Report, 2014) 1.
  - 65 Rainbow Health Victoria (n 59) 3; Wilson et al (n 59) 2.

attraction', and those proportions were higher than estimates that use only sexual identity as an indicator.<sup>66</sup>

3.30 In 2014, the Australian Human Rights Commission suggested that 'Australians of diverse sexual orientation, sex or gender identity may account for up to 11 per cent of the Australian population', while acknowledging 'a lack of comprehensive, publicly available data'.<sup>67</sup> Other studies have found that people identifying as lesbian, gay, and bisexual (not other minorities) have been estimated to account for 3–4% of Australia's population,<sup>68</sup> while a 2017 survey in Victoria found that almost 6% of the population was LGBTQ+.<sup>69</sup>

3.31 Despite a lack of comprehensive data, reported rates of sexual diversity have increased in recent decades. For example, the reported number of same-sex couples more than tripled between the 1996 Australian Census and the 2011 Australian Census.<sup>70</sup> Data from the 2021 Australian Census indicates that there are over 78,000 same-sex couples in Australia (an increase of approximately 68% from the 2016 Australian Census), and that around 17% of those couples have children living with them.<sup>71</sup>

3.32 In addition, young people are increasingly more likely to report diverse gender identity or sexual orientation. For example, the number of 18- to 25-year-olds identifying as LGB+ has doubled over the last decade, accounting for 13–14% of the 18- to 25-year-old population in 2020.<sup>72</sup> More recent data indicates that 17% of people aged 18–34 identify as LGBTQ+.<sup>73</sup>

3.33 For those under 18-years-old, the proportion of people identifying as LGBTQ+ is estimated to be much larger. For example, one national survey of people aged 14–18 years in 2021 found that 42% of respondents did not identify as heterosexual,<sup>74</sup> around 23% identified as bisexual, around 6% identified as gay or lesbian, around 6% said they were unsure of their sexuality, and a further 6% used other terms (such as 'pansexual', 'queer', or 'asexual') to describe their sexuality.<sup>75</sup>

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66 Rainbow Health Victoria (n 59) 3.

67 Australian Human Rights Commission (n 64) 2.

68 Wilson et al (n 59) 4; Rainbow Health Victoria (n 59) 3; Australian Bureau of Statistics, 'General Social Survey: Summary Results, Australia' <[www.abs.gov.au/statistics/people/people-and-communities/general-social-survey-summary-results-australia/latest-release](http://www.abs.gov.au/statistics/people/people-and-communities/general-social-survey-summary-results-australia/latest-release)>.

69 Victorian Agency for Health Information, *The Health and Wellbeing of the Lesbian, Gay, Bisexual, Transgender, Intersex and Queer Population in Victoria* (Victorian Government, 2020) 4.

70 Australian Bureau of Statistics, *Same-Sex Couples, Australian Social Trends, July 2013* (Catalogue No 4102.2, 25 July 2013).

71 Australian Bureau of Statistics, 'Same-Sex Couples Living Together in Australia' <[www.abs.gov.au/articles/same-sex-couples-living-together-australia](http://www.abs.gov.au/articles/same-sex-couples-living-together-australia)>.

72 Ezzy (n 27) 7.

73 Shaun Wilson et al, *Religion in Australian Politics and Society: Report on the Religion Module for the Australian Cooperative Election Survey 2022* (Report, 1 July 2023) 36.

74 Jennifer Power et al, *The 7th National Survey of Secondary Students and Sexual Health 2021* (Monograph Series No 133, 2022) 29.

75 Ibid.

3.34 Another national survey of 15- to 18-year-olds found that 7% of participants ‘identified their gender outside of a male/female binary’,<sup>76</sup> and that just over half (52%) did not identify as heterosexual.<sup>77</sup> Same-sex attraction can develop by the time a child is around 10-years-old, and adolescence has been identified as ‘the critical time in which individuals address the question “Who am I?”’.<sup>78</sup>

3.35 In a 2021 Australian survey of LGBTQ+ young people aged 14–21 years, around 27% of respondents reported identifying with a religion. A similar percentage of respondents reported belonging to a religious family or household.<sup>79</sup> Further, approximately 25% of respondents reported attending a religiously affiliated school.<sup>80</sup> Accordingly, there is likely to be a significant population of young people attending religious educational institutions in Australia who would potentially be affected by existing exceptions in the *Sex Discrimination Act*.

## Survey data on public views

3.36 This part examines public views (as represented by published statistics) on issues relevant to this Inquiry. Various surveys have captured public views on the appropriate interaction between religious educational institutions and their staff and students. The results of these surveys (some of which are summarised below) appear to differ somewhat depending on how questions were framed or worded. For example, the surveys summarised below indicate, as a general trend, that:

- surveys that ask whether religious schools should be permitted to preference staff or students who support the school’s beliefs, values, or ethos (without explicitly mentioning issues of discrimination) tend to receive a majority positive response; whereas
- surveys that ask whether religious schools should be able to terminate, refuse to hire, or discriminate against staff (or take equivalent actions against students) on the basis of their sexual orientation or gender identity tend to receive a majority negative response.

3.37 Consequently, the meaning or weight that should be attributed to the various survey results may be contested.

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76 Angela Higginson and Matthew Morgan, *Australian Youth Safety Survey: 2020 Technical Report* (Report, 14 December 2020) 1.

77 Ibid 2.

78 McBrien, Rutigliano and Sticca (n 60) 12–13.

79 Adam O Hill et al, *Writing Themselves In 4: The Health and Wellbeing of LGBTQA+ Young People in Australia* (Report, 2021) 32.

80 Ibid 33.

3.38 Some examples of different survey results reported recently, which relate to employment and enrolment practices, include:

- Sixty-three percent of the general population, 82% of Catholics, and 79% of Catholic school parents believe religious schools should be 'entitled to require employees to act in their roles that uphold the ethos and values of that faith' and the school should be free to favour hiring employees who share these values.<sup>81</sup>
- Over 75% of survey respondents (including nearly 90% of parents with children in a faith-based school) supported 'the right of a religious school to employ teachers and other staff who support the clearly stated values and beliefs of the school', and over 60% of 'Christian school parents support terminating the employment of staff if they no longer share these beliefs'.<sup>82</sup>
- Over 98% of survey respondents (in a self-selected sample) agreed that 'parents should be able to choose to send their children to a school of their choice which aligns with their religious values', and over 93% agreed that religious schools 'should be able to preference the hiring of staff of the same religious belief, as long as this is in accordance with a publicly available written policy'.<sup>83</sup>
- Fifteen percent of survey respondents agreed that 'religious schools should be able to refuse to employ staff based on their sexual orientation', while 67% disagreed.<sup>84</sup> Of those respondents who 'have a religion', 19% agreed with this statement, while 57% disagreed. Of those who 'regularly' practise their religion, 38% agreed, while 37% disagreed. There were very similar results in relation to refusing to employ transgender staff, and in relation to excluding students on the basis of sexual orientation and transgender identity.<sup>85</sup>
- Nineteen percent of survey respondents agreed that 'conservative Catholic, Anglican, Jewish, and Muslim schools should be allowed to refuse to employ a teacher because they are LGBT+', while 73% disagreed.<sup>86</sup>
- Eighteen percent of survey respondents supported existing laws permitting 'gay and lesbian' students (and children of same-sex couples) to be expelled, 21% agreed that religious schools should dismiss teachers who enter a same-sex marriage, and 22% supported existing laws permitting 'transgender students or teachers to be legally expelled from religious schools'. In contrast, 78% of

81 National Catholic Education Commission, *Submission 409*, citing John Utting Research (November 2021).

82 Australian Association of Christian Schools, 'New Data Shows Strong Support For Religious Schools' <[www.aacs.net.au/new-data-shows-large-support-for-religious-schools-and-legal-protections](http://www.aacs.net.au/new-data-shows-large-support-for-religious-schools-and-legal-protections)>.

83 Parliamentary Joint Committee on Human Rights (Cth), *Religious Discrimination Bill 2021 and Related Bills* (Inquiry Report, 4 February 2022) Appendix 4.

84 Kate Gleeson, Robert Ross and Shaun Wilson, 'Australians Reject Discrimination That Is Based on Religious Belief: New Research', *The Conversation* (15 July 2022) <[www.theconversation.com/australians-reject-discrimination-that-is-based-on-religious-belief-new-research-186751](http://www.theconversation.com/australians-reject-discrimination-that-is-based-on-religious-belief-new-research-186751)>.

85 Wilson et al (n 73) 20–3.

86 Douglas Ezzy, 'Only 19% of Australians Agree Religious Schools Should Be Able to Ban LGBT+ Teachers', *The Conversation* (9 February 2022) <[www.theconversation.com/only-19-of-australians-agree-religious-schools-should-be-able-to-ban-lgbt-teachers-176454](http://www.theconversation.com/only-19-of-australians-agree-religious-schools-should-be-able-to-ban-lgbt-teachers-176454)>.

respondents said that religious schools should not be entitled to tax-payer funding if they legally discriminate against 'gay, lesbian and transgender teachers and students'.<sup>87</sup>

- Seventy-two percent of survey respondents supported the statement that: 'Students and teachers at faith-based schools should be legally protected from expulsion or firing on the basis of them being gay or transgender'.<sup>88</sup>
- Sixty-six percent of survey respondents agreed that religious schools should not be able to fire someone or expel a student for being transgender, including 60% of respondents who described themselves as 'very or somewhat religious'.<sup>89</sup>
- Only a small minority of parents with a child at a religiously affiliated school expressed negative attitudes towards relationships and sexuality education that is 'inclusive to all students', regardless of gender identity and sexual orientation, and that seeks to reduce homophobia and transphobia (between 4% and 15% of parents in response to a series of questions posed).<sup>90</sup>

3.39 Analysing several recent polls reflecting public views on the rights of religious providers of publicly funded services to discriminate against students and staff on grounds contained in the *Sex Discrimination Act*, some commentators have argued that such practices are 'opposed by a substantial majority of the Australian population and a majority of religious Australians'.<sup>91</sup>

## Reported experiences

3.40 This part examines the reported experiences of people in religious communities and religious educational institutions in relation to issues relevant to this Inquiry.

### Religious community experiences

3.41 Dr Chavura, Emeritus Professor Gascoigne, and Associate Professor Tregenza have described the secularisation of Australian society over the past 70 years as 'a major social transformation which has led to the marginalisation of religion from the mainstream of civic life'.<sup>92</sup> They have further observed that the dominant liberal ideology, including widespread support for human rights, may itself

87 YouGov Galaxy, *Attitudes Relating to Religion and Law* (Report, 30 May 2018).

88 Equality Australia, Submission No 282 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018* (2019) Attachment 1.

89 Equality Australia, 'New Research Shows Overwhelming Support among Australians on Trans Equality', *Equality Australia* <[www.equalityaustralia.org.au/overwhelming-support-on-trans-equality/](http://www.equalityaustralia.org.au/overwhelming-support-on-trans-equality/)>.

90 Jacqueline Hendriks et al, 'Parental Attitudes toward Sexual Orientation and Gender Diversity: Challenging LGBT Discrimination in Australian Schools' (2023, under review, doi:10.31235/osf.io/futgx).

91 Ezzy et al (n 12) 933 (emphasis in original).

92 Stephen A Chavura, John Gascoigne and Ian Tregenza, *Reason, Religion and the Australian Polity: A Secular State?* (Taylor & Francis, 2019) 298.

be seen as 'a type of faith', given ideas such as human dignity and moral equality of human beings have deep religious (rather than rational) roots.<sup>93</sup>

3.42 According to Australian Census data, there has been a steady decline over the last 50 years in the number of people reporting a religious affiliation with Christianity, from about 86% in 1971 to about 44% in 2021. Conversely, over the same period, the number of people reporting an affiliation with 'no religion' has steadily increased from almost 7% in 1971 to almost 39% in 2021. Between the 2016 Australian Census and the 2021 Australian Census, an additional 2.8 million people (approximately) reported an affiliation with 'no religion'.<sup>94</sup> In addition, the proportion of people reporting an affiliation with a non-Christian religion has increased from 3.5% in 1996 to 10% in 2021.<sup>95</sup>

3.43 In addition to Australian Census data, surveys indicate that the importance attributed to religion by people has also declined.<sup>96</sup> Nevertheless, Australia has sometimes been characterised as a 'post-secular' society, in that religious organisations continue to perform an important role in public life, including in the provision of education.<sup>97</sup>

### **Minority religions and their experiences**

3.44 In relation to minority religions in Australia, Jewish and Islamic communities have established the largest number of non-Christian religious educational institutions. Other minority religions (including Sikhs and Buddhists) have also begun to establish religious educational institutions in Australia. Nevertheless, people of non-Christian faiths seeking employment in the education sector have vastly fewer options reflecting their own faith. However, as highlighted by the Australian Human Rights Commission, government schools make up the majority of Australian educational institutions, and such schools are not permitted to discriminate against members of minority (or other) faiths.<sup>98</sup>

3.45 At a roundtable discussion with a number of members of the Australian Partnership of Religious Organisations, the ALRC heard disparate views on the issues raised by this Inquiry. Some stakeholders were strongly supportive of protections for religious educational institutions to select staff and students in accordance with their respective beliefs and practices, while other stakeholders suggested that permitting institutions to recruit entirely from one narrow faith group would likely be more damaging than beneficial for students.

93 Ibid 208–9.

94 Australian Bureau of Statistics, 'Religious Affiliation in Australia' <[www.abs.gov.au/articles/religious-affiliation-australia](http://www.abs.gov.au/articles/religious-affiliation-australia)>.

95 Ibid.

96 Andrew Trounson, 'Losing Our Religion' <[pursuit.unimelb.edu.au/articles/losing-our-religion](http://pursuit.unimelb.edu.au/articles/losing-our-religion)>; Francisco Perales, Gary Bouma and Alice Campbell, 'Religion, Support of Equal Rights for Same-Sex Couples and the Australian National Vote on Marriage Equality' (2019) 80(1) *Sociology of Religion* 107; Ezzy (n 27); N Francis, *Submission* 284.

97 Possamai and Tittensor (n 1) 195.

98 Australian Human Rights Commission, *Submission* 384.



3.46 Some representatives of minority religions were also concerned about the potential for members of their communities to be induced or coerced into changing their religion (in violation of their right to freedom of religion) for the purposes of obtaining or maintaining employment at a religious educational institution.

3.47 Some commentators have described religious communities, broadly, as minorities experiencing discrimination on account of their views, such that they require the protection of the law (including in the form of exceptions to anti-discrimination laws) to maintain their distinctive character. It is important to consider such views in light of the purposes of prohibitions on discrimination: to address historic oppression, exclusion, stigma, and disadvantage.<sup>99</sup> In terms of the general enjoyment of religious freedom, the Religious Freedom Review reported that most ‘stakeholders of faith acknowledged that, by and large, they have been free to observe their religious beliefs’.<sup>100</sup>

### Experiences in religious educational institutions

3.48 Empirical research indicates that religious educational institutions in Australia vary in their attitudes towards exceptions to prohibitions on discrimination.<sup>101</sup> Religious educational institutions and related organisations emphasised in submissions that they seek to care for each student and staff member sensitively and pastorally, with a primary focus on the individual’s wellbeing.<sup>102</sup>

3.49 It is difficult to quantify the extent to which existing exceptions to anti-discrimination laws are relied upon by religious educational institutions.<sup>103</sup> However, employee representatives have suggested that only a small minority of religious educational institutions rely upon legislative exceptions.<sup>104</sup>

3.50 The number of formal complaints about discrimination at religious educational institutions is low. For example, the Queensland Human Rights Commission has reported that complaints of discrimination against religious educational institutions make up 0.02% of their overall complaints received, numbering just 23 complaints since 2009.<sup>105</sup> Equal Opportunity Tasmania has similarly advised that it has received few complaints of discrimination against religious educational institutions.<sup>106</sup> Other submissions noted, however, that there may be disincentives for parents to make

99 See **Chapter 2**.

100 *Religious Freedom Review: Report of the Expert Panel* (Report, 18 May 2018) [1.13].

101 Evans and Gaze (n 30). See also R Barker, *Submission 166*.

102 P Parkinson, *Submission 95*; Catholic School Parents Australia, *Submission 247*; Australian Association for Religious Education, *Submission 306*.

103 R Barker, *Submission 166*; Law Council of Australia, *Submission 428*.

104 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Legislative Exemptions That Allow Faith-Based Educational Institutions to Discriminate against Students, Teachers and Staff* (Report, November 2018) 29 [2.39], quoting the Independent Education Union.

105 Queensland Human Rights Commission, *Submission 125*.

106 Letter from Commissioner Sarah Bolt to the ALRC, 23 September 2023. See also Equality Tasmania, *Submission 423*.

complaints, with the result that not all claims of discrimination are reported (or publicly known).<sup>107</sup>

3.51 The ALRC agrees with the Law Council of Australia that the existing legislative exceptions may ‘by their very nature’ cause harm, even if these exceptions are infrequently relied upon, ‘because of the important symbolic role played by legislation in defining what is acceptable behaviour in the community’.<sup>108</sup> Similarly, the NSW Advocate for Children and Young People supported reforms to the *Sex Discrimination Act*, in order to reduce fears amongst LGBTQ+ students about the possibility of expulsion or other differential or disadvantaging treatment, even if such incidents were rare in practice.<sup>109</sup>

3.52 Many people have described positive experiences in religious educational institutions, while others have said they have been subject to disadvantageous treatment on the basis of a range of attributes protected under the *Sex Discrimination Act*. A number of experiences were shared with the ALRC during the Inquiry, and several of those are set out in Background Paper ADL2.<sup>110</sup> Some reported experiences include:

- an offer of employment allegedly being withdrawn because the applicant had married a divorcee;<sup>111</sup>
- a student allegedly being told that she could never hold a leadership position because of her sex;<sup>112</sup>
- a teacher allegedly being denied a Year Level Coordinator position on the basis of his same-sex relationship;<sup>113</sup> and
- a student allegedly being told to hide the fact that he was gay in order to avoid further bullying from his peers.<sup>114</sup>

3.53 Previous parliamentary inquiries have heard similar evidence.<sup>115</sup> For example, in its submission to the Parliamentary Joint Committee on Human Rights’ *Inquiry on the Religious Discrimination Bill 2021 and Related Bills*, the Independent Education Union shared allegations of discrimination made by its members, which included:

- a teacher in a heterosexual marriage allegedly being dismissed as a consequence of becoming pregnant with the assistance of IVF;

107 Rainbow Families Queensland, *Submission 127*.

108 Law Council of Australia, *Submission 428*. See also NSW Advocate for Children and Young People, *Submission 209*.

109 NSW Advocate for Children and Young People, *Submission 209*. See also Senate Legal and Constitutional Affairs References Committee, Parliament of Australia (n 104) 41 [2.83]–[2.84].

110 Australian Law Reform Commission, ‘What We Heard’ (Background Paper ADL2, December 2023).

111 *Ibid* [60].

112 ALRC Survey (2023) (Child raised in religious college; 25–34 years old).

113 Australian Law Reform Commission, ‘What We Heard’ (Background Paper ADL2, December 2023) [25].

114 Personal account of a former student of a religious educational institution cited in D Patterson, *Submission 206*.

115 See, eg, Senate Legal and Constitutional Affairs References Committee, Parliament of Australia (n 104) ch 2; NSW Advocate for Children and Young People, *Submission 209*.

- an assistant principal allegedly being demoted because his wife's first marriage had not been annulled;
- a staff member allegedly being dismissed for 'falling pregnant out of wedlock';
- a teacher allegedly being demoted from a co-ordinator role and moved to a different school after being seen at a shopping centre with her same-sex partner and their child; and
- staff allegedly being disciplined or dismissed for refusing to sign amended statements of faith including new clauses describing homosexuality and same-sex marriage as morally wrong.<sup>116</sup>

3.54 Furthermore, the Independent Education Union reported that 24% of members surveyed felt they could not confidently be 'open and honest' about their 'belief, marital/relationship status, parental status, sexual orientation or gender identity'.<sup>117</sup>

## LGBTQ+ wellbeing

3.55 There is a significant body of literature reporting on the health and wellbeing of LGBTQ+ people and, relatedly, on determinants of health. This literature indicates that while many LGBTQ+ people enjoy positive mental health, many others are vulnerable to experiencing poor mental health.<sup>118</sup>

### General wellbeing

3.56 Findings from the 2021 *Writing Themselves In 4* survey, which drew on 6,418 valid responses from LGBTQ+ young people aged 14–21 years, indicated that:

- Over 35% of young people reported 'poor' or 'fair' general health. This was more than three times the rate in the general youth population (which was around 9%). In addition, LGBTQ+ young people were much less likely, as compared to the general youth population, to describe their general health as 'very good' or 'excellent' (28% compared to 63%).<sup>119</sup>
- Around 81% of young people reported having experienced 'high' or 'very high' levels of psychological distress in the past four weeks.<sup>120</sup> The rates of distress reported amongst LGBTQ+ young people who were 16- or 17-years-old, was more than three times the rate observed in the general population of young people at approximately the same age.<sup>121</sup>

116 Independent Education Union, Submission No 127 to Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Religious Discrimination Bill 2021 and Related Bills* (2021) 6, Attachment 1.

117 Independent Education Union, *Submission 387*.

118 See, eg, LGBTIQ+ Health Australia, *Snapshot of Mental Health and Suicide Prevention Statistics for LGBTIQ+ People* (October 2021). See also L van Leent, M Jeffries, N Barnes and S Jowett, *Submission 158*.

119 Hill et al (n 79) 79.

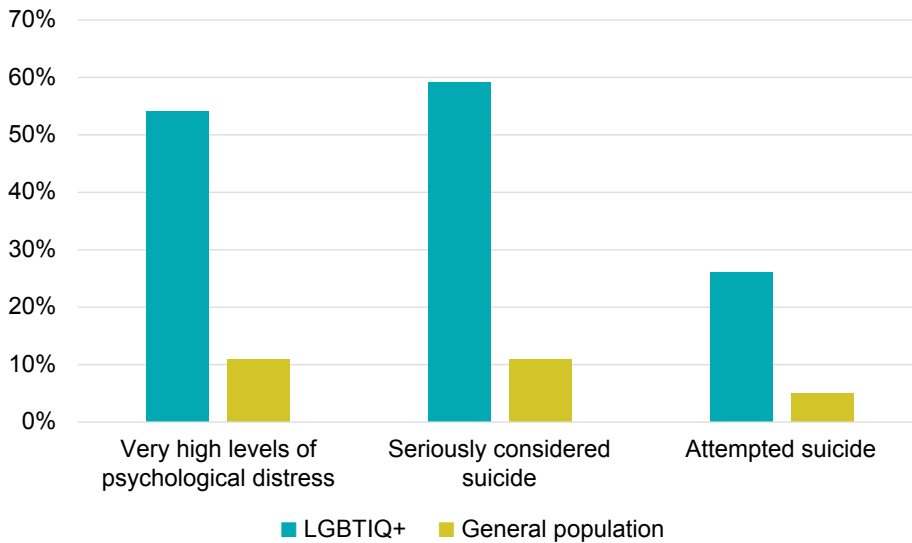
120 Ibid 81.

121 Ibid 83.

- Approximately 79% of LGBTQ+ young people reported having thought about deliberately harming themselves, and a similar number reported having thought about suicide at some point in their lives.<sup>122</sup> Approximately 62% of LGBTQ+ young people reported having actually harmed themselves, and approximately 26% of LGBTQ+ young people reported having attempted suicide at some point in their lives. These experiences of suicide attempt by LGBTQ+ young people are approximately five times that of the general youth population (see **Figure 3.3** below).<sup>123</sup>

3.57 A 2017 survey of transgender children and young people in Australia indicated that approximately 80% of respondents had self-harmed and that approximately 48% of respondents reported a suicide attempt.<sup>124</sup>

**Figure 3.3: Mental health of LGBTQ+ 16- and 17-year-olds**



122 Ibid 86.

123 Ibid. See also Productivity Commission, *Mental Health* (Report No 95, Vol 2, 30 June 2020).

124 Penelope Strauss et al, *Trans Pathways: The Mental Health Experiences and Care Pathways of Trans Young People* (Telethon Kids Institute, 2017) 33.

## Discrimination and wellbeing

3.58 Studies have indicated that psychological stress, self-harm, and poorer health and educational outcomes for LGBTQ+ people may correlate with, or be attributed to, ‘hostile and stressful social environment[s]’ where ‘stigma, prejudice and discrimination’ are experienced.<sup>125</sup> Parliamentary committees have heard evidence that poorer mental health outcomes for LGBTQ+ people are primarily a consequence of negative experiences (including discrimination), and that laws legitimating discrimination (for example, in the form of exceptions for religious educational institutions) can themselves exacerbate such harm.<sup>126</sup>

3.59 Children’s Commissions in several jurisdictions supported the reforms proposed in the *Consultation Paper* on the basis that the reforms would seek to address, in some way, the additional disadvantage and vulnerabilities faced by LGBTQ+ young people.<sup>127</sup>

3.60 Australian medical guidelines for transgender and gender diverse young people recognise the significant distress typically experienced by this group and emphasise the importance, for such young people’s mental health, of providing individualised care, using respectful and affirming language, avoiding harm, and considering sociocultural factors.<sup>128</sup>

3.61 While discrimination has been shown to cause poorer health and well-being outcomes for staff, welcoming and inclusive workplaces that enable people to be open about their status enhance both health outcomes and work productivity.<sup>129</sup>

## Educational environments and wellbeing

3.62 In relation to students and staff in educational institutions, the Special Rapporteur on the right to health has identified determinants of mental health to include a safe school environment, a healthy workplace, and respect for diversity.<sup>130</sup> In acknowledging adolescence as a critical phase for achieving human potential, the Special Rapporteur has recognised social relationships and environment as integral to ‘shaping capabilities that are the foundation for future health and well-being’.<sup>131</sup> The role of schools was expressly identified, with the Special Rapporteur stating:

125 Hill et al (n 79) 78. See also McBrien, Rutigliano and Sticca (n 60) 8; Productivity Commission (n 123) 93, 141.

126 See, eg, Senate Legal and Constitutional Affairs References Committee, Parliament of Australia (n 104) 37 [2.70]–[2.71].

127 See, eg, NSW Advocate for Children and Young People, *Submission 209*; Commissioner for Children and Young People of Western Australia, *Submission 373*.

128 Michelle Telfer et al, *Australian Standards of Care and Treatment Guidelines for Trans and Gender Diverse Children and Adolescents* (The Royal Children’s Hospital Melbourne, 2020) 5–6.

129 Ezzy et al (n 12) 936–7.

130 Dainius Pūras, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, 41st sess, UN Doc A/HRC/41/34 (12 April 2019) [27]–[26].

131 Ibid [63].

Schools play a crucial role in nurturing the development of adolescents, and are especially important in mitigating the effects of violence and conflict. There is considerable evidence of the effectiveness of a whole-school approach to promote mental health and to tackle problems such as bullying ... Education should equip children to flourish socially, emotionally and economically.<sup>132</sup>

3.63 Survey data indicates that a high proportion of LGBTQ+ young people (60% of respondents) attending secondary school in Australia (including students attending both religious and non-religious schools) reported feeling unsafe or uncomfortable at school in the past 12 months due to their sexuality or gender identity.<sup>133</sup> An Australian study analysing high rates of poor mental health amongst LGBTQ+ young people has found that rates of suicidal ideation and suicide attempts were higher where students did not feel 'part of their school' or 'safe to openly identify as LGBTIQ'.<sup>134</sup> As the study noted, these findings highlight the importance of 'creating educational environments that are supportive' of LGBTQ+ people.<sup>135</sup>

3.64 Other research demonstrates, and submissions pointed to, links between discrimination experienced by same-sex attracted students (including in religious schools) and high levels of depression, self-harm, risk-taking behaviour (such as drug use), homelessness, and suicide.<sup>136</sup> Schools have been identified as the site of the vast majority of bullying experienced by students.<sup>137</sup> Fear of negative consequences leads many to keep their sexuality secret, creating a significant burden of shame and guilt for lying to family and friends, feelings of isolation and alienation, negative self-image, lower self-esteem, and depression.<sup>138</sup>

132 Ibid [64].

133 Hill et al (n 79) 52. See also Commissioner for Children and Young People of Western Australia, *Submission 373*.

134 Adam O Hill et al, 'Suicidal Ideation and Suicide Attempts Among Lesbian, Gay, Bisexual, Pansexual, Queer, and Asexual Youth: Differential Impacts of Sexual Orientation, Verbal, Physical, or Sexual Harassment or Assault, Conversation Practices, Family or Household Religiosity' (2022) 9(5) *LGBT Health* 1, 6–9.

135 Ibid 9.

136 See, eg, Peter Norden, *Safe and Inclusive Learning Communities* (Consultation Report, December 2016) 24–8; Commissioner for Children & Young People (SA), *No Exceptions: Creating Safer Schools for LGBTQIA+ Students* (Project Report No 25, 2021); NSW Advocate for Children and Young People, *Submission 209*; LGBTI Legal Service, *Submission 427*; John Tobin, 'Should Discrimination in Victoria's Religious Schools Be Protected? Using the *Victorian Charter of Human Rights and Responsibilities Act* to Achieve the Right Balance' (2010) 36(2) *Monash University Law Review* 16, 34–5.

137 Norden (n 136) 10, quoting Kerry Robinson et al, *Growing Up Queer: Issues Facing Young Australians Who Are Gender Variant and Sexually Diverse* (Report, February 2014) v.

138 Norden (n 136) 29–30.

3.65 In addition, there is evidence that vulnerability can be compounded for students who are themselves religious.<sup>139</sup> Some research has found a correlation between young same-sex attracted people having a religious background and contemplating or attempting suicide, concluding that ‘religion and religious homophobia may not be solely responsible ... [but] they are important factors that should not be overlooked’.<sup>140</sup>

3.66 A link between discrimination, and health and educational outcomes has also been established. The OECD working paper, *The Inclusion of LGBTQI+ Students across Education Systems*, cites several studies that link discrimination against LGBTQ+ students with ‘significant impact[s] on their health and educational outcomes’.<sup>141</sup> With respect to LGBTQ+ adolescents, the United Nations Committee on the Rights of the Child has also linked higher rates of depression and suicide to exclusion from education and training.<sup>142</sup>

3.67 Other research has shown that students exposed to ‘conversion ideologies’ at school (such as messaging that ‘gay people should become straight’) report difficulties with concentration, grades, and attendance, and are significantly more likely to consider self-harm, engage in self-harming behaviours, consider suicide, and attempt suicide.<sup>143</sup>

3.68 It has been suggested that educators who support LGBTQ+ youth can reduce harassment and bullying, and improve students’ well-being, school attendance, and educational performance.<sup>144</sup> According to Professor Ezzy, teachers in government schools have traditionally been more supportive of same-sex couple rights in general compared to teachers in non-government schools, although more recent data suggests similar levels of support in both cohorts.<sup>145</sup> Most young Australians support same-sex couple rights, with slightly stronger support amongst those who attended Catholic schools than those who attended other non-government schools or government schools.<sup>146</sup> These trends reflect increasing acceptance of same-sex

139 See, eg, Megan C Lytle et al who found that ‘[o]verall, increased importance of religion was associated with higher odds of recent suicide ideation for both gay/lesbian and questioning students’: Megan C Lytle et al, ‘Association of Religiosity With Sexual Minority Suicide Ideation and Attempt’ (2018) 54(5) *American Journal of Preventative Medicine* 644, 644. The authors also highlighted a link between internalised negativity toward one’s LGBTQ+ identity and religiously-based stigma in non-affirming religious contexts: at 645. See also Hill et al (n 134).

140 Norden (n 136) 30, quoting Ron Macdonald and Trudi Cooper, ‘Young Gay Men and Suicide: A Report of a Study Exploring the Reasons Which Young Men Give for Suicide Ideation’ (1998) 17(4) *Youth Studies Australia* 26.

141 McBrien, Rutigliano and Sticca (n 60) 8.

142 Committee on the Rights of the Child, *General Comment No 20: Implementation of the rights of the child during adolescence*, UN Doc CRC/C/GC/20 (6 December 2016) [33]–[34], cited in Law Council of Australia, *Submission 428*.

143 Tiffany Jones, ‘Religious Freedom and LGBTIQ+ Students’ (2023) 20(3) *Sexuality Research and Social Policy* 1133, 1134.

144 Joseph G Kosciw et al, ‘The Effect of Negative School Climate on Academic Outcomes for LGBT Youth and the Role of In-School Supports’ (2013) 12(1) *Journal of School Violence* 45, 58.

145 Ezzy (n 27) Table 5.

146 Ibid Graph 1.

couple rights in the broader Australian population.<sup>147</sup> As some have commented, 'people who identify as religious ... are not a monolithic block, and often embody sociodemographic traits associated with supportive attitudes toward LGBTIQ+ issues'.<sup>148</sup>

3.69 Reports on the views of young LGBTQ+ people indicate that they value seeing LGBTQ+ teachers at their schools, and value the support they gain from LGBTQ+ friends at school.<sup>149</sup>

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147 Perales, Bouma and Campbell (n 96) 115–16. See also Ezzy (n 27) Table 5.

148 Perales, Bouma and Campbell (n 96) 112.

149 NSW Advocate for Children and Young People, *Submission 209*.



# **PART TWO: RECOMMENDATIONS**



## 4. Exceptions in Anti-Discrimination Law — Sex Discrimination Act Grounds

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### Introduction

4.1 The Terms of Reference ask the ALRC to consider reforms to the *Sex Discrimination Act*, including s 38, to ensure (to the extent practicable) that the Act reflects the policy commitments set out in the Terms of Reference in a manner that is consistent with Australia's obligations under international law.

4.2 This chapter contains one recommendation regarding exceptions in the *Sex Discrimination Act* relevant to religious educational institutions. The recommendation responds to the first two policy positions set out in the Terms of Reference, read in light of the third policy position.<sup>1</sup> The first two policy positions are that religious educational institutions:

- must not discriminate against a student on the basis of sexual orientation, gender identity, marital or relationship status or pregnancy; and

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1 See [Terms of Reference](#).

- must not discriminate against a member of staff on the basis of sex, sexual orientation, gender identity, marital or relationship status or pregnancy.

4.3 In setting out the justification for **Recommendation 1**, this chapter addresses two critical questions:

- Which human rights (if any) would be limited under **Recommendation 1**; and
- Would any limitations imposed by **Recommendation 1** be justifiable under international law?

4.4 The ALRC's assessment of the consistency of **Recommendation 1** with Australia's obligations under international law concludes that the recommended reforms would enhance many human rights, but may limit, for some people, the freedom to manifest religion or belief in community with others, and the associated parental liberty to ensure the religious and moral education of one's children in conformity with one's own convictions. However, in assessing the limitation of these rights with reference to criteria specified at international law, the ALRC has determined that such limitations would be permissible under international law. The overall effect of **Recommendation 1** would be to maximise the realisation of human rights.

**Recommendation 1** The Australian Government's policy, as expressed in the Terms of Reference, to ensure that an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed (a 'religious educational institution'):

- must not discriminate against a student on the basis of sexual orientation, gender identity, marital or relationship status or pregnancy;
- must not discriminate against a member of staff on the basis of sex, sexual orientation, gender identity, marital or relationship status or pregnancy;

is best implemented in a manner that is consistent with the rights and freedoms recognised in the international agreements to which Australia is a party, by amending the *Sex Discrimination Act 1984* (Cth), so that:

- section 38 is repealed;
- section 37 is amended to specify that s 37(1)(d) does not apply to an act or practice in relation to an educational institution; and
- section 23 is amended to specify that s 23(3)(b) does not apply to accommodation provided by an educational institution.

All other exceptions in the *Sex Discrimination Act 1984* (Cth) that are relevant to religious educational institutions should continue to apply.

Like all persons, and in accordance with s 7B of the *Sex Discrimination Act 1984* (Cth) ('Indirect discrimination: reasonableness test'), religious educational institutions should continue to be able to impose on another person, or propose to impose on another person, a condition, requirement or practice which has or is likely to have a disadvantaging effect, if the condition, requirement or practice is reasonable in the circumstances.

4.5 **Recommendation 1** suggests legislative amendments that would remove general exceptions and disapply some other exceptions to prohibitions on discrimination, currently applicable to religious educational institutions.

4.6 The discussion of **Recommendation 1** in this chapter is informed by relevant principles of international human rights law (see **Chapters 10** and **11**), input received from stakeholders (see Background Paper ADL2), analysis of related domestic laws (see **Chapters 12** and **13**), and experiences in several other countries that have adopted policy positions similar to those in the Terms of Reference (see Background Paper ADL1).

4.7 As laid out in this chapter, **Recommendation 1** is justified by a wide range of reasons, including that it:

- would maximise the realisation of relevant human rights;
- would not be inconsistent with the requirements of the *Australian Constitution*;
- would complement existing (or recently recommended) law in most states and territories and, as such, would promote coherence in the law, such that **Recommendation 1** is not anticipated to bring about significant practical change for religious educational institutions in most states and territories;
- would be consistent with the law in several comparable overseas jurisdictions that have adopted policy positions similar to those in the Terms of Reference, and whose religious educational institutions continue to flourish;
- would be consistent with existing practice in the vast majority of religious educational institutions that continue to operate successfully and authentically;
- would not interfere with the capacity of schools to impose a condition, requirement, or practice which has or is likely to have a disadvantaging effect on a person, if the condition, requirement, or practice is reasonable in all of the circumstances and is not directly discriminatory; and
- received overwhelming support in submissions, particularly in relation to students.

4.8 This chapter proceeds in three parts. The particular legislative amendments contemplated in **Recommendation 1** are analysed in turn in those parts. The first part addresses the repeal of s 38 of the *Sex Discrimination Act*, the second part addresses an amendment to s 37 of the Act, and the final part addresses an amendment to s 23 of the Act.

## Repeal of section 38

4.9 This part analyses the recommended repeal of s 38 of the *Sex Discrimination Act* in relation to the following considerations: its legal impact, views expressed in submissions, consistency with international law, consistency with the *Australian Constitution*, coherence with state and territory laws, a comparison with overseas jurisdictions, and the role of indirect discrimination provisions.

## Legal impact of reform

4.10 This section summarises the existing legal effect of s 38 of the *Sex Discrimination Act*, and the anticipated legal effect of repealing s 38 under **Recommendation 1**. The existing legal effect of s 38 of the *Sex Discrimination Act* is set out in some detail in **Chapter 12**.<sup>2</sup> More detail on the anticipated effects of **Recommendation 1** is contained in **Chapter 5**.

4.11 In summary, s 38 currently provides exceptions to aspects of prohibitions on direct and indirect discrimination in employment, contract work, and education at religious educational institutions, if the discrimination is ‘in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed’.

4.12 In relation to employment<sup>3</sup> of staff at religious educational institutions, the legal effect of s 38(1) is that discrimination on certain grounds is currently not unlawful in relation to:

- the arrangements made for the purpose of determining who should be offered employment;
- in determining who should be offered employment; or
- dismissing the employee.<sup>4</sup>

4.13 Section 38(1) does not provide any exception to the prohibitions relating to the terms or conditions of employment; limiting an employee’s opportunities for promotion, transfer, training, or other benefits; or subjecting an employee to any other detriment.<sup>5</sup>

4.14 Section 38(1) provides an exception in relation to discrimination on the grounds of sex, sexual orientation, gender identity, marital or relationship status, or pregnancy, but not on the grounds of intersex status, potential pregnancy, breastfeeding, or family responsibilities.

4.15 In relation to contract workers,<sup>6</sup> for religious educational institutions the legal effect of s 38(2) is that discrimination is currently not unlawful in relation to ‘not allowing the contract worker to work or continue to work’.<sup>7</sup>

4.16 Section 38(2) does not provide any exception to the prohibitions relating to the terms or conditions of the contract work, denying or limiting access to any benefit

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2 See **Chapter 12** at [12.72]–[12.82].

3 The definition of ‘employment’ in s 4 of the *Sex Discrimination Act* includes services provided by a contractor. See further **Chapter 6** at [6.27].

4 *Sex Discrimination Act 1984* (Cth) ss 38(1), 14(1)(a)–(b), 14(2)(c).

5 *Ibid* ss 14(1)(c), 14(2)(b)–(c).

6 ‘Contract worker’ is defined in s 4 of the *Sex Discrimination Act* to mean ‘a person who does work for another person pursuant to a contract between the employer of the first-mentioned person and that other person’. See further **Chapter 6** at [6.28].

7 *Sex Discrimination Act 1984* (Cth) ss 38(2), 16(b).

associated with the work, or subjecting a contract worker to any other detriment.<sup>8</sup> The grounds excepted from protection under s 38(2) are the same as under s 38(1).

4.17 In relation to students at religious educational institutions, the legal effect of s 38(3) is that discrimination is currently not unlawful in relation to:

- refusing an application for admission as a student;
- setting terms or conditions on which admission is accepted;
- denying or limiting a student's access to any benefits;
- expelling a student; or
- subjecting a student to any other detriment.<sup>9</sup>

4.18 Section 38(3) provides an exception in relation to discrimination on the grounds of sexual orientation, gender identity, marital or relationship status, or pregnancy, but not on the grounds of sex,<sup>10</sup> intersex status, potential pregnancy, breastfeeding, or family responsibilities.

4.19 Consequently, if s 38 of the *Sex Discrimination Act* were repealed, it would no longer be lawful for any person to discriminate, either directly or indirectly, in relation to those aspects of employment, contract work, and education listed above, including at religious educational institutions.

4.20 Other existing provisions in the *Sex Discrimination Act* that are relevant to religious educational institutions would continue to apply. For example, existing narrower exceptions relating to single-sex schools (s 21(3)), boarding school accommodation (s 34(2)), the education of particular religious leaders (s 37(1)(b): see **Recommendation 2**), and benefits conferred by charities (s 36) would continue to apply to religious educational institutions when relevant. In addition, the definition of indirect discrimination would remain unaltered. Accordingly, the imposition or proposed imposition by a religious educational institution of a condition, requirement, or practice that has, or is likely to have, a disadvantaging effect on a ground contained in the *Sex Discrimination Act* would be permissible if the condition, requirement, or practice were reasonable in the circumstances (s 7B of the *Sex Discrimination Act*) and did not constitute direct discrimination.

4.21 For religious educational institutions in most states and territories, the practical effect of repealing s 38 of the *Sex Discrimination Act* would be minimal because state and territory anti-discrimination laws operate concurrently with the *Sex Discrimination Act*.<sup>11</sup> Anti-discrimination laws in most states and territories already prohibit discrimination against staff and students of religious educational institutions. A more detailed discussion of state and territory laws is set out below.<sup>12</sup>

8 Ibid ss 16(a), (c)–(d).

9 Ibid ss 38(3), 21.

10 There is a separate provision allowing for single-sex educational institutions: ibid s 21(3).

11 See further **Chapter 13** at [13.28]–[13.33].

12 See below at [4.141]–[4.149].

## Submissions and brief responses

### *Students: repeal of s 38(3)*

4.22 The repeal of s 38(3) of the *Sex Discrimination Act* under **Recommendation 1** reflects Proposition A.1 in the *Consultation Paper*. Proposition A.1 was that 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. There was broad stakeholder support for Proposition A.1 from religious bodies and organisations, theological colleges, peak educational bodies, children's advocates, human rights agencies, professional legal bodies, non-governmental organisations, academics, and unions.<sup>13</sup> This support reflects the general political consensus on prohibiting discrimination against students. For example, there was bipartisan support for the repeal of s 38(3) of the *Sex Discrimination Act* when the Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018 (Cth) was introduced. As the Commonwealth Parliament could not agree on related legislative amendments, the Bill ultimately lapsed.

4.23 In relation to submissions made to the ALRC in this Inquiry, key reasons underpinning stakeholder support for Proposition A.1 were:

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13 See Anglican Social Responsibilities Commission, Diocese of Perth, *Submission 98*; University of Divinity, *Submission 115*; Victorian Pride Lobby, *Submission 123*; Catholics for Renewal, *Submission 124*; Queensland Human Rights Commission, *Submission 125*; Queensland Council for Civil Liberties, *Submission 156*; L van Leent, M Jeffries, N Barnes and S Jowett, *Submission 158*; Australian Lawyers Alliance, *Submission 162*; Anglican Youthworks, *Submission 176*; ACON, *Submission 191*; Associated Christian Schools, *Submission 193*; Wear It Purple, *Submission 197*; University of Southern Queensland Law, Religion, and Heritage Research Program Team, *Submission 202*; Not published, *Submission 204*; NSW Advocate for Children and Young People, *Submission 209*; Transgender Victoria, *Submission 211*; Thorne Harbour Health, Brave Network and SOGICE Survivors, *Submission 213*; Rainbow Families NSW, *Submission 217*; Public Affairs Commission of the Anglican Church of Australia, *Submission 225*; Queer Department of the National Union of Students and Queer Office of University of Technology Sydney Students' Association, *Submission 252*; Liberty Victoria, *Submission 253*; Victorian Equal Opportunity and Human Rights Commission, *Submission 255*; Pride in Protest, *Submission 260*; Activate Church, *Submission 283*; Not published, *Submission 297*; Not published, *Submission 300*; Queer Unionists in Tertiary Education, *Submission 321*; Kingsford Legal Centre, *Submission 339*; Catholic Secondary Principals Australia, *Submission 363*; Commissioner for Children and Young People WA, *Submission 373*; Equality Australia, *Submission 375*; Australian Human Rights Commission, *Submission 384*; Anglican Schools Australia, *Submission 385*; Independent Education Union, *Submission 387*; Australian Education Union, *Submission 395*; Diversity Council Australia, *Submission 398*; Australian Section of the International Commission of Jurists & International Commission of Jurists Victoria, *Submission 404*; Public Interest Advocacy Centre, *Submission 405*; NSW Council for Civil Liberties, *Submission 407*; Uniting Network Australia, *Submission 408*; Not published, *Submission 410*; Australian Council of Trade Unions, *Submission 411*; Just.Equal Australia, *Submission 422*; Uniting Church in Australia Assembly, *Submission 425*; LGBTI Legal Service, *Submission 427*; Law Council of Australia, *Submission 428*. Other submissions supported greater protection for students more generally: see Australian Discrimination Law Experts Group, *Submission 75*.



- coherence with international and domestic law;<sup>14</sup>
- reducing the risk of harm to vulnerable students;<sup>15</sup>
- supporting inclusion and diversity;<sup>16</sup> and
- compulsory school education is a public good, supported by public funding, so schools should be safe environments for all students, and should be accountable to community expectations.<sup>17</sup>

4.24 Some organisations expressed some caution about the narrowing of exceptions for religious educational institutions in relation to students, citing concerns related to the accommodation of transgender students in single-sex schools and ongoing accommodation of gender segregation in co-educational schools.<sup>18</sup> These concerns are addressed in [Chapter 5](#).<sup>19</sup>

4.25 Some religious bodies, educational institutions, peak educational bodies, academics, and non-government organisations did not support the narrowing of exceptions for religious educational institutions in relation to students.<sup>20</sup> The ALRC has taken such concerns into account in considering [Recommendation 1](#). Some of

14 See, eg, Australian Discrimination Law Experts Group, *Submission 75*; Australian Lawyers Alliance, *Submission 162*; Kingsford Legal Centre, *Submission 339*; Catholic Secondary Principals Australia, *Submission 363*; Commissioner for Children and Young People WA, *Submission 373*; Australian Human Rights Commission, *Submission 384*.

15 See, eg, Anglican Social Responsibilities Commission, Diocese of Perth, *Submission 98*; Aleph Melbourne, *Submission 179*; Wear It Purple, *Submission 197*; Kingsford Legal Centre, *Submission 339*; Commissioner for Children and Young People WA, *Submission 373*; Equality Australia, *Submission 375*; Australian Human Rights Commission, *Submission 384*; Uniting Network Australia, *Submission 408*. See also Australian Law Reform Commission, 'What We Heard' (Background Paper ADL2, December 2023).

16 See, eg, Catholic Secondary Principals Australia, *Submission 363*; Diversity Council Australia, *Submission 398*. See also Australian Law Reform Commission, 'What We Heard' (Background Paper ADL2, December 2023).

17 Australian Human Rights Commission, *Submission 384*; Australian Law Reform Commission, 'What We Heard' (Background Paper ADL2, December 2023) [102]–[104].

18 See Association of Heads of Independent Schools of Australia, *Submission 196*; Executive Council of Australian Jewry, *Submission 377*; Australian Council of Jewish Schools, *Submission 396*.

19 See [Chapter 5](#) at [\[5.13\]](#)–[\[5.16\]](#) and [\[5.41\]](#)–[\[5.44\]](#).

20 See A Deagon, *Submission 4*; Healinglife Church and Ministries, *Submission 9*; Australian Federation of Islamic Councils, *Submission 84*; P Parkinson, *Submission 95*; Human Rights Law Alliance, *Submission 96*; Australian Union Conference of Seventh-day Adventists, Adventist Schools Australia, *Submission 138*; D Khlentzos, *Submission 175*; Anglican Church Diocese of Sydney, *Submission 189*; Presbyterian Church of Victoria, *Submission 195*; M Fowler, *Submission 201*; Freedom for Faith, *Submission 203*; Sydney Missionary and Bible College, *Submission 205*; Australian Christian Higher Education Alliance, *Submission 208*; Institute of Public Affairs, *Submission 250*; Not published, *Submission 298*; Australian Christian Lobby, *Submission 299*; Islamic Council of Victoria, *Submission 301*; Christian Voice Australia & CitizenGo, *Submission 378*; Bishops of Australasian-Middle East Christian Apostolic Churches, *Submission 388*; Not published, *Submission 391*; Ambrose Centre for Religious Liberties, *Submission 394*; Catholic Education Tasmania, *Submission 397*; Australian National Imams Council, *Submission 401*; Australian Catholic Bishops Conference, *Submission 406*; National Catholic Education Commission, *Submission 409*; I Benson, *Submission 413*; Muslim Legal Network (NSW), *Submission 419*.

the key themes appearing in such submissions are briefly addressed in the following paragraphs and are considered further elsewhere in this Report.

4.26 Some submissions emphasised that, despite the existing exceptions, religious schools do not exclude, expel, or mistreat LGBTQ+ students.<sup>21</sup> Some submissions highlighted that schools are already capable of transmitting religious faith while simultaneously supporting students in their personal challenges in a sensitive and pastoral fashion without heavy-handed regulation.<sup>22</sup> Views such as these indicate to the ALRC that the existing legislative exceptions are unnecessarily broad, and would not need to be relied upon by schools in any event. In addition, the Law Council of Australia submitted that the existing legislative exceptions may ‘by their very nature’ cause harm, even if such exceptions are only infrequently relied upon, ‘because of the important symbolic role played by legislation in defining what is acceptable behaviour in the community’.<sup>23</sup> Similarly, the NSW Advocate for Children and Young People supported narrowing legislative exceptions in order to reduce fear amongst LGBTQ+ students about the possibility of expulsion or other adverse treatment, even if such incidents were rare in practice.<sup>24</sup>

4.27 A small number of submissions suggested that narrowing existing exceptions so that religious schools would be required to accept LGBTQ+ students would likely have a negative impact on those students, because they would not be completely accepted by their school community or safe from bullying or harm.<sup>25</sup> Views such as these suggest that there is a risk of harm to LGBTQ+ students in at least some schools.

4.28 Some submissions stated that the proposed reforms lack respect for the nature of religion or genuinely and strongly held traditional religious beliefs about sex, sexuality, and gender.<sup>26</sup> In addition, some submissions stated that institutions should be permitted to apply conduct rules for students in line with religious

21 See Healinglife Church and Ministries, *Submission 9*; Australian Christian Churches, *Submission 80*; Anglican Church Diocese of Sydney, *Submission 189*; Presbyterian Church of Victoria, *Submission 195*; Freedom for Faith, *Submission 203*; Presbyterian Church Australia in NSW, *Submission 235*; Islamic Council of Victoria, *Submission 301*; Presbyterian Christian Schools NSW (Low-Fee Christian Schools Board), *Submission 356*; Bishops of Australasian-Middle East Christian Apostolic Churches, *Submission 388*; National Catholic Education Commission, *Submission 409*.

22 Bishops of Australasian-Middle East Christian Apostolic Churches, *Submission 388*; Lutheran Education Australia, *Submission 402*.

23 Law Council of Australia, *Submission 428*. See also NSW Advocate for Children and Young People, *Submission 209*.

24 NSW Advocate for Children and Young People, *Submission 209*. See also Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Legislative Exemptions That Allow Faith-Based Educational Institutions to Discriminate against Students, Teachers and Staff* (Report, November 2018) 41 [2.83]–[2.84].

25 S C (a minor), *Submission 121*; Not published, *Submission 165*; F T (a minor), *Submission 168*; Not published, *Submission 296*.

26 D Khlentzos, *Submission 175*; Freedom for Faith, *Submission 203*; Sydney Missionary and Bible College, *Submission 205*; Australian Christian Lobby, *Submission 299*; HillSide Christian College Association and Board of Governance, *Submission 338*; Ambrose Centre for Religious Liberties, *Submission 394*; Australian National Imams Council, *Submission 401*; I Benson, *Submission 413*.

doctrines and beliefs.<sup>27</sup> Some submissions further stated that accommodating transgender and gender diverse students may be inconsistent with religious beliefs.<sup>28</sup> **Recommendation 1** is not intended or expected to reduce respect for any particular religious beliefs, including beliefs regarding relevant attributes under the *Sex Discrimination Act*. The right to hold beliefs is absolute, but the freedom to manifest beliefs is not.<sup>29</sup> **Recommendation 1** would limit the right to manifest beliefs only in ways that can be justified in accordance with strict criteria under international law.<sup>30</sup>

4.29 Some submissions asserted that institutions would not be able to establish an authentic faith community if students embraced lifestyles that contradicted the beliefs of the community.<sup>31</sup> Some expressed concern that diversity and multiculturalism would suffer because religious schools would no longer be distinctive, but rather would become ‘divided faithless communities’.<sup>32</sup> Some expressed concern that narrowing legislative exceptions would make schools vulnerable to vexatious litigation.<sup>33</sup> **Recommendation 1** is not expected to reduce the authenticity of faith communities, nor increase litigation. The ALRC is not aware of evidence of such consequences having been realised in jurisdictions with narrower exceptions for religious educational institutions than the exceptions currently available under the *Sex Discrimination Act*.<sup>34</sup>

4.30 Finally, some submissions placed significance on the fact that students and families who are not comfortable with a particular school environment, or whose views do not align with a particular school, can leave and choose a different school.<sup>35</sup>

27 Human Rights Law Alliance, *Submission 96*; Australian Union Conference of Seventh-day Adventists, *Adventist Schools Australia, Submission 138*; Presbyterian Church of Victoria, *Submission 195*; Freedom for Faith, *Submission 203*; Australian Christian Lobby, *Submission 299*; Islamic Council of Victoria, *Submission 301*; Christian Voice Australia & CitizenGo, *Submission 378*; Lutheran Education Australia, *Submission 402*. A need for students to model Christian living was also raised: Presbyterian Church of Australia, *Submission 186*; Presbyterian Church Australia in NSW, *Submission 235*.

28 A Deagon, *Submission 4*; P Parkinson, *Submission 95*; Human Rights Law Alliance, *Submission 96*; D Khlentzos, *Submission 175*; Freedom for Faith, *Submission 203*; Australian Christian Lobby, *Submission 299*; Bishops of Australasian-Middle East Christian Apostolic Churches, *Submission 388*; Catholic Education Tasmania, *Submission 397*; Institute for Civil Society, *Submission 399*; Australian National Imams Council, *Submission 401*.

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

30 See below at [4.108]–[4.116].

31 See, eg, Healinglife Church and Ministries, *Submission 9*.

32 See, eg, ALRC Survey, 2023 (Parent or carer in a school or university in the last 5 years; 55–64 years old).

33 S Lamont, *Submission 302*.

34 See below at [4.106]. See further **Chapter 5** at [5.31].

35 See A Deagon, *Submission 4*; Healinglife Church and Ministries, *Submission 9*; Australian Federation of Islamic Councils, *Submission 84*; Moore Theological College Governing Board, *Submission 99*; HillSide Christian College Staff, *Submission 290*; HillSide Christian College Association and Board of Governance, *Submission 338*; Christian Voice Australia & CitizenGo, *Submission 378*; Australian Catholic Bishops Conference, *Submission 406*; I Benson, *Submission 413*.

These issues are discussed further below (see [Table 4.1](#)).<sup>36</sup> In summary, the ALRC has heard a number of compelling reasons from stakeholders why a student may wish to remain in a particular school, or may not have a realistic option to move elsewhere.

### **Staff: repeal of ss 38(1)–(2)**

4.31 The repeal of ss 38(1)–(2) of the *Sex Discrimination Act* under [Recommendation 1](#) closely reflects Proposition B.1 in the *Consultation Paper*. Proposition B.1 was 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. Proposition B.1 was supported by a significant number and a broad range of stakeholders, including religious bodies, religious educational institutions, equality organisations, human rights bodies, non-government organisations, legal professional bodies, unions, peak educational bodies, and academics.<sup>37</sup> Other stakeholders were supportive, albeit cautious about Proposition B1.<sup>38</sup>

4.32 Key reasons that stakeholders cited for supporting the narrowing of exceptions in relation to staff included that:

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- 36 See below at [\[4.115\]](#). See also Australian Law Reform Commission, 'What We Heard' (Background Paper ADL2, December 2023) [97]–[101].
- 37 Australian Discrimination Law Experts Group, *Submission 75*; Anglican Social Responsibilities Commission, Diocese of Perth, *Submission 98*; University of Divinity, *Submission 115*; Queensland Human Rights Commission, *Submission 125*; Victorian Pride Lobby, *Submission 123*; Queensland Council for Civil Liberties, *Submission 156*; L van Leent, M Jeffries, N Barnes and S Jowett, *Submission 158*; Australian Lawyers Alliance, *Submission 162*; ACON, *Submission 191*; Wear It Purple, *Submission 197*; University of Southern Queensland Law, Religion, and Heritage Research Program Team, *Submission 202*; Transgender Victoria, *Submission 211*; Thorne Harbour Health, Brave Network and SOGICE Survivors, *Submission 213*; Rainbow Families NSW, *Submission 217*; Liberty Victoria, *Submission 253*; Victorian Equal Opportunity and Human Rights Commission, *Submission 255*; Pride in Protest, *Submission 260*; Activate Church, *Submission 283*; Not published, *Submission 300*; Queer Unionists in Tertiary Education, *Submission 321*; Kingsford Legal Centre, *Submission 339*; Catholic Secondary Principals Australia, *Submission 363*; Commissioner for Children and Young People WA, *Submission 373*; Anglican Schools Australia, *Submission 385*; Independent Education Union, *Submission 387*; Equality Australia, *Submission 375*; Australian Human Rights Commission, *Submission 384*; Australian Education Union, *Submission 395*; Diversity Council Australia, *Submission 398*; Australian Section of the International Commission of Jurists & International Commission of Jurists Victoria, *Submission 404*; Public Interest Advocacy Centre, *Submission 405*; NSW Council for Civil Liberties, *Submission 407*; Uniting Network Australia, *Submission 408*; Australian Council of Trade Unions, *Submission 411*; Just.Equal Australia, *Submission 422*; Uniting Church in Australia Assembly, *Submission 425*; LGBTI Legal Service, *Submission 427*; Law Council of Australia, *Submission 428*.
- 38 Executive Council of Australian Jewry, *Submission 377*; Australian Council of Jewish Schools, *Submission 396*.

- the reform would be consistent with international and domestic law;<sup>39</sup>
- the reform would address the vulnerability of staff to discrimination on grounds contained in the *Sex Discrimination Act*;<sup>40</sup>
- the reform would address the potential harm sustained by staff who may have to hide their identity and live covert lives;<sup>41</sup>
- young LGBTQ+ people value seeing LGBTQ+ teachers at school, and it is important to demonstrate to young people that everyone has a right to equality;<sup>42</sup>
- excluding LGBTQ+ staff potentially denies students access to the best teachers from a range of applicants, and risks perpetuating notions that LGBTQ+ adults are a threat and danger to children;<sup>43</sup>
- LGBTQ+ staff can be faithful adherents of a particular religion;<sup>44</sup>
- religious schools comprise ‘a large share of a significant industry providing a public, and publicly funded, good’;<sup>45</sup>
- publicly funded services should be committed to providing a safe and welcoming environment for all people;<sup>46</sup> and
- many religious schools do not seek to discriminate in any event (which suggests that the existing exceptions have little utility).<sup>47</sup>

4.33 In its submission, the Independent Education Union highlighted the impact of current exceptions on staff in religious educational institutions:

The consequence of the religious educational institution’s exemptions from discrimination is that [Independent Education Union] members employed in a significant minority of faith-based schools do not enjoy the same rights at work as other Australian workers. In these workplaces there is a real risk of termination of employment where an employee has an attribute which is at odds with a school’s religious teachings.<sup>48</sup>

39 See Australian Discrimination Law Experts Group, *Submission 75*; Victorian Pride Lobby, *Submission 123*; Queensland Human Rights Commission, *Submission 125*; Victorian Equal Opportunity and Human Rights Commission, *Submission 255*; Activate Church, *Submission 283*; Kingsford Legal Centre, *Submission 339*; Commissioner for Children and Young People WA, *Submission 373*; Equality Australia, *Submission 375*; Australian Human Rights Commission, *Submission 384*; Australian Section of the International Commission of Jurists & International Commission of Jurists Victoria, *Submission 404*.

40 Equality Australia, *Submission 375*; Independent Education Union, *Submission 387*; Just.Equal Australia, *Submission 422*.

41 Kingsford Legal Centre, *Submission 339*; Catholic Secondary Principals Australia, *Submission 363*; Australian Human Rights Commission, *Submission 384*.

42 NSW Advocate for Children and Young People, *Submission 209*; Commissioner for Children and Young People WA, *Submission 373*.

43 Just.Equal Australia, *Submission 422*.

44 Ibid.

45 Australian Human Rights Commission, *Submission 384*. See also Diversity Council Australia, *Submission 398*.

46 ACON, *Submission 191*; Australian Human Rights Commission, *Submission 384*.

47 Not published, *Submission 297*.

48 See Independent Education Union, *Submission 387*.

4.34 Some stakeholders, including peak educational bodies, religious educational institutions, religious institutions and bodies, academics, and non-government organisations, did not support Proposition B.1. The ALRC has taken into account these concerns when considering **Recommendation 1**. Some of the key themes appearing in such submissions are briefly addressed in the following paragraphs and are considered further elsewhere in this Report.

4.35 Some submissions suggested that the existing exceptions in the *Sex Discrimination Act* pose no threat to the health or rights of others, and there is no evidence that staff with LGBTQ+ identities are excluded or treated poorly.<sup>49</sup> However, the ALRC did hear from staff members in religious educational institutions regarding harm they had experienced.<sup>50</sup> There is also empirical evidence regarding the potential for harm, and regarding the proportion of staff who may be hiding their personal attributes from their employer.<sup>51</sup>

4.36 Some organisations and individuals submitted that the exception for religious educational institutions, in relation to staff, should continue to operate to enable institutions to uphold their doctrines, teachings, tenets, and canons when acting in good faith.<sup>52</sup> Others urged that institutions should be permitted to impose conduct rules on staff based on principles of their religion, including in relation to sexuality and gender.<sup>53</sup> Some religious organisations, peak educational bodies, and confidential submissions emphasised the importance of allowing institutions to hire staff who support the beliefs and ethos of the institution, and who model a life of faith for students.<sup>54</sup> For example, the Australian Christian Higher Education Alliance submitted that their member institutions

do not discriminate, or seek to discriminate, against staff based on individuals' personal attributes (current or prospective). However, ... for some [faith-based higher educational institutions] to function they do necessitate the requirement that an individual uphold the religious beliefs, ethos and mission of the

49 E Brown, *Submission 38*; B Fakhoury, *Submission 357*.

50 See, eg, Australian Law Reform Commission, 'What We Heard' (Background Paper ADL2, December 2023) [25], [36]. See also the case studies contained in Equality Australia, *Submission 375*.

51 See, eg, Independent Education Union, *Submission 387*.

52 See Healinglife Church and Ministries, *Submission 9*; Australian Federation of Islamic Councils, *Submission 84*; P Parkinson, *Submission 95*; Human Rights Law Alliance, *Submission 96*; Institute for Judaism and Civilization, *Submission 114*; Anglican Youthworks, *Submission 176*; Presbyterian Church of Australia, *Submission 186*; M Fowler, *Submission 201*; Freedom for Faith, *Submission 203*; Sydney Missionary and Bible College, *Submission 205*; Australian Christian Higher Education Alliance, *Submission 208*; Association of Independent Schools of South Australia, *Submission 212*; Public Affairs Commission of the Anglican Church of Australia, *Submission 225*; Institute of Public Affairs, *Submission 250*; Islamic Society of South Australia, *Submission 389*; Ambrose Centre for Religious Liberties, *Submission 394*.

53 Not published, *Submission 246*.

54 Anglican Social Responsibilities Commission, Diocese of Perth, *Submission 98*; Anglican Church Diocese of Sydney, *Submission 189*; Presbyterian Church Australia in NSW, *Submission 235*; Not published, *Submission 246*; Not published, *Submission 297*; Executive Council of Australian Jewry, *Submission 377*; Catholic Education Tasmania, *Submission 397*. See also Australian Law Reform Commission, 'What We Heard' (Background Paper ADL2, December 2023) [31].

[institution] in both word and conduct. This is especially true for all staff in [an institution] who act as manifestations of the belief system and faith tradition.<sup>55</sup>

4.37 In light of the package of reforms being recommended by the ALRC, religious educational institutions would retain sufficient capacity to uphold their religious character. In relation to the education or training of religious leaders, under **Recommendation 1** (and **Recommendation 2**) institutions would remain excepted from prohibitions on discrimination under s 37(1)(b) of the *Sex Discrimination Act*. In relation to the education or training of other students, under **Recommendation 7** such institutions would be able to give preference to a person of the same religion, in good faith, in selecting staff, where it is reasonably necessary to build a community of faith, and where the giving of such preference is proportionate to that objective. In addition, the imposition or proposed imposition of any condition, requirement, or practice with a disadvantaging effect, on the basis of attributes protected under the *Sex Discrimination Act*, would be lawful if the condition, requirement, or practice were reasonable in the circumstances (under s 7B of that Act), and if the discrimination were not direct.

4.38 Some submissions emphasised that education is relational and formative, and not just the intellectual transfer of information, such that the conduct of staff in religious educational institutions is a legitimate and relevant concern of their employer.<sup>56</sup> Some submissions expressed concern that narrowing exceptions in the *Sex Discrimination Act* would undermine the ability of schools and parents to live their faith consistently, or to form authentic faith communities,<sup>57</sup> and would mean that religious schools are no different from non-religious schools.<sup>58</sup>

4.39 As discussed below, the ALRC is not aware of evidence to suggest that such concerns have been borne out in jurisdictions with narrower exceptions for religious educational institutions than the exceptions that currently apply under the *Sex Discrimination Act*. One submission suggested that anti-discrimination law in Victoria 'is proving detrimental to the freedom of Catholic schools to express their identity and mission'.<sup>59</sup> However, the ALRC was not provided with any specific or concrete examples of problems that had actually arisen under such laws, despite requesting examples from a number of stakeholders.<sup>60</sup>

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55 Australian Christian Higher Education Alliance, *Submission 208*.

56 Presbyterian Church of Australia, *Submission 186*; Not published, *Submission 204*; Presbyterian Church Australia in NSW, *Submission 235*.

57 Not published, *Submission 110*; Presbyterian Church of Australia, *Submission 186*; Anglican Church Diocese of Sydney, *Submission 189*; Calvary Christian College (College Council), *Submission 192*; Catholic School Parents Australia, *Submission 247*.

58 Freedom for Faith, *Submission 203*; P Taylor, *Submission 386*; Not published, *Submission 391*.

59 Australian Catholic Bishops Conference, *Submission 406*.

60 See below at [\[4.106\]](#).



4.40 Some submissions expressed caution regarding the extent to which decisions made by religious educational institutions on religious grounds should be subject to oversight by secular authorities such as commissions or courts.<sup>61</sup> In contrast, some consultees and submissions suggested that, in light of the harms that can be caused by discrimination, the state has a duty to intervene and respond to discriminatory conduct, even when that conduct may be religiously motivated.<sup>62</sup>

4.41 Finally, some submissions placed significance on the fact that staff members can choose, instead, to work at other educational institutions.<sup>63</sup> These issues are discussed further below (see [Table 4.1](#)).<sup>64</sup> In summary, the ALRC has heard a number of legitimate reasons from stakeholders why a staff member may wish to work at a particular religious educational institution.

## Consistency with international law

4.42 The Terms of Reference ask the ALRC to consider reforms that, to the extent practicable, reflect the policy commitments set out in the Terms of Reference, in a manner that is consistent with Australia's obligations under international law. In addition, the law establishing the ALRC requires the ALRC to endeavour to make recommendations that are 'as far as practicable, consistent with Australia's international obligations that are relevant to the matter'.<sup>65</sup>

4.43 This section addresses two critical questions:

- Which human rights (if any) would be limited under [Recommendation 1](#); and
- Would any limitations imposed by [Recommendation 1](#) be justifiable under international law?

4.44 Having undertaken an extensive analysis of Australia's international law obligations in relation to [Recommendation 1](#), the ALRC has concluded that the recommended reforms may limit, for some people, the freedom to manifest religion or belief in community with others, and the associated parental liberty to ensure the religious and moral education of one's children in conformity with one's own convictions. The ALRC's assessment of these limitations with reference to criteria specified at international law is that the restrictions imposed by [Recommendation 1](#) would be justifiable under international law.

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61 A Deagon, *Submission 4*; Australian Christian Churches, *Submission 80*; Associated Christian Schools, *Submission 193*; Australian Christian Lobby, *Submission 299*; I Benson, *Submission 413*; N Aroney, *Submission 417*.

62 See, eg, Catholics for Renewal, *Submission 124*.

63 A Deagon, *Submission 4*; Australian Federation of Islamic Councils, *Submission 84*; M Fowler, *Submission 201*; HillSide Christian College Staff, *Submission 290*.

64 See below at [\[4.115\]](#). See also Australian Law Reform Commission, 'What We Heard' (Background Paper ADL2, December 2023) [97]–[100].

65 *Australian Law Reform Commission Act 1996* (Cth) s 24(1)(b).



4.45 An additional effect of **Recommendation 1** would be to enhance the realisation of several other human rights, including the right to equality and non-discrimination, children's rights, the right to education, the rights to health and life, the right to privacy, the right to work, and freedom of expression. The freedom to manifest religion or belief, and the associated parental liberty to ensure the religious and moral education of one's children in conformity with one's own convictions, would also be promoted for some people.

4.46 The ALRC has concluded that, overall, **Recommendation 1** would maximise the realisation of human rights, and would restrict the realisation of some rights only in accordance with relevant criteria under international law. Accordingly, **Recommendation 1** would be consistent with Australia's obligations under international law.

4.47 The ALRC has approached its assessment of **Recommendation 1** on the basis that it is necessary for each human right to be respected and treated on an equal footing with all other rights, in the particular context of the religious educational sector in Australia. The concept of proportionality plays an important role under international law in managing intersecting rights. It has been argued that analysing intersecting rights through the lens of proportionality is 'inherently capable' of ensuring 'respectful' outcomes, since 'proportionality requires rights to be optimised where they conflict'.<sup>66</sup>

4.48 The Terms of Reference do not directly request the ALRC to assess whether the Australian Government's policy position itself is consistent with international law. However, it is necessary for the ALRC to assess, to some extent, the Australian Government's policy position in light of international law, in order to recommend a method of implementing that policy position in law that is consistent with international law. After careful consideration, the ALRC has reached the conclusion that the Australian Government's policy position (reading the three elements of the policy position together) is within the range of approaches that are permissible under international law.

4.49 A detailed discussion of Australia's human rights obligations is contained in later chapters of this Report.<sup>67</sup> There are a number of human rights relevant to the proposed repeal of s 38 of the *Sex Discrimination Act*. A tension between some of these rights may be suggested if each is viewed in isolation. However, human rights are 'indivisible and interdependent and interrelated'.<sup>68</sup> Human rights must be considered in parallel with each other and in a mutually enriching manner. Only a

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66 Megan Pearson, *Proportionality, Equality Laws, and Religion: Conflicts in England, Canada, and the USA* (Routledge, 2017) 71.

67 **Chapters 10 and 11.**

68 *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23 (12 July 1993, adopted 25 June 1993 by the World Conference on Human Rights) [5], endorsed by UN General Assembly, *World Conference on Human Rights*, GA Res 48/121, UN GAOR, UN Doc A/48/49 (20 December 1993).

small number of human rights are absolute. Most rights can be limited, strictly, to promote other objectives, including other human rights.

4.50 International law has developed mechanisms to guide the application of multiple intersecting rights.<sup>69</sup> The ALRC has drawn on these mechanisms of international law in the following sections to identify the legislative reforms that would be most consistent with international law, with the aim of maximising the overall realisation of all applicable human rights.

4.51 In analysing intersecting rights through the lens of proportionality, in particular, the ALRC has considered, for example, evidence of harms that may be caused by discrimination against students and staff, and the relative lack of evidence of harm to religious educational institutions in jurisdictions where existing laws more closely reflect the reforms contemplated under **Recommendation 1**. The evidence available to the ALRC suggests that any detriment to religious educational institutions under **Recommendation 1** would be minor, and would be less significant than detriments experienced by students and staff in religious educational institutions under existing legislative exceptions.

4.52 Human rights particularly relevant to students and staff at religious educational institutions include:

- the right to equality and non-discrimination;
- the right to freedom of religion or belief (and, in particular, the freedom to manifest religion or belief);
- children's rights;
- the right to education;
- the right to freedom of expression;
- rights to health and life;
- the right to privacy; and
- the right to work.

4.53 A detailed analysis of these rights, the related provisions of international treaties, and how these rights intersect is contained in **Chapter 11**. The anticipated effect of **Recommendation 1** on each of these rights is addressed in the following sections. Rights that would be reinforced under **Recommendation 1** are discussed prior to an assessment of rights that would be limited in some way under **Recommendation 1**.

4.54 This section of the chapter refers generally to **Recommendation 1**, rather than just to the repeal of s 38 of the *Sex Discrimination Act*, because the international law analysis is relevant to all legislative amendments contemplated under **Recommendation 1**.

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69 See **Chapter 10** at [10.12]–[10.23].

## Right to equality and non-discrimination

4.55 The right to equality and non-discrimination recognises that ‘all persons are equal before the law and are entitled without any discrimination to the equal protection of the law’.<sup>70</sup> A detailed analysis of this right is set out in [Chapter 11](#).<sup>71</sup>

4.56 Australia is obliged under international law to enact legislation to operationalise the right to equality and non-discrimination.<sup>72</sup> Discrimination on grounds including one or more of sex, sexual orientation, gender identity, marital or relationship status, pregnancy, or religion is prohibited under several treaties.<sup>73</sup> Prohibitions on discrimination aim to ensure comprehensive and effective protection from discrimination, and may be given effect through the repeal or amendment of laws that discriminate.<sup>74</sup>

4.57 The Committee on Economic, Social, and Cultural Rights has expressly asked Australia to

provide information on any steps taken to reform anti-discrimination legislation at the federal and the state levels with a view to addressing the protection gaps in the existing legislation. In particular, please also indicate any steps taken to address the discriminatory effect of section 38 of the Sex Discrimination Act against lesbian, gay, bisexual, transgender and intersex teachers and students in religious educational institutions.<sup>75</sup>

4.58 **Recommendation 1** would strongly reinforce children’s right to enjoy their rights ‘without discrimination of any kind’<sup>76</sup> and, for students more broadly, the rights to protection from discrimination found in the ICCPR and CADE. These proposed reforms would also promote the rights of staff to protection from discrimination, enshrined under the ICCPR, CEDAW, and the ILO 111.

70 ICCPR art 26.

71 See [Chapter 11](#) at [\[11.4\]](#)–[\[11.30\]](#).

72 See [Chapter 11](#) at [\[11.1\]](#).

73 Under the *Universal Declaration of Human Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 2 (‘UDHR’); ICCPR art 2(1); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976) art 2(2) (‘ICESCR’); *Convention on the Elimination of all Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) arts 3, 5(a), 10, 11(1)(b), 11(2)(a) (‘CEDAW’); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 2, 13, 14, 19, 24(1), 29(1), 30 (‘CRC’); *Discrimination (Employment and Occupation) Convention*, opened for signature 25 June 1958, ILO No 111 (entered into force 15 June 1960) arts 1, 2 (which cover equality of opportunity and discrimination in the context of employment and occupation) (‘ILO 111’). For an explanation of how the list of prohibited grounds has increased since these conventions were adopted, see [Chapter 11](#) at [\[11.23\]](#)–[\[11.24\]](#).

74 Equal Rights Trust and Office of the United Nations High Commissioner for Human Rights, *Protecting Minority Rights: A Practice Guide to Developing Comprehensive Anti-Discrimination Legislation* (2022) 115.

75 Committee on Economic, Social and Cultural Rights, *List of Issues Prior to Submission of the Sixth Periodic Report of Australia*, 70th sess, UN Doc E/C.12/AUS/QPR/6 (7 April 2022) [9].

76 CRC art 2.

4.59 **Recommendation 1** would address the risk of harm to students and staff caused by discrimination on grounds contained in the *Sex Discrimination Act*, recognising that discrimination can cause significant harms both to individuals and at a societal level.<sup>77</sup> For example, a staff member fearing potential discrimination on the ground of marital status may be more likely to remain in an abusive relationship in order to maintain employment. **Chapter 3** sets out some of the significant harms to which discrimination can contribute, including psychological distress, self-harm, suicidal ideation, and suicide attempt.<sup>78</sup> In addition, the ALRC received confidential submissions from former staff at religious educational institutions recounting harms they experienced on the basis of their LGBTQ+ identity.<sup>79</sup> The ALRC also heard, in consultations, of specific benefits for staff and administrators in religious schools when protections against discrimination were enhanced.

4.60 In contrast, some stakeholders expressed that any limitation of religious freedom (for example, through the narrowing of exceptions for religious educational institutions in the *Sex Discrimination Act*) would constitute discrimination against religious communities or individuals.<sup>80</sup> However, reforms that would subject religious educational institutions to the same obligations as all other persons should not properly be categorised as discriminatory.

4.61 Given all the matters considered in relation to this right, **Recommendation 1** would strongly reinforce the right to equality and non-discrimination held by students and staff of religious educational institutions and would be compatible with Australia's obligations under international law.

### Children's rights

4.62 Children's rights are protected under international law through general treaty provisions (applicable to all people) and through treaty provisions specifically for children.<sup>81</sup> Australia is obliged to 'ensure that the interests of the child have been assessed and taken as a primary consideration in decisions and actions taken', including by the private sector.<sup>82</sup> This duty covers individual decisions that concern or impact a child made by 'administrative authorities' with respect to education.<sup>83</sup>

77 For a discussion of harms that may be associated with discrimination, see **Chapter 3** at [3.58]–[3.67]. See also Senate Legal and Constitutional Affairs References Committee, Parliament of Australia (n 24) 36–8 [2.66]–[2.73]. The Committee heard that the existence of the exceptions in itself could be harmful, whether or not institutions in fact rely upon them: at 41 [2.83]–[2.85]. The Dissenting Report of the Coalition Senators did not dispute the majority's view on harms caused to the mental health of the LGBTQ+ community by discrimination.

78 See **Chapter 3**.

79 See, eg, Australian Law Reform Commission, 'What We Heard' (Background Paper ADL2, December 2023) [25], [36], [38]–[39], [46], [51], [76], [108].

80 See, eg, W Larkin, *Submission 15*; C Hurt, *Submission 161*; A Lahhoud, *Submission 234*; H Leach, *Submission 254*; Not published, *Submission 265*; R Dickens, *Submission 276*.

81 A detailed analysis of this right is set out in **Chapter 11** at [11.53]–[11.59].

82 Committee on the Rights of the Child, *General Comment No 14: The Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration* (Art 3, Para 1), 62nd sess, UN Doc CRC/C/GC/14 (29 May 2013) [30].

83 Ibid.

4.63 A large number of students in religious educational institutions are children in primary and secondary school.<sup>84</sup> For this reason, children's rights are significant in relation to **Recommendation 1**. By removing exceptions to the prohibition on discrimination against students in the provision of education, **Recommendation 1** would reinforce:

- children's right to enjoy their rights 'without discrimination of any kind',<sup>85</sup> and
- the right to education on the basis of equal opportunity.<sup>86</sup>

4.64 Empirical evidence concerning the effect of the school environment on health outcomes for LGBTQ+ youth suggests that children's rights to health and to life are similarly relevant in this context. For example, discrimination against LGBTQ+ students (including in religious schools, but also in other areas) has been linked to high rates of depression, self-harm, risk-taking behaviour (including drug use), homelessness, and suicide.<sup>87</sup>

4.65 **Recommendation 1** would afford children greater opportunity to attend educational institutions conducted in accordance with their religion. On this basis, **Recommendation 1** would promote a child's right to hold a religion or belief,<sup>88</sup> to practice their religion in community with others (a right that is expressly directed towards minority groups and Indigenous peoples),<sup>89</sup> and to associate freely.<sup>90</sup>

4.66 In relation to the best interests of the child, available evidence suggests that having diverse role models in the context of education (for example, amongst staff members) is likely to promote the realisation of children's rights, including the right to health and the right to life,<sup>91</sup> and arguably promotes the aims of education.<sup>92</sup> Submissions from children's commissioners and individuals similarly highlighted that the treatment of staff can have an effect on the wellbeing of students.<sup>93</sup>

84 Australian Bureau of Statistics, 'Schools' <[www.abs.gov.au/statistics/people/education/schools/latest-release](http://www.abs.gov.au/statistics/people/education/schools/latest-release)>.

85 CRC art 2.

86 Ibid art 28(1).

87 See **Chapter 3** at [3.63]–[3.67].

88 ICCPR art 18(1); CRC art 14(1). The right and duty of parents to provide direction to children regarding freedom of religion and religious education is to be read alongside the best interests of the child, the child's evolving capacities, other rights (including freedom from discrimination), and the aims of education. This parental liberty is subject to principles set out in arts 13(1) and (4) of the ICESCR. See **Chapter 11** at [11.79]–[11.81] and [11.93]–[11.101]. See also John Tobin and Sylvie Langlaude Done, 'Article 14: The Right to Freedom of Thought, Conscience, and Religion' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 475, 475, 492–4, 499–500, 504.

89 CRC art 30; Tobin and Langlaude Done (n 88).

90 CRC art 15(1).

91 See **Chapter 11** at [11.111]–[11.122].

92 Tobin and Langlaude Done (n 88) 492–4, 499–500, 504. See also **Chapter 11** at [11.66].

93 NSW Advocate for Children and Young People, *Submission 209*; Name withheld, *Submission 347*; Commissioner for Children and Young People SA, *Submission 360*; Commissioner for Children and Young People WA, *Submission 373*; Name withheld, *Submission 415*.

4.67 In considering all matters raised here, the ALRC views **Recommendation 1** as strongly reinforcing the rights of children, and as compatible with Australia's international law obligations in this regard.

### **Right to education**

4.68 International law protects everyone's right to education.<sup>94</sup> This right is both a standalone right and a crucial means of realising other rights.<sup>95</sup> The importance of this right, for everyone, was highlighted in submissions from children's commissioners, the Australian Human Rights Commission, and Just.Equal Australia.<sup>96</sup>

4.69 **Recommendation 1** would reinforce the right to education:

- on the basis of equal opportunity,<sup>97</sup> by protecting and expanding the educational opportunities available to all students;
- by directing education to the full development of all students and their sense of dignity;<sup>98</sup> and
- by including a greater diversity of student and staff identities in religious educational institutions, promoting a central aim of education: to develop respect for diversity and pluralism.<sup>99</sup>

4.70 Australia is obliged to repeal any statutory provisions that involve discrimination in education<sup>100</sup> and to ensure, by legislation where necessary, that there is no discrimination in the admission of a student to an educational institution.<sup>101</sup>

**Recommendation 1** would support Australia to meet this obligation by repealing and narrowing provisions in the *Sex Discrimination Act* which currently except religious educational institutions from prohibitions on discrimination against students on grounds protected under s 21 of the Act.

4.71 Considering all relevant matters, the ALRC considers that **Recommendation 1** strongly reinforces the right to education, and that it is compatible with Australia's obligations under international law in this regard.

94 ICESCR art 13(1).

95 Committee on Economic, Social and Cultural Rights, *General Comment No 13: The Right to Education (Article 13 of the Covenant)*, 21st sess, UN Doc E/C.12/1999/10 (8 December 1999) [1]. For a detailed analysis of this right, see **Chapter 11** at [11.60]–[11.70].

96 NSW Advocate for Children and Young People, *Submission 209*; Commissioner for Children and Young People SA, *Submission 360*; Commissioner for Children and Young People WA, *Submission 373*; Australian Human Rights Commission, *Submission 384*; Just.Equal Australia, *Submission 422*.

97 CRC art 28(1).

98 ICESCR art 13(1).

99 CRC art 29(1); Oduntan Jawoniyi, 'Fulfilling Article 29:1 of the United Nations Convention on the Rights of the Child—the Aims of Education—through Religious Education' (2014) 9(1) *Religion and Human Rights* 31, 35, 37, 49–50, 52.

100 CADE art 3(a).

101 Ibid art 3(b).

## Rights to health and life

4.72 Under international law, Australia is obliged to recognise ‘the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’.<sup>102</sup> Crucially, the right to health depends on the realisation of other rights relevant to this Inquiry, including the right to education, the right to equality and non-discrimination, and the right to work.<sup>103</sup>

4.73 Submissions from former students and staff at religious educational institutions recounted the detrimental impact of discrimination (on the basis of attributes protected under the *Sex Discrimination Act*) on their health and wellbeing. In its submission, LGBTIQ+ Health Australia also underscored the relationship between discrimination and poor mental health outcomes for LGBTIQ+ students and staff (in particular).<sup>104</sup> Other submissions highlighted, more broadly, a need to protect and promote the right to health of LGBTIQ+ students and staff in educational settings.<sup>105</sup>

4.74 A safe school environment, a healthy workplace, and respect for diversity have been identified by the Special Rapporteur on the right to health as determinants of mental health.<sup>106</sup> Further, there is empirical evidence that suggests that a reduction in discrimination is likely to improve health outcomes for LGBTIQ+ students and staff.<sup>107</sup>

4.75 The right to health is also informed by the right to life.<sup>108</sup> The right to life includes the right to enjoy life with dignity, and states are urged to ‘take adequate measures ... to prevent suicides, especially among individuals in particularly vulnerable situations’, including children and LGBTIQ+ persons.<sup>109</sup> High rates of attempted suicide amongst LGBTIQ+ youth in Australia, and the importance of supportive educational environments, are discussed in [Chapter 3](#).<sup>110</sup>

102 ICESCR art 12(1). The right to health is also recognised under art 10(h) of CEDAW, art 24 of the CRC, and art 5(e)(iv) of CERD.

103 Committee on Economic, Social, and Cultural Rights, *General Comment No 14: The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 22nd sess, UN Doc E/C.12/2000/4 (11 August 2000) [3]. A detailed analysis of this right is set out in [Chapter 11](#) at [\[11.111\]](#)–[\[11.122\]](#).

104 LGBTIQ+ Health Australia, *Submission 372*.

105 Catholics for Renewal, *Submission 124*; L van Leent, M Jeffries, N Barnes and S Jowett, *Submission 158*; ACON, *Submission 191*; Wear It Purple, *Submission 197*; Black Dog Institute, *Submission 221*; Commissioner for Children and Young People SA, *Submission 360*; Commissioner for Children and Young People WA, *Submission 373*; Australian Human Rights Commission, *Submission 384*.

106 Dainius Pūras, Special Rapporteur, *Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, 41st sess, UN Doc A/HRC/41/34 (12 April 2019) [26]–[27].

107 See [Chapter 3](#) at [\[3.58\]](#)–[\[3.69\]](#).

108 ICCPR art 6(1). See further [Chapter 11](#) at [\[11.111\]](#)–[\[11.122\]](#).

109 Human Rights Committee, *General Comment No 36: Article 6 (Right to Life)*, 124th sess, UN Doc CCPR/C/GC/36 (3 September 2019) [9], [23].

110 See [Chapter 3](#) at [\[3.56\]](#)–[\[3.57\]](#), [\[3.62\]](#)–[\[3.69\]](#).



4.76 **Recommendation 1** would reinforce the right to health and the right to life for students and staff in religious educational institutions by promoting safe and inclusive educational and workplaces that respect diversity. Consequently, **Recommendation 1** would positively contribute to Australia's compliance with its obligations under international law regarding this right.

### **Right to privacy**

4.77 The right to privacy means that no person shall be subjected to arbitrary or unlawful interference with their privacy, family, home, or correspondence, or unlawful attacks on their honour and reputation. Under international law, Australia is obliged to ensure that 'everyone has the right to the protection of the law against such interference or attacks'.<sup>111</sup> This right is recognised as 'essential to the free development of an individual's personality and identity' and as supporting the 'exercise and enjoyment of other human rights'.<sup>112</sup>

4.78 A range of stakeholders — including human rights commissions, children's commissioners, unions, and civil society organisations — indicated that the right to privacy is a key consideration in this Inquiry.<sup>113</sup> Some submissions highlighted the importance of the right to privacy with respect to employment practices,<sup>114</sup> including the use of an organisation's ethos to limit employee rights,<sup>115</sup> and in relation to a person's identity as an LGBTQ+ person and relationship status.<sup>116</sup>

4.79 Protection of the right to privacy from interference by private actors (which includes religious educational institutions) is required under relevant treaties.<sup>117</sup>

**Recommendation 1** would diminish the potential for a student or staff member's relationship status, attraction to others, and personal beliefs about such matters to be of any relevance to the lawful conduct of a religious educational institution. As such, this recommended reform would reinforce the right to privacy by discouraging and, in some circumstances, prohibiting intrusions into the private lives of students and staff by religious educational institutions.

111 See ICCPR art 17(2). A detailed analysis of this right is set out in **Chapter 11** at [11.123]–[11.128].

112 Joseph Cannataci, Special Rapporteur, *Right to Privacy*, 40th sess, UN Doc A/HRC/40/63 (16 October 2019) [52].

113 Queensland Human Rights Commission, *Submission 125*; NSW Advocate for Children and Young People, *Submission 209*; Australian Human Rights Commission, *Submission 384*.

114 M Fowler, *Submission 201*; Victorian Equal Opportunity and Human Rights Commission, *Submission 255*; Australian Human Rights Commission, *Submission 384*; Law Council of Australia, *Submission 428*.

115 Queensland Human Rights Commission, *Submission 125*.

116 Australian Human Rights Commission, *Submission 384*; Equality Tasmania, *Submission 423*.

117 Human Rights Committee, *General Comment No 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant: International Covenant on Civil and Political Rights*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004, adopted 29 March 2004) [8].



4.80 The right to privacy is not absolute. Any interference with the right needs to be justified under international law, including considerations of proportionality.<sup>118</sup> While not binding on Australia, jurisprudence from the ECtHR that concerns the employment of non-ecclesiastical employees by religious bodies indicates that the particular role of the individual concerned is relevant to whether an interference with their right to privacy is proportionate.<sup>119</sup>

4.81 Considering all matters, the ALRC views **Recommendation 1** as reinforcing the right to privacy, consistently with Australia's obligations under international law.

### ***Right to work***

4.82 The right to work includes 'the right of everyone to the opportunity to gain [their] living by work which [they] freely choose or accept' and

to the enjoyment of just and favourable conditions of work which ensure ... safe and healthy working conditions [and] equal opportunity for everyone to be promoted in [their] employment to an appropriate higher level, subject to no considerations other than those of seniority and competence.<sup>120</sup>

4.83 **Recommendation 1** would reinforce the right to work, in all of its various aspects, by removing barriers to employment, to the enjoyment of just and favourable conditions, to safe and healthy conditions, and to equal opportunity for staff on the basis of attributes protected under the *Sex Discrimination Act* in religious educational institutions.

4.84 A high proportion of staff in the Australian education sector are employed by religious educational institutions, particularly schools.<sup>121</sup> A number of submissions pointed to the size of the religious educational sector (as an employer and educator) as justification for narrowing exceptions for religious educational institutions.<sup>122</sup> The existing exceptions in the *Sex Discrimination Act* that apply in relation to all staff at religious educational institutions represent a significant interference with the right to work. As observed by Professor Vickers:

It is one thing to allow some discrimination in a small number of faith schools in large urban areas, where staff enjoy a real choice of schools in which to work. It is quite another to allow religious discrimination in up to a third of schools [referring to UK statistics], many of which are in towns and villages that contain

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118 For an explanation of the basis upon which the right to privacy may be permissibly limited (by states) under international law, see **Chapter 11** at [11.126].

119 See, eg, *Schüth v Germany* (European Court of Human Rights, Court (Fifth Section), Application No 1620/03, 23 September 2010). Jurisprudence considering institutional autonomy is examined in detail in **Appendix I**.

120 ICESCR arts 6–7. This right is also enshrined under art 11 of CEDAW, and more broadly in the ILO 111. A detailed analysis of this right is set out in **Chapter 11** at [11.129]–[11.136].

121 Approximately 38% of school staff are employed in non-government schools in Australia, with over 90% of non-government schools having a religious affiliation: see Australian Bureau of Statistics (n 84) Table 50a.

122 *Wear It Purple, Submission 197*; Australian Human Rights Commission, *Submission 384*; Diversity Council Australia, *Submission 398*; Just.Equal Australia, *Submission 422*.

just one or two schools, so that teachers' choice of employer and chances of career progression may be restricted ...<sup>123</sup>

4.85 Considering the size of the religious school sector in Australia, and that educational settings are more limited in regional and remote areas in Australia, the narrowing of *Sex Discrimination Act* exceptions for religious educational institutions in relation to staff would substantially diminish the denial of opportunities to staff on the basis of protected attributes. Greater access to employment in non-government education might also result in economic opportunities, to the extent that salaries may be higher in the non-government education sector.<sup>124</sup>

4.86 **Recommendation 1** would not limit the ability of staff who hold a particular religion from seeking employment at a religious educational institution founded on the same religion.

4.87 The ALRC considers that **Recommendation 1** reinforces the right to work and promotes Australia's compliance with its obligations under international law regarding this right.

### ***Right to freedom of expression***

4.88 The right to freedom of expression includes the

freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of [one's] choice.<sup>125</sup>

4.89 The right includes 'expression of views and opinions that offend, shock or disturb'.<sup>126</sup> Under international law, the right to freedom of expression is protected as a stand-alone right that has a mutually reinforcing relationship with freedom of religion or belief.<sup>127</sup>

123 Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart Publishing, 2016) 221.

124 Peter Goss, Julie Sonnemann and Jonathan Nolan, *Attracting High Achievers to Teaching* (Report, August 2019) 37 (fig 5.1). See also Gabriella Marchant, 'Private Schools Are Poaching Teachers from the Public Sector with Better Salaries, Principals Say', *ABC News* (online, 5 February 2023) <[www.abc.net.au/news/2023-02-05/public-schools-losing-teachers-to-private-education-jobs/101748966](http://www.abc.net.au/news/2023-02-05/public-schools-losing-teachers-to-private-education-jobs/101748966)>.

125 ICCPR art 19(2). For a detailed analysis of this right, see **Chapter 11** at [11.102]–[11.105].

126 Frank La Rue, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, 17th sess, UN Doc A/HRC/17/27 (16 May 2011) [37].

127 Office of the United Nations High Commissioner for Human Rights, 'Use Human Rights Frameworks to Promote Freedoms of Religion, Belief, and Expression: UN Experts' <[www.ohchr.org/en/press-releases/2023/03/use-human-rights-frameworks-promote-freedoms-religion-belief-and-expression](http://www.ohchr.org/en/press-releases/2023/03/use-human-rights-frameworks-promote-freedoms-religion-belief-and-expression)>.

4.90 A number of submissions from diverse organisations emphasised that all staff and students are holders of this right.<sup>128</sup> In addition, Kingsford Legal Centre submitted that s 38 of the *Sex Discrimination Act* may currently violate a student or staff member's right to freedom of expression, and the Law Council of Australia submitted that the right to manifest religion that is promoted for some people under s 38 may conflict with the freedom of expression of others.<sup>129</sup>

4.91 In contrast, Catholic Education Tasmania submitted that s 38 of the *Sex Discrimination Act* is critical to the 'free expression of religion'.<sup>130</sup> Freedom for Faith, academics, and other individuals cautioned against proposed reforms that may interfere with the right of staff and students to express their views on particular issues.<sup>131</sup> These issues are dealt with below.<sup>132</sup>

4.92 The *Consultation Paper* identified that some propositions and proposals put forward at that time may interfere with the right to freedom of expression. The ALRC considers that **Recommendation 1** would reinforce the right to freedom of expression, and would not limit that right, based on the following analysis.

4.93 **Recommendation 1** would reinforce the right to freedom of expression by supporting a broad range of beliefs and views to be expressed by students and staff in religious educational institutions. For example, it would no longer be lawful for a religious educational institution to subject a student to any 'detriment' (under s 21 of the *Sex Discrimination Act*) for expressing their LGBTQ+ identity, even if the 'detriment' were in good faith in order to avoid injury to religious susceptibilities (per s 38 of the Act). The ALRC received submissions from former students and teachers in religious educational institutions who expressly identified detriment to students who came out as LGBTQ+.<sup>133</sup>

4.94 **Recommendation 1** would require staff, students, and families involved in religious educational institutions to tolerate the expression of alternative perspectives. In turn, **Recommendation 1** would support intra-religious pluralism (as distinct from inter-religious pluralism which describes diversity between different religious groups)<sup>134</sup> and, subsequently, freedom of religion or belief for all students and staff, as well as promoting respect for diversity and pluralism as a central aim of education.<sup>135</sup>

128 University of Divinity, *Submission 115*; Queensland Human Rights Commission, *Submission 125*; Kingsford Legal Centre, *Submission 339*; Equality Australia, *Submission 375*; Independent Education Union, *Submission 387*; Australian National Imams Council, *Submission 401*; Law Council of Australia, *Submission 428*.

129 Kingsford Legal Centre, *Submission 339*; Law Council of Australia, *Submission 428*.

130 Catholic Education Tasmania, *Submission 397*.

131 D Khlentzos, *Submission 175*; Freedom for Faith, *Submission 203*; A Rasul, *Submission 282*.

132 See below at [4.95]–[4.96].

133 See Australian Law Reform Commission, 'What We Heard' (Background Paper ADL2, December 2023) [36], [38], [51].

134 Heiner Bielefeldt, Special Rapporteur, *Elimination of All Forms of Religious Intolerance*, 68th sess, UN Doc A/68/290 (7 August 2013) [41].

135 CRC art 29(1)(d); Jawoniyi (n 99) 34.

4.95 The ALRC does not consider that **Recommendation 1** would limit the right to freedom of expression. Under the *Sex Discrimination Act*, prohibited discrimination relevantly involves treating a person less favourably or imposing (or proposing to impose) a requirement, condition, or practice on a person that would have a disadvantaging effect.<sup>136</sup> Mere expression of a particular view would not ordinarily constitute discrimination in this sense.<sup>137</sup> In relation to the teaching of religious doctrine, the ALRC agrees with the Australian Human Rights Commission that it is ‘difficult to imagine’ that such teaching could constitute direct or indirect discrimination under the *Sex Discrimination Act*.<sup>138</sup> In limited circumstances, such as racial vilification, mere expression has been found to constitute discrimination.<sup>139</sup> However, expression that amounts to vilification would not appear to fall within the existing exception in s 38, which applies only to conduct ‘in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed’. Accordingly, repealing s 38 is unlikely to make unlawful any expression of views that is currently lawful under the *Sex Discrimination Act* in the context of religious educational institutions.

4.96 **Recommendation 1** would not, therefore, further limit the right to freedom of expression. The ALRC views **Recommendation 1** as reinforcing the right of freedom of expression in accordance with Australia’s international law obligations.

136 See, eg, *Sex Discrimination Act 1984* (Cth) ss 5(1)–(2).

137 See, eg, Attorney-General’s Department, Submission No 191 to Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Religious Discrimination Bill 2021 and Related Bills 191*, quoted in Parliamentary Joint Committee on Human Rights (Cth), *Religious Discrimination Bill 2021 and Related Bills* (Inquiry Report, 4 February 2022) [6.23]. In contrast, mere expression can constitute ‘harassment’ under ss 28A and 28AA of the *Sex Discrimination Act* (noting that the exceptions in s 38 of that Act do not apply in relation to harassment in any event). See also Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws* (Report No 129, December 2015) [4.167]–[4.169].

138 Australian Human Rights Commission, *Submission 384*.

139 In two employment-related cases, the Federal Court has held that racially offensive speech may, in particular circumstances, constitute direct discrimination on the ground of race: see *Qantas Airways Ltd v Gama* (2008) 167 FCR 537; *Vata-Meyer v Commonwealth* [2015] FCAFC 139. These cases involved the making of racially offensive remarks by a co-worker or supervisor to an employee in a workplace. See also Bill Swannie, ‘Speech Acts: Is Racial Vilification a Form of Racial Discrimination?’ (2020) 41(1) *The Adelaide Law Review* 179. In *R (on the application of Ngole) v The University of Sheffield* [2019] EWCA Civ 1127 [10], the Court of Appeal of England of Wales sought to distinguish the expression of religious views with the notion of discrimination and stated, ‘The mere expression of views on theological grounds (e.g. that “homosexuality is a sin”) does not necessarily connote that the person expressing such views will discriminate on such grounds’.

### ***Right to freedom of religion or belief***

4.97 The right to freedom of religion or belief includes the freedom to adopt a religion or belief of one's choice, alongside a prohibition on coercion that would impair a person's freedom to have or to adopt a religion or belief of that person's choice. Both of these aspects of the right are absolute and protected unconditionally.<sup>140</sup> None of the reforms recommended by the ALRC negatively impinge upon these aspects of the right to freedom of religion or belief. The right to freedom of religion or belief also includes the freedom to manifest one's religion or belief in worship, observance, practice, and teaching, individually or in community with others, in public or private. These aspects of the right may be subjected to limitation under criteria specified under international law.<sup>141</sup> In addition, parents are afforded a liberty to ensure the religious and moral education of their children in conformity with their own convictions.<sup>142</sup> Protection against religiously based discrimination and protection for people belonging to religious minorities are guaranteed under other treaty provisions.<sup>143</sup> A detailed analysis of the right to freedom of religion or belief is set out in [Chapter 11](#).<sup>144</sup>

4.98 **[Recommendation 1](#)** would provide greater freedom for students, staff, and their families involved in religious educational institutions to hold and manifest diverse religious beliefs about protected attributes under the *Sex Discrimination Act*. This would include beliefs that may differ from those adopted by the institution, supporting intra-religious pluralism which, in addition to inter-religious pluralism, adds value to society. The ALRC accepts the view expressed in a number of consultations that tolerating alternative perspectives and different people is important in a pluralistic society. **[Recommendation 1](#)** would protect students and staff from being coerced through pressure from an institution to adopt or accept a particular religious claim or belief in order to maintain their enrolment or employment — noting that coercion is prohibited by s 18(2) of the ICCPR.<sup>145</sup>

4.99 **[Recommendation 1](#)** would not interfere with any person's freedom to hold a religion or belief. All people, including those in religious educational institutions, would remain free to hold any chosen religion or belief, including beliefs relevant to attributes protected under the *Sex Discrimination Act*. It is important that genuinely

140 ICCPR arts 18(1)–(2).

141 Limitation criteria applicable to the manifestation of religion or belief are discussed in detail in [Chapter 11](#) at [\[11.44\]](#)–[\[11.52\]](#). These limitation criteria are restated and applied below at [\[4.107\]](#)–[\[4.114\]](#).

142 ICCPR art 18(4); CRC art 14(2).

143 ICCPR arts 2, 20(2), 26, 27; ILO 111 art 1; ILO 158 art 5.

144 See [Chapter 11](#) at [\[11.31\]](#)–[\[11.52\]](#).

145 Human Rights Council, *Freedom of Religion or Belief, and Freedom from Violence and Discrimination Based on Sexual Orientation and Gender Identity*, 53rd sess, UN Doc A/HRC/53/37 (7 June 2023) [51].

held religious beliefs regarding sex, sexuality, and gender are afforded proper respect.<sup>146</sup>

4.100 There is the potential, however, for **Recommendation 1** to interfere with the freedom to manifest one's religion or belief 'in community with others'. The freedom to manifest religion or belief in community with others has an understandably strong nexus with 'worship, observance, practice and teaching' of a religion, being the scope of activities protected by art 18(1) of the ICCPR.<sup>147</sup> However, the extent to which that nexus extends to the provision of education in a religious educational institution beyond religious instruction is less clear. The ALRC is not aware of international law jurisprudence directly on this point.<sup>148</sup> However, to the extent that the activities of religious educational institutions are concerned with 'worship, observance, practice and teaching' of religion, the ALRC has proceeded on the basis that those activities are capable of being protected by the freedom to manifest religion or belief. The extent of such activities will vary from institution to institution, and in consultations the ALRC heard that the scope of activities of some religious educational institutions that may fall within the protection of art 18(1) would not be insignificant. The ALRC has proceeded on the basis that, in some institutions, religious worship, observance, practice, and teaching is sufficiently infused into the provision of education to warrant the conclusion that some level of protection under art 18(1) applies.

4.101 Some of the submissions supporting the retention of the existing exceptions in the *Sex Discrimination Act* essentially asserted that the freedom to manifest religion or belief in community with others encompasses the right to determine the persons who participate (and who do not participate) in the communal manifestation of religion or belief. These submissions relied variously on freedom to manifest religion or belief, freedom of association,<sup>149</sup> or the concept of institutional autonomy.<sup>150</sup> Some submissions argued in favour of very strong, and sometimes complete, autonomy of religious educational institutions in these matters.<sup>151</sup> These submissions included Dr Deagon who, quoting Professors Ahdar and Leigh, submitted that

146 D Khlentzos, *Submission 175*; Freedom for Faith, *Submission 203*; Sydney Missionary and Bible College, *Submission 205*; Australian Christian Lobby, *Submission 299*; HillSide Christian College Association and Board of Governance, *Submission 338*; Ambrose Centre for Religious Liberties, *Submission 394*; Australian National Imams Council, *Submission 401*; I Benson, *Submission 413*.

147 ICCPR art 18(1).

148 It could be inferred from comments of the ECtHR in *Siebenhaar v Germany* (European Court of Human Rights, Court (Fifth Section), Application No 18136/02, 3 February 2011) [41] that rights regarding communal manifestation of religion under the ECHR were considered relevant in some way, in the context of a kindergarten run by a church.

149 See **Chapter 11** at [11.108]–[11.110].

150 **Appendix I** analyses jurisprudence from UN treaty bodies and regional human rights courts which clarifies the scope of institutional autonomy recognised in relation to employment decisions impacting the rights of ecclesiastical and non-ecclesiastical staff, and in educational contexts.

151 See, eg, A Deagon, *Submission 4*; Human Rights Law Alliance, *Submission 96*; Anglican Church Diocese of Sydney, *Submission 189*; M Fowler, *Submission 201*.

'religious group association may [and must] sometimes trammel individual rights' because that is intrinsic to the definition of association itself; the ability to associate necessarily entails the ability to exclude, and it is up to the association to put standards in place to make these decisions in relation to leadership, membership, employment, and external activities. As a reasonable accommodation, individuals have a right to leave the group if they wish and, if they like, form a new association with others of similar mind.<sup>152</sup>

4.102 However, the ALRC is not aware of any jurisprudence at international law to indicate that freedom of association (including any ability to exclude particular persons when determining membership) extends to the selection of staff for employment at, or to the enrolment of students in, religious educational institutions.<sup>153</sup> Freedom of association ordinarily applies to voluntary organisations, such as unions, churches, and clubs, and not in the context of compulsory or formal education, or the employment of staff for that purpose. Consequently, the ALRC has not analysed in this chapter any anticipated impact of **Recommendation 1** on freedom of association, and has instead discussed that right in **Chapter 11**.

4.103 Further, it is not clear under international law the extent to which the freedom to manifest religion or belief 'in community with others' includes the freedom of some (even if they were to constitute the majority or most of the community) to determine the people who should constitute the entirety of the community with whom they seek to manifest religion or belief. That is particularly so in the context of a religious educational institution, as opposed to a religious institution such as a church, temple, or other such religious body. In contrast, a number of submissions proceeded on the implicit basis that there is no relevant distinction between the autonomy of religious institutions broadly and religious educational institutions specifically.<sup>154</sup>

4.104 Quoting Professor Aroney and Dr Taylor, Deagon's submission highlighted instances where the ECtHR has found in favour of the religious institution when an employee has breached the institution's ethos, 'even when the ethos requirements of the employer organisation impinge on the employee's fundamental human

152 A Deagon, *Submission 4*, quoting Rex J Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2nd ed, 2015) 375–7. See also Nicholas Aroney, 'Freedom of Religion as an Associational Right' (2014) 33(1) *University of Queensland Law Journal* 153, 184, who stated, 'A reductively individualist conception of religious freedom is obviously opposed to the capacity of such groups to determine their own conditions of membership'.

153 In *Siebenhaar v Germany*, the ECtHR stated that the right to manifest religion or belief 'must be interpreted in light of' the right to freedom of association, rather than directly applying the right to freedom of association itself, in the context of a kindergarten run by a church: Strasbourg Consortium, '*Siebenhaar v Germany* - Chamber Judgment (Unofficial English Translation)' [41] <[www.strasbourgconsortium.org/common/document.view.php?docId=5201](http://www.strasbourgconsortium.org/common/document.view.php?docId=5201)>.

154 See, eg, A Deagon, *Submission 4*; Human Rights Law Alliance, *Submission 96*; Australian Union Conference of Seventh-day Adventists, *Adventist Schools Australia, Submission 138*; Anglican Church Diocese of Sydney, *Submission 189*; M Fowler, *Submission 201*; Freedom for Faith, *Submission 203*.



rights'.<sup>155</sup> Relevant aspects of those cases are summarised in **Appendix I**. In each case, the relevant court emphasised the employee's duty of loyalty to their employer. Only one of those cases related to a teacher not specifically identified as a religious instruction teacher and, in that case, the Court made comments indicating that the associative aspect of the freedom to manifest religion or belief was relevant to some extent.<sup>156</sup> In contrast, in a recent case before the IACtHR regarding disqualification of a religious instructor in a public school, the Court held that it was not clear that there was 'an actual or potential infringement of the autonomy of the religious community', and that institutional autonomy in effect 'becomes weaker and less robust' when applied in fields such as education in public establishments, in contrast to 'determination of the membership of the church, its ministers and its hierarchies'.<sup>157</sup> Although this Inquiry does not relate to public schools, it is significant in this regard that religious educational institutions do receive public funding and that education is a public good.<sup>158</sup>

4.105 Several submissions pointed to factors that justify state intervention in religious educational institutions, including relevant duties of the state to protect a range of human rights. For example, the Australian Human Rights Commission<sup>159</sup> and Catholics for Renewal<sup>160</sup> emphasised that freedom of religion or belief is a right held by individuals, not a right held by institutions. Some submissions emphasised that there is significant diversity of views within religious communities, including religious educational institutions, on issues of sexuality and gender identity.<sup>161</sup> Catholics for Renewal submitted that, while it would not be appropriate for the state to take a view on the interpretation of religious doctrine, the state does have a duty to intervene in schools to prevent harm to students and staff.<sup>162</sup> Various submissions invoked a range of specific considerations — such as the rights of the child,<sup>163</sup> the aims of education, and workers' rights,<sup>164</sup> and the significant

155 A Deagon, *Submission 4*, quoting Nicholas Aroney and Paul Taylor, 'The Politics of Freedom of Religion in Australia: Can International Human Rights Standards Point the Way Forward?' (2020) 47(1) *University of Western Australia Law Review* 42, 58–60, who cite *Fernández Martínez v Spain* (European Court of Human Rights, Grand Chamber, Application No 56030/07, 12 June 2014); *Travaš v Croatia* (European Court of Human Rights, Court (Second Section), Application No 75581/13, 30 January 2017); *Siebenhaar v Germany* (European Court of Human Rights, Court (Fifth Section), Application No 18136/02, 3 February 2011); *Obst v Germany* (European Court of Human Rights, Court (Fifth Section), Application No 425/03, 23 December 2010).

156 *Strasbourg Consortium* (n 153) [40]–[41]. The Court also made reference to the separate right of freedom of association under art 11 of the ECHR in this regard: see **Appendix I** at [I.17].

157 *Pavez Pavez v Chile* (Inter-American Court of Human Rights, Series C No 449, 4 February 2022) [128], [144]. See **Appendix I** at [I.22]–[I.27].

158 See **Chapter 3** at [3.16]–[3.17]; Australian Law Reform Commission, 'What We Heard' (Background Paper ADL2, December 2023) [102]–[104], [113].

159 Australian Human Rights Commission, *Submission 384*.

160 Catholics for Renewal, *Submission 124*.

161 *Ibid*; L van Leent, M Jeffries, N Barnes and S Jowett, *Submission 158*.

162 Catholics for Renewal, *Submission 124*.

163 L van Leent, M Jeffries, N Barnes and S Jowett, *Submission 158*; Commissioner for Children and Young People WA, *Submission 373*.

164 Law Council of Australia, *Submission 428*.



public funding of religious educational institutions<sup>165</sup> — as justification for the state ensuring uniform application of anti-discrimination laws in compulsory education, and limiting institutional autonomy of such schools to the extent necessary to achieve that aim.

4.106 Significantly, the ALRC requested that a number of religious educational institutions and associated individuals, groups, and peak educational bodies provide any evidence that demonstrated how the removal of particular exceptions from state and territory laws — like those recommended for removal by the ALRC — had resulted in diminished institutional autonomy or freedom to manifest religion or belief. While some fears and concerns have been expressed, the ALRC has not been provided with any evidence in response to its requests. Nor is the ALRC otherwise aware of any actual detriment suffered by religious educational institutions upon the removal of exceptions in relevant state and territory laws. An analysis of submissions made by peak educational bodies, religious bodies and organisations, and academics to three previous relevant inquiries, similarly, did not reveal any specific evidence that would indicate detriment to religious educational institutions as a result of the absence or narrowing of exceptions.<sup>166</sup>

4.107 Without forming a concluded view on these issues, the ALRC has proceeded on the basis that it is possible that an aspect of the freedom to manifest religion or belief in community with others includes capacity to determine those others with whom one associates or participates in the manifestation of religion or belief. However, art 18(3) of the ICCPR expressly provides that the freedom may be limited (discussed in more detail below). In that respect, it should be noted, by analogy with the right to freedom of association, that freedom of association is also capable of being limited under international law.<sup>167</sup> Further, in relation to the scope of the right to freedom of association, there must be a reasonable justification for any differential treatment based on personal characteristics with respect to membership of an association.<sup>168</sup>

165 Rationalist Society of Australia, *Submission 81*; ACON, *Submission 191*; Australian Human Rights Commission, *Submission 384*.

166 These submissions were in relation to Attorney-General's Department (Cth), 'Religious Discrimination Bills – First Exposure Draft' (Draft Exposure Consultation, 2 October 2019) <[www.ag.gov.au/rights-and-protections/consultations/religious-discrimination-bills-first-exposure-drafts](http://www.ag.gov.au/rights-and-protections/consultations/religious-discrimination-bills-first-exposure-drafts)>; Attorney-General's Department (Cth), 'Religious Discrimination Bills – Second Exposure Draft' (Draft Exposure Consultation, 31 January 2020) <[www.ag.gov.au/rights-and-protections/consultations/religious-discrimination-bills-second-exposure-drafts](http://www.ag.gov.au/rights-and-protections/consultations/religious-discrimination-bills-second-exposure-drafts)>; Parliamentary Joint Committee on Human Rights (Cth) (n 137).

167 For a discussion of the freedom of association, see **Chapter 11** at [11.106]–[11.110].

168 European Commission for Democracy Through Law and OSCE Office for Democratic Institutions and Human Rights, *Joint Guidelines on Freedom of Association*, Doc No CDL-AD(2014)046, adopted by the European Commission 101st plen sess, 13–14 December 2014 [95].

4.108 To the extent that **Recommendation 1** may limit the right of a person to manifest religion or belief in community with others, any limitation must be justified under international law.<sup>169</sup> Each of art 18(3) of the ICCPR and art 14(3) of the CRC specifies that, to be permissible, a limitation of this right must be:

- prescribed by law; and
- necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others.

4.109 The limitation criteria prescribed under art 18(3) of the ICCPR have been interpreted by the Human Rights Committee in General Comment No 22, and are elaborated upon in the Siracusa Principles, which apply to all rights enshrined in the ICCPR.

4.110 The Siracusa Principles provide that whenever a limitation is required under the ICCPR to be ‘necessary’, the term ‘necessary’ implies that the limitation:

- is based on one of the grounds justifying limitations recognised by the relevant article of the ICCPR;
- responds to a pressing public or social need;
- pursues a legitimate aim; and
- is proportionate to that aim.<sup>170</sup>

4.111 Further, the Human Rights Committee has clarified that ‘restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner’ and ‘must not be applied in a manner that would vitiate the rights guaranteed in article 18’ of the ICCPR.<sup>171</sup>

4.112 Each of the limitation criteria in art 18(3) of the ICCPR (and art 14(3) of the CRC) is now addressed in turn.

4.113 **Prescribed by law:** Any limitation on the freedom to manifest religion or belief under **Recommendation 1** would be prescribed by law through amending legislation that would repeal s 38 of the *Sex Discrimination Act*. After such repeal, limitation of the right would be prescribed by ss 14, 16, and 21 of the Act, which would apply more fully in relation to religious educational institutions.

169 Articles 18(3) of the ICCPR and 14(3) of the CRC set out identical criteria for determining whether a limitation on the right to freedom of religion or belief is permissible at international law. Article 18(3) is elaborated on by the Human Rights Committee in Human Rights Committee, *General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993, adopted 30 July 1993). Criteria for the permissible limitation of rights are further elaborated on in the Siracusa Principles.

170 Siracusa Principles [10].

171 Human Rights Committee, *General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993, adopted 30 July 1993) [8]. For further discussion of limitation criteria and interpretive principles, see **Chapters 10 and 11**.

4.114 **Necessary:** Applying the Siracusa Principles, any limitation on the freedom to manifest religion or belief under [Recommendation 1](#) would be necessary for several reasons:

- The limitation would be **based on one of the grounds justifying limitations**: the conduct of religious educational institutions (as is the case with other institutions), including policies and practices relating to the provision of education and to employment, has the potential to limit a range of human rights, including all rights considered in this section. Protection of the ‘fundamental rights and freedoms of others’ is a ground for justifying limitation under art 18(3) of the ICCPR and art 14(3) of the CRC. All rights considered in this chapter, including the right to non-discrimination, the right to education, the right to health, and children’s rights are fundamental rights and freedoms.<sup>172</sup>
- The limitation would **respond to a pressing public or social need**: the potential harm caused by discrimination (generally) underpins prohibitions on discrimination in international and domestic law. Vulnerable and historically marginalised populations, such as LGBTQ+ communities and students who are children, are particularly at risk of harm from discrimination on the basis of attributes protected under the *Sex Discrimination Act*.<sup>173</sup> Submissions, survey responses, consultations, and commentary demonstrate that there is substantial evidence of actual harm to LGBTQ+ students and staff as a result of discrimination.<sup>174</sup>
- The limitation would **pursue a legitimate aim**: [Recommendation 1](#) seeks to eliminate discrimination against students and staff in religious educational institutions, so far as possible, on the ground of sexual orientation, gender identity, marital or relationship status, and pregnancy (and on the ground of sex in relation to staff). This legitimate aim is reflected in the objects of the *Sex Discrimination Act*, which include giving effect to Australia’s obligations under CEDAW and other international instruments.<sup>175</sup>
- The limitation would be **proportionate to the legitimate aim** sought, including because:
  - the limitation would apply only to the extent necessary to promote the other rights of students in the provision of education, and staff in relation to employment;
  - the provision of education is a public good, particularly in the context of compulsory education, and religious educational institutions educate

172 Regarding the proper characterisation of such rights as ‘fundamental rights and freedoms’, see [Chapter 11](#) at [11.48].

173 For further detail on the vulnerability of LGBTQ+ communities, see [Chapter 3](#) at [3.55]–[3.69].

174 See [Chapter 3](#) at [3.58], [3.61], [3.63]–[3.67]; Australian Law Reform Commission, ‘What We Heard’ (Background Paper ADL2, December 2023) [25], [36]–[38], [41], [46], [51]–[56], [60], [83], [108].

175 *Sex Discrimination Act 1984* (Cth) s 3.

- over 30% of school-aged students in Australia and employ over 30% of staff in Australian schools;<sup>176</sup>
- children often do not themselves make a choice whether or not to be educated at a religious educational institution;<sup>177</sup>
- existing freedoms would remain in relation to the training of religious leaders, staff who train religious leaders, selection of people to perform duties in connection with religious observances, accommodation provided by charities, and staff positions involving residential care of children (such as in boarding schools);<sup>178</sup>
- under **Recommendation 7**, religious educational institutions would continue to be able to select staff for employment on the basis of religion, in good faith, for the purpose of building and maintaining a community of faith. In turn, this would enhance the parental liberty to choose an education for one's child in conformity with one's own religious or moral convictions, consistent with the evolving capacities of the child to exercise their rights;
- existing provisions dealing with indirect discrimination apply a reasonableness test which permits consideration of all relevant rights and interests in the event that the imposition or proposed imposition of a condition, requirement, or practice of a religious educational institution has, or is likely to have, a disadvantaging effect on relevant grounds under the *Sex Discrimination Act*. Where reasonable in all the circumstances and not directly discriminatory, the condition, requirement, or practice will not constitute discrimination;<sup>179</sup> and
- the retention of exceptions is inconsistent with Australia's positive obligations in addressing discrimination and stereotypes in education.<sup>180</sup>

4.115 **Table 4.1** sets out some additional relevant factors in assessing the proportionality of **Recommendation 1** in pursuing a legitimate aim.<sup>181</sup>

176 See **Chapter 3** at [3.10]–[3.14].

177 See Australian Law Reform Commission, 'What We Heard' (Background Paper ADL2, December 2023) [101].

178 For discussion on the recommendation to amend ss 37(1)(b) and 23 of the *Sex Discrimination Act*, see below.

179 For further discussion on the indirect discrimination test in the *Sex Discrimination Act*, see below at [4.156]–[4.162].

180 CEDAW art 10. See also Equal Rights Trust and Office of the United Nations High Commissioner for Human Rights (n 74) 192.

181 The additional relevant factors considered in relation to proportionality draw on guidance from the Parliamentary Joint Committee on Human Rights, which elaborates on the Siracusa Principles and authoritative statements regarding international law: see Parliamentary Joint Committee on Human Rights (Cth), *Guidance Note 1: Draft Statements of Compatibility* (December 2014). For example, the importance of considering alternative less restrictive measures when applying a limitation is set out in the Siracusa Principles [11]. See further **Chapter 10** at [10.19].

**Table 4.1: Proportionality of the recommended limitation on the freedom to manifest religion or belief**

<b>Alternative less restrictive measures</b>	<p>The ALRC does not consider that there are any alternative measures that would restrict the freedom to manifest religion or belief to a lesser extent, while promoting the realisation of other rights to the same extent. In particular, the ALRC anticipates that alternative reforms proposed by some stakeholders that may restrict the freedom to manifest religion or belief to a lesser extent would have the effect of maintaining existing restrictions on other rights.<sup>182</sup></p> <p>For example, some submissions suggested that exceptions for religious educational institutions should be retained in the <i>Sex Discrimination Act</i> because students and staff have a ‘right to exit’ those institutions.<sup>183</sup> The UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity has recognised that</p> <p style="padding-left: 40px;">while persons have a right to exit the community, this remedy does not always address the complex relationship between a believer and their religion. For many individuals, their religion is part of the foundation of their sense of self, the source of truth. Although they may disagree with certain tenets of their religious teaching, or with the ways in which religious authorities interpret these, it is an important part of their identity and social fabric. To leave, and sometimes be forced to leave because of exclusionary practices or teachings can have significant implications for identity and spiritual wellbeing.<sup>184</sup></p>
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182 For discussion of alternative reforms proposed by stakeholders, see [Chapter 5](#) at [5.51]–[5.66].

183 A Deagon, *Submission 4*; Australian Federation of Islamic Councils, *Submission 84*; R Barnett, *Submission 122*; Anglican Church Diocese of Sydney, *Submission 189*; HillSide Christian College Association and Board of Governance, *Submission 338*; Christian Voice Australia & CitizenGo, *Submission 378*; I Benson, *Submission 413*. A detailed analysis of submissions that discussed religious educational institutions as voluntary associations is set out in Australian Law Reform Commission, ‘What We Heard’ (Background Paper ADL2, December 2023) [97]–[101].

184 Human Rights Council, *Freedom of Religion or Belief, and Freedom from Violence and Discrimination Based on Sexual Orientation and Gender Identity*, 53rd sess, UN Doc A/HRC/53/37 (7 June 2023) [51].

<b>Effective safeguards and controls</b>	Sufficient safeguards are in place to ensure that the recommended reforms do not unduly restrict the freedom to manifest religion or belief. There is no evidence that the removal of equivalent exceptions from the laws of some states and territories has unduly restricted this freedom. Furthermore, the Australian Human Rights Commission would be well placed to assess and report on the ultimate impact of the legislative amendments on religious educational institutions, to conciliate complaints against institutions that are brought to it, and to grant temporary exemptions to any institutions that require additional time to comply with new legal requirements.
<b>The extent of the interference with human rights</b>	The interference with the freedom to manifest religion or belief would be limited to the extent necessary to protect the rights of others in the provision of education and employment in educational institutions. The ALRC acknowledges that religious beliefs are often deeply held and that any perceived interference with the freedom to manifest religion or belief may cause substantial distress to many individuals.
<b>Whether affected groups are particularly vulnerable</b>	Religious minorities, including religious communities that are also cultural minorities, may be susceptible to intersectional discrimination on the basis of race and religion. <sup>185</sup> The rights of individual members of such groups (and to a degree the collective) are protected under international law. <sup>186</sup> The suite of reforms recommended by the ALRC, including <b>Recommendation 7</b> , seeks to ensure that religious educational institutions constituted by religious and cultural minority groups can flourish and function as communities of faith.

185 Committee on the Elimination of Racial Discrimination, *General Recommendation No 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms Racial Discrimination*, 75th sess, UN Doc CERD/C/GC/32 (24 September 2009) [7]; Equal Rights Trust and Office of the United Nations High Commissioner for Human Rights (n 74) xii, xxii, xxiv, 4–5.

186 See ICCPR art 27; CRC art 30; CADE art 5(1)(c); *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, GA Res 47/135, 47th sess, UN Doc A/RES/47/135 (3 February 1993, adopted 18 December 1992).

<p><b>Sufficient flexibility to treat different cases differently</b></p>	<p>The suite of recommended reforms seeks to ensure that sufficient flexibility is retained for different institutions to operate appropriately in their particular circumstances. Religious educational institutions would still be able to rely upon applicable general exceptions in the <i>Sex Discrimination Act</i> relating to direct discrimination. In addition, in relation to indirect discrimination, religious educational institutions (like any other educational institution) would continue to be able to impose or propose to impose a condition, requirement, or practice that has, or is likely to have, a disadvantaging effect, if the condition, requirement, or practice is reasonable in the circumstances (including consideration of whether the condition, requirement, or practice is proportionate to the result sought).</p>
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4.116 Given all matters considered in the assessment of **Recommendation 1** against the limitation criteria in art 18(3) of the ICCPR and art 14(3) of the CRC, the ALRC considers that **Recommendation 1** would be an acceptable limitation on the manifestation of religion or belief, and would be compatible with Australia's obligations under international law in this regard.

### ***Parental liberty***

4.117 The liberty held by parents (and guardians) to choose an education for their child in conformity with their own religious or moral convictions, and consistent with the evolving capacities of the child to exercise their rights, is recognised under multiple treaties in connection with the right to education and the freedom to manifest religion or belief.<sup>187</sup> This right flows from the 'guarantees of the freedom to teach a religion or belief' protected under art 18(1) of the ICCPR.<sup>188</sup>

4.118 Submissions from religious bodies, peak educational bodies, advocacy groups, and several individuals highlighted the importance of respecting parental liberties.<sup>189</sup> This was the sole right identified in many survey responses and submissions to this Inquiry.

187 ICCPR art 18(4); ICESCR art 13(3); CADE art 5(b), read in light of art 14(2) of the CRC. A detailed analysis of this right is set out in **Chapter 11** at [11.71]–[11.101].

188 Human Rights Committee, *General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993, adopted 30 July 1993) [6].

189 See, eg, Australian Union Conference of Seventh-day Adventists, *Adventist Schools Australia, Submission 138*; Anglican Youthworks, *Submission 176*; Presbyterian Church of Australia, *Submission 186*; Anglican Church Diocese of Sydney, *Submission 189*; Association of Heads of Independent Schools of Australia, *Submission 196*; Freedom for Faith, *Submission 203*; Catholic Education Tasmania, *Submission 397*.

4.119 In consultations, the ALRC heard a range of views from parents about students and staff in religious educational institutions. Parents did not express support for discrimination against students on grounds contained in the *Sex Discrimination Act*. In addition, recent research suggests that only a small minority of parents with children attending religiously affiliated schools in Australia are unsupportive of relationships education that is 'inclusive to all students', regardless of gender identity and sexual orientation, and that seeks to reduce homophobia and transphobia.<sup>190</sup>

4.120 The ALRC received submissions and survey responses suggesting that the parental liberty (to ensure the religious and moral education of one's children in conformity with one's own convictions) is closely connected to the ability of an institution to select staff on the basis that staff authentically model the religious beliefs of a school.<sup>191</sup> Other parents expressed a view that having teachers who represent diverse identities supports student wellbeing within religious schools.<sup>192</sup> Some submissions maintained that the removal of exceptions currently afforded to religious educational institutions would result in the secularisation of schools with a religious character, and would undermine the ability of these institutions to give effect to parental liberties.<sup>193</sup>

4.121 **Recommendation 7** aims to ensure that religious educational institutions retain the ability to select staff on the basis of religion, in good faith, for the purpose of building and maintaining a community of faith and, in this way, to enhance the parental liberty to ensure the religious and moral education of one's children in conformity with one's own convictions.

4.122 Drawing on a statement in General Comment No 22 of the Human Rights Committee that the parental liberty to ensure the religious and moral education of one's children in conformity with one's own convictions 'cannot be restricted', the Presbyterian Church of Victoria stated in its submission that this parental liberty is absolute.<sup>194</sup> However, UN treaty bodies, special rapporteurs, and other experts have made comments indicating that, in practice, the scope and application of parental liberty must be interpreted and, if necessary, restricted in light of a number of other rights.<sup>195</sup> A literal reading of the statement in General Comment No 22, in isolation, would lead to anomalous results, given that all other forms of manifesting religion or belief can justifiably be limited in accordance with criteria set out in art 18(3) of

190 Jacqueline Hendriks et al, 'Parental Attitudes toward Sexual Orientation and Gender Diversity: Challenging LGBT Discrimination in Australian Schools' (2023, under review, doi:10.31235/osf.io/futgx). See further **Chapter 3** at [3.38].

191 See, eg, D Walter, *Submission 199*. The issue of authenticity within communities is addressed in Australian Law Reform Commission, 'What We Heard' (Background Paper ADL2, December 2023) [31], [40]. This Background Paper also synthesises views shared by parents in relation to the reforms proposed in **Recommendation 1**.

192 See Australian Law Reform Commission, 'What We Heard' (Background Paper ADL2, December 2023) [69].

193 See, eg, M Fowler, *Submission 201*.

194 Presbyterian Church of Victoria, *Submission 195*. See also G & N Dethlefs, *Submission 36*, which stated that 'parents have the absolute right to educate their children in the way they see fit'.

195 See **Chapter 11** at [11.93]–[11.101].



the ICCPR. The ALRC's detailed analysis of this liberty in **Chapter 11**, and below, reflects the view that parental liberty is not absolute.<sup>196</sup>

4.123 Under the ICESCR and CADE, parental liberty sits alongside and, in effect, is restricted by, the state's duty to:

- ensure minimum education standards; and
- give effect to the principles of non-discrimination and equality in education such that 'the liberty set out in article 13(4) [of the ICESCR] does not lead to extreme disparities of educational opportunity for some groups in society'.<sup>197</sup>

4.124 In light of these duties of the state set out in CADE and the ICESCR, **Recommendation 1** would enshrine equality and a prohibition on discrimination as minimum education standards applicable to all educational institutions, as provided for by the *Sex Discrimination Act*. Accordingly, **Recommendation 1** recognises a scope of parental liberty that does not lead to a disparity in educational opportunities (for example, for students who are LGBTQ+, pregnant, or in a de facto relationship).

4.125 **Recommendation 1** would reinforce parental rights by enabling some parents (including parents whose children are LGBTQ+) greater freedom to enrol their child in a school that aligns with the parent's religious beliefs. In contrast, s 38 of the *Sex Discrimination Act* may currently limit parental choice, to the extent that discriminatory conduct in some religiously affiliated schools may make those schools unavailable or less welcoming for some religious and non-religious families.<sup>198</sup>

4.126 However, to the extent that the parental liberty to choose an education for one's child in conformity with one's own religious or moral convictions might be restricted under **Recommendation 1**, this limitation must be justified under international law.

4.127 On the basis that parental liberty is related to the guarantee of the freedom to teach a religion protected under art 18(1) of the ICCPR,<sup>199</sup> this right may only be limited in strict accordance with the criteria in art 18(3). The Human Rights Committee has not, to date, had cause to apply the limitation criteria set out in art 18(3) to alleged infringements of the parental liberty under art 18(4). While there is no directly relevant jurisprudence from the Human Rights Committee in this regard, there is jurisprudence from the ECtHR that establishes, under the ECHR, that a parent's right to freedom of religion (in the context of their child's education) may permissibly

196 Ibid.

197 Committee on Economic, Social and Cultural Rights, *General Comment No 13: The Right to Education (Article 13 of the Covenant)*, 21st sess, UN Doc E/C.12/1999/10 (8 December 1999) [29]–[30].

198 See Australian Law Reform Commission, 'What We Heard' (Background Paper ADL2, December 2023) [95].

199 Human Rights Committee, *General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993, adopted 30 July 1993) [6].

be restricted in strict accordance with limitation criteria that are equivalent to those in art 18(3) of the ICCPR.<sup>200</sup>

4.128 A limitation of parental liberty under **Recommendation 1** is justified for the same reasons as the permissible limitation on the freedom to manifest religion set out above.<sup>201</sup>

4.129 **Recommendation 1** would not prevent children from being educated in conformity with their parent's religious and moral convictions (in schools or in other educational settings), particularly in light of **Recommendation 7**. **Recommendation 1** would mean that students may be exposed to different viewpoints within their educational and faith community, which is an express aim of education under art 29(1)(d) of the CRC. The ALRC acknowledges that some survey responses expressed the view that religious schools should be able to serve as 'shelters' from the secular world to support a child's identity formation in alignment with particular religious values and beliefs.<sup>202</sup>

4.130 In summary, the ALRC considers that **Recommendation 1** would reinforce parental liberty for some parents and would restrict parental liberty for other parents. To the extent that this liberty is restricted, such limitation would be permissible under international law. **Recommendation 1**, therefore, is compatible with Australia's obligations under international law in relation to this right.

### **Overall analysis under international law**

4.131 As foreshadowed earlier in this chapter, the ALRC has taken into consideration the anticipated impact of **Recommendation 1** on each of the individual rights examined above, and on the overall realisation of human rights.

4.132 The analysis of each right examined suggests that realisation of those rights would be promoted by **Recommendation 1** in various ways. In particular, there is a strong basis for concluding that rights to non-discrimination, education, work, health, privacy, children's rights, and freedom of expression would be promoted. Relatedly, it is anticipated that the potential for harm under the existing exceptions in the *Sex Discrimination Act* would be reduced.

200 See *Osmanoğlu and Kocabaş v Switzerland* (European Court of Human Rights, Court (Third Section), Application No 29086/12, 10 January 2017). See also *Konrad v Germany* (European Court of Human Rights, Court (Fifth Section), Application No 35504/03, 11 September 2006) [1]. However, in that case, the Court declared the application in this matter inadmissible. For discussion of these cases and other relevant jurisprudence, see further **Chapter 11** at [11.95].

201 See above at [4.113]–[4.116].

202 See Australian Law Reform Commission, 'What We Heard' (Background Paper ADL2, December 2023) [111].

4.133 For those rights that might in some ways be limited by **Recommendation 1** for some people (namely, the freedom to manifest religion or belief in community with others and the associated parental liberty to choose an education for one's child in conformity with one's own religious or moral convictions), the limitations would be justified under international law as a necessary and proportionate means of promoting other human rights. For some people, the freedom to manifest religion or belief and the associated parental liberty would be promoted by **Recommendation 1**. Religious educational institutions would, in any event, retain their ability to build a community of faith through the selection of staff pursuant to **Recommendation 7**.

4.134 The available evidence clearly demonstrates the potential for harm to students and staff in religious educational institutions, who currently have very limited protection from discrimination because of existing exceptions provided by the *Sex Discrimination Act*. The potential for harm to students and staff is far greater than the potential for harm — if those exceptions were to be narrowed as recommended — to people involved in religious educational institutions who are concerned to ensure the maintenance of the religious ethos of those institutions. Consequently, from the perspective of the overall impact on the realisation of human rights, **Recommendation 1** would enhance the realisation of human rights.

4.135 Another indication of consistency with international law is that the approach taken in **Recommendation 1** is generally in line with the existing legal position in the majority of Australian states and territories, and in many overseas jurisdictions, including those with significant human rights scrutiny through regional human rights courts.

4.136 In addition, the Australian Human Rights Commission, in its submission, supported the ALRC's analysis of relevant international law in the *Consultation Paper*.<sup>203</sup>

## Consistency with the Australian Constitution

4.137 A small number of submissions suggested that implementation of the proposals in the *Consultation Paper* would result in legislative amendments that may violate s 116 of the *Australian Constitution*, on the ground that they interfere with the free exercise of religion.<sup>204</sup> For example, Deagon submitted:

Passing a law to remove the religious exemptions in the *Sex Discrimination Act* is likely to breach the clause, unless legislation providing equivalent rights is passed in their place. ... Since staff and students of religious educational institutions engage in or receive, at the very least, the teaching and propagation of religion, the ability of these institutions to select staff consistent with their religious convictions and regulate their teaching of students comes within the ambit of free exercise.<sup>205</sup>

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203 Australian Human Rights Commission, *Submission 384*.

204 See, eg, A Deagon, *Submission 4*; Anglican Church Diocese of Sydney, *Submission 189*.

205 A Deagon, *Submission 4*.

4.138 This issue has also been raised in previous inquiries. Some have argued that removing exceptions for religious educational institutions might be unconstitutional,<sup>206</sup> while others have argued that the existing exceptions are themselves contrary to s 116 of the *Australian Constitution*.<sup>207</sup> For example, Dr Jones argued that the exceptions might amount to imposing a religious observance, or imposing a religious test for qualifying to work in Commonwealth-funded religious educational institutions.<sup>208</sup> The Senate Legal and Constitutional Affairs References Committee noted that these 'varying positions indicate that the constitutionality of the existing provisions in the [*Sex Discrimination Act*], and any proposed changes to the [Act], remains a matter of some debate'.<sup>209</sup>

4.139 Section 116 of the *Australian Constitution* contains a number of prohibitions that restrict the kinds of laws the Commonwealth can make in relation to religion. One of those restrictions is that the Commonwealth shall not make any law 'prohibiting the free exercise of any religion'. As discussed further in **Chapter 13**, the High Court has held that s 116 of the *Constitution* is directed at laws that have an explicit aim that is prohibited, rather than laws that have an indirect effect in relation to a prohibited aim.<sup>210</sup> Additionally, conduct engaged in to give effect to a religious belief will be 'outside the area of any immunity, privilege or right conferred on the grounds of religion' where it 'offends against the ordinary law'.<sup>211</sup> Moreover, 'general laws to preserve and protect society are not defeated by a plea of religious obligation to breach them'.<sup>212</sup>

4.140 **Recommendation 1** has the direct aim of prohibiting discrimination on the grounds contained in the *Sex Discrimination Act*. If implemented, it would apply equally to everyone and would not target religion or a specific religion. Rather, any effect on the free exercise of religion would be an indirect effect of the aim of prohibiting discrimination, by narrowing exceptions currently provided by the *Sex Discrimination Act*. As such, if implemented, **Recommendation 1** would not be unconstitutional under s 116 of the *Australian Constitution*.

206 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia (n 24) 81–2 [50]–[53] (Dissenting Report by Coalition Senators). It is relevant to note that the High Court has held that a plenary power to legislate with respect to a particular subject matter 'carries with it the power to repeal or amend existing laws' with respect to that subject-matter: *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 [47] (Gaudron J).

207 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia (n 24) 25–7 [2.21]–[2.27].

208 Ibid 26 [2.22].

209 Ibid 27 [2.27].

210 See *Kruger v Commonwealth* (1997) 190 CLR 1, 40 (Brennan CJ), 86 (Toohey J), 133–4 (Gaudron J), 161 (Gummow J); *Minister for Immigration and Ethnic Affairs v Lebanese Moslem Association* (1987) 17 FCR 373, 378, 388 (Jackson J); *A-G (Vic); Ex Rel Black v Commonwealth* (1981) 146 CLR 559; *Cheedy v Western Australia* (2011) 194 FCR 562 [88]–[89]. See also Carolyn Evans, *Legal Protection of Religious Freedom in Australia* (Federation Press, 2012) 74–9.

211 *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 136 (Mason ACJ, Brennan J).

212 Ibid 136.

## State and territory laws: students

4.141 In relation to students, the repeal of s 38(3) of the *Sex Discrimination Act* would align with laws in the ACT, Queensland, SA, Tasmania, Victoria, and the NT,<sup>213</sup> where it is unlawful to discriminate against students or prospective students on the basis of sex, sexual orientation, gender identity, marital or relationship status, and pregnancy.<sup>214</sup>

4.142 Removal of s 38(3) would contrast with laws in NSW where prohibitions on discrimination on the grounds of sex,<sup>215</sup> homosexuality,<sup>216</sup> 'transgender grounds',<sup>217</sup> marital or domestic status,<sup>218</sup> and pregnancy<sup>219</sup> do not apply to private educational authorities. It would also contrast with laws in WA where religious educational institutions may discriminate against students and prospective students on protected grounds (including sex, marital status, pregnancy, gender history, and sexual orientation)<sup>220</sup> when it is in

good faith in favour of adherents of that religion or creed generally, but not in a manner that discriminates against a particular class or group of persons who are not adherents of that religion or creed.<sup>221</sup>

4.143 However, the WA Government is considering a recommendation to remove exceptions in relation to students on these grounds, and anti-discrimination law in NSW is currently under review by the NSW Law Reform Commission.<sup>222</sup>

4.144 Consequently, the repeal of s 38(3) of the *Sex Discrimination Act* would have little practical effect for religious educational institutions in the provision of education in most jurisdictions within Australia because state and territory anti-discrimination laws operate concurrently with the *Sex Discrimination Act*.<sup>223</sup>

213 *Discrimination Act 1991* (ACT) ss 7, 18; *Anti-Discrimination Act 1991* (Qld) ss 7, 38–39; *Equal Opportunity Act 1984* (SA) s 37; *Anti-Discrimination Act 1998* (Tas) ss 16, 22(1)(b); *Equal Opportunity Act 2010* (Vic) ss 6, 38; *Anti-Discrimination Amendment Act 2022* (NT) (repealing s 37A); *Anti-Discrimination Act 1992* (NT) ss 19, 29.

214 See [Table 12.4](#) in [Chapter 12](#) and [Appendix E](#).

215 *Anti-Discrimination Act 1977* (NSW) s 31A(3)(a).

216 *Ibid* s 49ZO(3).

217 *Ibid* s 38K(3).

218 *Ibid* s 46A(3).

219 'Pregnancy' is treated as a characteristic of sex and the law states that pregnancy 'is a characteristic that appertains generally to women': *ibid* ss 24(1A)–(1B), 31A(3)(a).

220 *Equal Opportunity Act 1984* (WA) ss 8–10, 35AB, 35O.

221 *Ibid* s 73(3).

222 In 2022, the Law Reform Commission of WA recommended amendments to the *Equal Opportunity Act 1984* (WA) to narrow exceptions so that religious educational institutions may only discriminate in the provision of education and training on the basis of a person's religious conviction at the time of admission, and only in accordance with certain criteria: see Law Reform Commission of Western Australia, *Project 111: Review of the Equal Opportunity Act 1984 (WA)* (Final Report, May 2022) 187, rec 81. In July 2023, the NSW Law Reform Commission commenced a review of the *Anti-Discrimination Act 1977* (NSW): Law Reform Commission of NSW, 'Terms of Reference' <[www.lawreform.nsw.gov.au/current-projects/anti-discrimination-act-review/anti-discrimination-act-review-terms-of-reference.html](http://www.lawreform.nsw.gov.au/current-projects/anti-discrimination-act-review/anti-discrimination-act-review-terms-of-reference.html)>.

223 See further [Chapter 13](#).

However, **Recommendation 1** would, at present, have the effect of introducing new prohibitions on discrimination in relation to students of religious educational institutions located in NSW and WA.

### State and territory laws: staff

4.145 In relation to staff, the repeal of ss 38(1) and (2) of the *Sex Discrimination Act* would be consistent with existing law in the ACT, Tasmania, and, more recently, Victoria and the NT.<sup>224</sup>

4.146 While laws in WA and Queensland currently contain exceptions relevant to religious educational institutions regarding the prohibition on discrimination against staff,<sup>225</sup> both states are considering law reform proposals to remove these exceptions which would create even greater coherence.<sup>226</sup>

4.147 Removal of ss 38(1) and (2) of the *Sex Discrimination Act* is not consistent with anti-discrimination law in NSW, which affords ‘private educational authorities’ broad exceptions to prohibitions on discrimination against staff on the grounds of sex, homosexuality, transgender grounds, marital or domestic status, and pregnancy.<sup>227</sup> Removal of ss 38(1) and (2) of the *Sex Discrimination Act* is consistent — to a degree — with equal opportunity law in SA, which does not permit exceptions for religious educational institutions to the prohibition on discrimination against staff on the grounds of sex and pregnancy, but does allow narrow exceptions on the grounds of sexual orientation, gender identity, and domestic partnership status (in relation to same-sex domestic partners).<sup>228</sup>

4.148 Consequently, repeal of ss 38(1) and (2) of the *Sex Discrimination Act* would have little practical effect for religious educational institutions in relation to employment in many jurisdictions within Australia, because state and territory laws operate concurrently with the *Sex Discrimination Act*.<sup>229</sup> However, **Recommendation 1** would introduce new prohibitions on discrimination against staff for religious educational institutions located in, at least, NSW and SA, and potentially also in WA and Queensland, depending on the respective governments’ responses to recent reform recommendations.

224 *Discrimination Act 1991* (ACT) ss 7, 10, 13; *Anti-Discrimination Act 1998* (Tas) ss 16, 22(1)(a); *Equal Opportunity Act 2010* (Vic) ss 6, 16, 18, 21; *Anti-Discrimination Act 1992* (NT) ss 19, 31.

225 *Equal Opportunity Act 1984* (WA) ss 73(1)–(2); *Anti-Discrimination Act 1991* (Qld) s 25(1). It is noted that the exceptions in WA are broad, while those in Queensland are narrow: see **Table 12.5** in **Chapter 12** and **Appendix E**.

226 Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (Report, July 2022) rec 39.1; Law Reform Commission of Western Australia (n 222) rec 79.

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

228 *Equal Opportunity Act 1984* (SA) s 85Z(2).

229 See further **Chapter 13**.

4.149 Harmonising laws across jurisdictions is beneficial as it can support the development of norms and remove unjustified compliance burdens.<sup>230</sup> Several submissions highlighted the desirability of greater consistency between anti-discrimination laws in Australia.<sup>231</sup> For example, the Law Council of Australia and the Australian Discrimination Law Experts Group submitted that addressing the uneven protection of rights through greater coherence can aid maximal protection against discrimination.<sup>232</sup> The Australian Section of the International Commission of Jurists and International Commission of Jurists Victoria similarly submitted that ‘coherence is necessary for effective protection of human rights and the predictability, legitimacy, and fairness required of the rule of law’.<sup>233</sup>

### Comparable overseas jurisdictions

4.150 In relation to students, repeal of s 38(3) of the *Sex Discrimination Act* is consistent with legislation in at least England and Wales, Ireland, New Zealand, and Canada.<sup>234</sup> None of these jurisdictions has enacted specific exceptions for religious educational institutions to prohibitions on discrimination on protected grounds (such as those contained in the *Sex Discrimination Act*).<sup>235</sup> Canada and New Zealand both have general justification provisions that could potentially be applied to justify discrimination against students in religious educational institutions on grounds equivalent to those protected under the *Sex Discrimination Act*. However, these provisions have not been applied in that way to date.

4.151 Other jurisdictions have taken different approaches in relation to students that are less consistent with the first policy commitment in the Terms of Reference. For example, in the United States, the prohibition on discrimination does not apply to religious educational institutions if applying the prohibition ‘would not be consistent

230 See, eg, the discussion of compliance burdens through inconsistent and fragmented regulation in Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, vol 1 (Report No 108, 2008) [14.18].

231 Australian Discrimination Law Experts Group, *Submission 75*; L van Leent, M Jeffries, N Barnes and S Jowett, *Submission 158*; Australian Lawyers Alliance, *Submission 162*; Catholic Secondary Principals Australia, *Submission 363*; Diversity Council Australia, *Submission 398*; Australian Section of the International Commission of Jurists & International Commission of Jurists Victoria, *Submission 404*; Public Interest Advocacy Centre, *Submission 405*; Law Council of Australia, *Submission 428*.

232 Australian Discrimination Law Experts Group, *Submission 75*; Law Council of Australia, *Submission 428*.

233 Australian Section of the International Commission of Jurists & International Commission of Jurists Victoria, *Submission 404*.

234 Under European Union law, there is no prohibition on discrimination that is directed specifically to protection of students, although all European Union states are bound by obligations of equality and non-discrimination under the ECHR. For further detail on the law in these jurisdictions, and the ALRC’s reasons for considering these jurisdictions in detail, see Australian Law Reform Commission, ‘International Comparisons’ (Background Paper ADL1, November 2023).

235 In the UK, the prohibition on harassment of students does not apply in relation to the grounds of religion or belief, sexual orientation, or gender reassignment: *Equality Act 2010* (UK) ss 85(3), 85(10), 26(1).



with the religious tenets of such [an] organization' (even if the institution receives public funding).<sup>236</sup>

4.152 In relation to staff, the approach in **Recommendation 1** is consistent with approaches that have been adopted in some comparable overseas jurisdictions.

4.153 For example, **Recommendation 1** would be largely consistent with existing law in the European Union ('EU'), England and Wales, Ireland, and New Zealand. None of these jurisdictions has enacted exceptions for religious educational institutions to prohibitions on discrimination on protected grounds (such as those contained in the *Sex Discrimination Act*).<sup>237</sup>

4.154 Other jurisdictions have taken different approaches in relation to staff that are less consistent with the Terms of Reference. For example, religious educational institutions in the United States are permitted to preference staff on various grounds (including the ground of sex).<sup>238</sup> In Germany, domestic laws ostensibly provide for strong institutional autonomy in hiring that could justify giving preference to particular staff on various grounds. However, these laws have been read down as a result of the application of EU law so that the giving of preference must be subject to a proportionality analysis.<sup>239</sup>

4.155 Many jurisdictions have general employment exceptions that could potentially be applied to allow religious educational institutions to discriminate against staff on grounds similar to those contained in the *Sex Discrimination Act*. However, these

236 See *Title IX of the Education Amendments of 1972*, 20 USC § 1681(a)(3).

237 See further Australian Law Reform Commission, 'International Comparisons' (Background Paper ADL1, November 2023). In Canada, denominational schools have an exception which confers rights and privileges that existed at Confederation. This exception may permit indirect discrimination on grounds such as those contained in the *Sex Discrimination Act* (provided they go to the 'essential denominational nature' of the school). In addition, in Canada some legislative exceptions that permit any employer to discriminate on the ground of a person's religion have been interpreted broadly to allow what might otherwise be classed as indirect discrimination on other grounds (potentially including the ground of marital status).

238 *Title IX of the Education Amendments of 1972*, 20 USC § 1681(a)(3). See also *McClure v Salvation Army*, 460 F2d 553 (5th Cir, 1972). See further Australian Law Reform Commission, 'International Comparisons' (Background Paper ADL1, November 2023).

239 *IX v WABE eV*; and *MH Müller Handels GmbH v MJ* (Court of Justice of the European Union, C-804/18 and C-341/19, ECLI:EU:C:2021:594, 15 July 2021) [36], [84]; *IR v JQ* (Court of Justice of the European Union, Grand Chamber, C-68/17, ECLI:EU:C:2018:696, 11 September 2018); *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* (Court of Justice of the European Union, Grand Chamber, C-414/16, ECLI:EU:C:2018:257, 17 April 2018). See also Bundesarbeitsgericht [German Federal Labor Court], 8 AZR 501/14, ECLI:DE:BAG:2018:251018.U.8AZR501.14.0, 25 October 2018 and Bundesarbeitsgericht [German Federal Labor Court], 2 AZR 746/14, ECLI:DE:BAG:2019:200219.U.2AZR746.14.0, 20 February 2019, cited in Committee of Experts on the Application of Conventions and Recommendations, *Direct Request Comment on Convention No 111 – Germany* (109th ILC Session, 2021); Bundesverfassungsgericht [German Constitutional Court], 2 BVR 577/01, ECLI:DE:BVerfG:2004:rk20040310.2bvr057701, 10 March 2004, cited in *TC and UB v Komisja za zashtita ot diskriminatsia and VA (Opinion of Advocate General Saugmandsgaard Øe)* (Court of Justice of the European Union, C-824/19, ECLI:EU:C:2021:324, 22 April 2021).



provisions have not been applied in that way to date, except in Canada.<sup>240</sup> Such provisions include, for example, exceptions for genuine and determining occupational requirements (in the EU and Ireland), genuine occupational requirements (in England, Wales, and New Zealand), and bona fide occupational requirements (in Canada). Most of these exceptions apply in relation to all protected grounds, but generally require application of a proportionality test.<sup>241</sup>

### Indirect discrimination and the reasonableness test

4.156 Under s 7B of the *Sex Discrimination Act*, which deals with indirect discrimination, the imposition or proposed imposition of any condition, requirement, or practice that has, or is likely to have, a disadvantaging effect on grounds prohibited under the *Sex Discrimination Act* will not constitute indirect discrimination if the condition, requirement, or practice is reasonable in the circumstances.

4.157 Submissions from, and consultations with, religious educational institutions, religious bodies, and peak educational bodies emphasised that, while they do not want to discriminate, religious educational institutions need to be able to implement policies and practices within the school environment related to their religious beliefs<sup>242</sup> — for example, in relation to the implementation of behavioural rules,<sup>243</sup> in requiring staff to affirm a particular religious belief, or in relation to the requirements of teaching particular religious doctrines.

4.158 The reasonableness test in s 7B of the *Sex Discrimination Act* provides religious educational institutions with an appropriate framework to consider the different rights and interests to be taken into account when the religious beliefs and aims of the institution intersect with equality rights and anti-discrimination law. Consultations with religious educational institutions indicated that religious educational institutions already adopt case-specific, ‘pastoral’, and practical approaches in these areas (even in the minority of states where exceptions equivalent to s 38 of the Act have not been removed in state anti-discrimination law). These approaches, in many cases, already reflect the principles of reasonableness and proportionality underpinning the reasonableness test. This suggests that religious educational institutions are well placed for the normative shift proposed in [Recommendation 1](#).

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240 See Australian Law Reform Commission, ‘International Comparisons’ (Background Paper ADL1, November 2023) [123]–[140].

241 For a discussion of general employment exceptions in selected overseas jurisdictions, see Australian Law Reform Commission, ‘International Comparisons’ (Background Paper ADL1, November 2023).

242 Bishops of Australasian-Middle East Christian Apostolic Churches, *Submission 388*; Australian Catholic Bishops Conference, *Submission 406*.

243 Australian Catholic Bishops Conference, *Submission 406*.

**In focus: Reasonableness test**

Section 7B(2) of the *Sex Discrimination Act* includes a non-exhaustive list of the matters that a tribunal or court may take into account in deciding whether a condition, requirement, or practice is reasonable in the circumstances, including:

- the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement, or practice;
- the feasibility of overcoming or mitigating the disadvantage; and
- whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement, or practice.

In *Secretary, Department of Foreign Affairs & Trade v Styles*,<sup>244</sup> Bowen CJ and Gummow J articulated a useful 'starting point' for determining reasonableness:

As Wilcox J held [in *Styles v Secretary, Department of Foreign Affairs and Trade*]<sup>245</sup> the test of reasonableness is less demanding than one of necessity, but more demanding than a test of convenience. ... The criterion is an objective one, which requires the court to weigh the nature and extent of the discriminatory effect, on the one hand, against the reasons advanced in favour of the requirement or condition on the other. All the circumstances of the case must be taken into account.<sup>246</sup>

**Chapter 13** further outlines how courts and commentators have interpreted the reasonableness test in s 7B of the Act.

4.159 Some submissions expressed concern that the proposals in the *Consultation Paper* would effectively require courts to make determinations as to whether a particular religious belief is 'reasonable' or 'proportionate'.<sup>247</sup> However, under the reasonableness test relating to indirect discrimination, courts are required to assess the application of religious requirements in a particular educational context, in light

<sup>244</sup> *Secretary, Department of Foreign Affairs & Trade v Styles* (1989) 23 FCR 251, 263.

<sup>245</sup> *Styles v Secretary, Department of Foreign Affairs and Trade* (1988) 84 ALR 408, 429 (Wilcox J).

<sup>246</sup> *Secretary, Department of Foreign Affairs & Trade v Styles* (1989) 23 FCR 251, 263.

<sup>247</sup> See, eg, Institute of Public Affairs, *Submission 250*. Courts have been required, under some state laws, to assess whether particular conduct 'conforms' with a relevant religious doctrine: see, eg, *OV and OW v Members of the Board of the Wesley Mission Council* (2010) 79 NSWLR 606 and *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 308 ALR 615. **Recommendation 1** would not introduce any equivalent requirement into the *Sex Discrimination Act*, but rather the existing equivalent provision in s 37(1)(d) of the Act would no longer apply in relation to religious educational institutions.

of all the relevant circumstances, and not to decide whether any particular religious doctrine itself is reasonable or proportionate.<sup>248</sup>

4.160 Some organisations told the ALRC that they were concerned that a test based on reasonableness and proportionality would prove difficult for religious educational institutions to apply and that there was a need for greater certainty in the law.<sup>249</sup> In this respect, however, it is important to note that in the majority of states and territories, religious educational institutions are already subject to very similar requirements under their existing state or territory anti-discrimination law. Even outside of those states and territories, requiring religious educational institutions to consider reasonableness and proportionality of their policies and practices in light of discrimination provisions would simply subject them to the same requirements as all other educational institutions (and indeed all persons). It is relevant to note here that by reason of s 47C of the *Sex Discrimination Act*, educational institutions (like all employers) now have a positive duty to take reasonable and proportionate measures to eliminate, as far as possible, unlawful discrimination on the ground of sex.

4.161 Nevertheless, it would be useful for the Australian Government and related bodies to issue further guidance. For instance, were **Recommendation 1** to be implemented, there would be benefit in having guidance in extrinsic materials, such as an explanatory memorandum and statement of compatibility, which would assist to communicate the Commonwealth Parliament's intent on how indirect discrimination provisions and the reasonableness test would apply in particular scenarios common to religious educational institutions. Guidance could include discussion of relevant case law and illustrative examples, and may support the development of further guidance (such as case studies) by organisations such as the Australian Human Rights Commission under **Recommendation 10**.<sup>250</sup>

4.162 In formulating guidance, the Australian Human Rights Commission should consider the extent to which it could set out examples of factors that a court might consider to be relevant when assessing reasonableness (including proportionality), as understood under s 7B of the *Sex Discrimination Act*. Any assessment of reasonableness and proportionality is necessarily context-specific, and guidance material could not purport to prescribe or limit such an assessment. However, some

248 See, for example, *Arora v Melton Christian College* [2017] VCAT 1507, in which the Victorian Civil and Administrative Tribunal considered the reasonableness of a school's uniform policy which expressly disallowed non-Christian head coverings. See **Case study: Uniform requirements** in **Chapter 5** for further discussion of this case in the context of indirect discrimination.

249 Australian Discrimination Law Experts Group, *Submission 75*; Islamic Society of South Australia, *Submission 389*; National Catholic Education Commission, *Submission 409*. For elaboration on the concerns expressed in submissions regarding a need for clarity and coherence in the law, see also Australian Law Reform Commission, 'What We Heard' (Background Paper ADL2, December 2023) [119]–[126].

250 See, eg, Explanatory Memorandum, Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022; Australian Human Rights Commission, *Guidelines for Complying with the Positive Duty under the Sex Discrimination Act 1984 (Cth)* (August 2023). The utility of using explanatory memoranda and second reading speeches to interpret amended provisions in the *Equal Opportunity Act 2010* (Vic) was recently demonstrated by the Victorian Supreme Court in *Austin Health v Tsikos* [2023] VSCA 82; 324 IR 1 [19]–[21].

existing guidance material published by the Australian Human Rights Commission does outline what might be considered relevant to an assessment of reasonableness or proportionality.<sup>251</sup> Accordingly, the Australian Human Rights Commission could consider (including in light of the extrinsic materials accompanying the relevant Bill) whether guidance materials could list some or all of the following as factors that a court might consider to be relevant in all the circumstances of a particular case:

- whether the condition, requirement, or practice is founded in and consistent with the established doctrines, tenets, beliefs, practices, or teachings of the religion of the institution;
- the harm (including psychological damage, particularly to any student) that has been or is likely to be caused or brought about by the condition, requirement, or practice;
- the nature of the institution, including the extent to which religious beliefs, practices, or teachings are infused throughout the activities of the institution or a part thereof;
- whether the institution is conducted primarily or solely for students from an ethnic, religious, or linguistic minority, or for Aboriginal or Torres Strait Islander children;
- the extent to which the institution prioritises the enrolment of students belonging to a particular religious community;
- the location of the institution and the realistic availability and accessibility of other comparable educational and employment opportunities for students and staff respectively;
- the specific ways in which the requirement, condition, or practice reinforces or maintains the religious nature of the institution; and
- whether the imposition of the condition, requirement, or practice is of significance for any objective of the religious educational institution to build a community of faith.

## Amendment of section 37

4.163 This part summarises the existing effect of the exception in s 37(1)(d) of the *Sex Discrimination Act*, and the anticipated legal effect of excluding religious educational institutions from this exception under [Recommendation 1](#).

4.164 The extent to which the provisions of s 37(1) of the *Sex Discrimination Act* apply in relation to religious educational institutions is not clear and requires clarification given the dearth of jurisprudence and other authoritative material in interpreting this provision.

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251 See, eg, Australian Human Rights Commission (n 250) 18: 'It may be reasonable for smaller organisations and businesses to have less formal measures in place to eliminate relevant unlawful conduct than a large organisation or business'.

4.165 On its face, s 37(1)(d) of the *Sex Discrimination Act* currently applies to all religious bodies, such that the prohibitions on discrimination in the Act do not apply to

any other act or practice of a body established for religious purposes ... 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.

4.166 While there is no jurisprudence clarifying the application of s 37(1)(d) to religious educational institutions, there is a risk that it could be read that way in the absence of s 38.

### Submissions and brief responses

4.167 Submissions from the Australian Human Rights Commission, Law Council of Australia, Australian Discrimination Law Experts Group, and Equality Australia identified that amendment of s 37(1)(d) of the *Sex Discrimination Act* would be a necessary corollary to the repeal of s 38 of the Act.<sup>252</sup> These submissions highlighted the ambiguity arising from the broad language in s 37(1)(d), and sought to ensure that it did not apply to religious educational institutions in the absence of s 38.

4.168 In contrast, submissions that explicitly opposed any amendment to s 37(1)(d) of the *Sex Discrimination Act* did so on the basis that religious educational institutions should continue to be excepted from prohibitions on discrimination against staff and students.<sup>253</sup> No submission suggested that it would be inappropriate to amend s 37(1)(d) as a corollary to the repeal of s 38.

4.169 Freedom for Faith submitted that s 37(1)(d) of the *Sex Discrimination Act* is necessary in tertiary institutions, for example, to protect the right of bible colleges to maintain their staffing practices and codes of conduct.<sup>254</sup> This concern was not raised directly by tertiary institutions. The ALRC considers that the exceptions in ss 37(1)(a) and (b) of the Act appropriately accommodate the needs of theological colleges (see [Recommendation 2](#)).

### Legal impact of reform

4.170 If s 37(1)(d) of the *Sex Discrimination Act* were retained in its current form and applied in relation to a wide range of religious educational institutions, it could, in effect, facilitate discriminatory conduct that is sought to be prohibited by the repeal of s 38 under [Recommendation 1](#).

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252 Australian Discrimination Law Experts Group, *Submission 75*; Equality Australia, *Submission 375*; Australian Human Rights Commission, *Submission 384*; Law Council of Australia, *Submission 428*. This recommendation was also supported by Anglican Social Responsibilities Commission, Diocese of Perth *Submission 98*; Not published, *Submission 297*; Independent Education Union, *Submission 387*; NSW Council for Civil Liberties, *Submission 407*.

253 See, eg, P Quin, *Submission 79*.

254 Freedom for Faith, *Submission 203*.

4.171 **Recommendation 1** would give effect to the Australian Government's first policy position in the Terms of Reference, by ensuring that the exception in s 37(1)(d) of the *Sex Discrimination Act* would not, following any repeal of s 38 of the Act, be read to apply to religious educational institutions.

4.172 Previous reform initiatives have similarly proposed to limit the operation of s 37(1)(d) of the *Sex Discrimination Act*, alongside the repeal of s 38(3). For example, the Explanatory Memorandum for the Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018 (Cth) identified that limiting the operation of s 37(1)(d) was necessary to remove the capacity of religious educational institutions to discriminate against students.

4.173 The exception in s 37(1)(d) applies in respect of all grounds of discrimination prohibited under the *Sex Discrimination Act*, and not just in respect of the particular grounds listed in the Terms of Reference. Accordingly, if **Recommendation 1** were implemented, s 37(1)(d) would not provide an exception for religious educational institutions in respect of any of the prohibited grounds of discrimination under the *Sex Discrimination Act*. The ALRC has proceeded on the basis that this is consistent with the Australian Government's policy position, even though the Terms of Reference expressly refer only to those grounds of discrimination that are currently listed in s 38 of the *Sex Discrimination Act*.<sup>255</sup>

## Consistency with international law

4.174 The above analysis of international law in relation to repealing s 38 of the *Sex Discrimination Act* similarly applies to excluding religious educational institutions from the operation of s 37(1)(d) of the Act. This reform would be consistent with Australia's international legal obligations and would maximise the realisation of relevant human rights and restrict some rights for some people only in strict accordance with limitation criteria under international law.

## State and territory laws

4.175 Most state and territory anti-discrimination laws contain a religious bodies exception identical or similar to s 37(1)(d) of the *Sex Discrimination Act*.<sup>256</sup> Both the ACT and Queensland statutes expressly exclude religious educational institutions from the scope of this exception, and Victorian legislation omits this

<sup>255</sup> Other recommended reforms that would, in effect, prohibit discrimination on more grounds under the *Sex Discrimination Act* than those expressly listed in the **Terms of Reference** are the recommended amendment to s 23 of the *Sex Discrimination Act* (see below at [4.181]–[4.197]), and **Recommendations 3–7**. No stakeholder suggested that religious educational institutions seek to be, or should be, the subject of exceptions relating to prohibited grounds of discrimination not listed in the **Terms of Reference**, such as intersex status, breastfeeding, potential pregnancy, or family responsibilities.

<sup>256</sup> *Anti-Discrimination Act 1977* (NSW) s 56(d); *Anti-Discrimination Act 1991* (Qld) s 109(1)(d); *Anti-Discrimination Act 1992* (NT) s 51(d); *Discrimination Act 1991* (ACT) s 32(1)(d); *Equal Opportunity Act 1984* (WA) s 72(d); *Equal Opportunity Act 1984* (SA) s 50(c).

exception altogether.<sup>257</sup> The WA Government is currently considering reforms to the *Equal Opportunity Act 1984* (WA), recommended by the Law Reform Commission of WA, to amend the religious bodies exception in s 72(d) of that Act to create three provisions that apply specifically to religious bodies (not religious educational institutions).<sup>258</sup> Consequently, excluding religious educational institutions from the exception in s 37(1)(d) of the *Sex Discrimination Act* would achieve greater alignment with some current state and territory laws, but not others.

### Section 37(1)(c)

4.176 The Law Council of Australia raised concerns about the scope of s 37(1)(c) of the *Sex Discrimination Act* and its application to religious observances and practices carried out by some religious educational institutions.<sup>259</sup>

4.177 Section 37(1)(c) of the *Sex Discrimination Act* states that the prohibitions on discrimination in the Act do not apply 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.

4.178 The ALRC expects that the exception in s 37(1)(c) of the *Sex Discrimination Act* would have limited application to the activities of religious educational institutions outside of the running of religious services. The ALRC has not heard of any instances of religious educational institutions excluding students or staff from participation in religious services on the basis of attributes protected under the Act. The conduct of religious observances and practices, whether performed within a religious institution or within a religious educational institution, is recognised under international law as requiring a greater degree of institutional autonomy without unjustified interference from the state. If religious educational institutions were to be excluded from the scope of s 37(1)(c), the law may unduly restrict religious activities that are at the core of the identity of these institutions. Further, anti-discrimination laws in Australian states and territories contain equivalent exceptions.

4.179 The ALRC anticipates that what constitutes a ‘religious observance or practice’ under s 37(1)(c) of the *Sex Discrimination Act* would be interpreted narrowly, in accordance with authorities such as *X v Commonwealth*.<sup>260</sup>

4.180 Further, the ALRC has proceeded on the basis that, despite the odd location of the phrase ‘or otherwise participate in’, s 37(1)(c) of the *Sex Discrimination Act* does not deal with the mere attendance of a person at a religious service, but

257 *Anti-Discrimination Act 1991* (Qld) s 109(2); *Discrimination Act 1991* (ACT) s 32(2); *Equal Opportunity Act 2010* (Vic) s 82(1).

258 Law Reform Commission of Western Australia (n 222) 177, rec 75.

259 Law Council of Australia, *Submission 428*.

260 *X v Commonwealth* (1999) 200 CLR 177 [146] (Kirby J). For example, the meaning of ‘religious observance or practice’ was narrowly construed in *Walsh v St Vincent de Paul Society Queensland* (No 2) [2008] QADT 32 [77]; *Tassone v Hickey* [2001] VCAT 47 [42]–[43].

is directed only to the selection, appointment, or participation of a person in the performance of duties or functions for the purposes of, or in connection with, a religious observance or practice. Thus, while a religious educational institution might be able to select or appoint a student or staff member to perform a particular religious duty or function, the institution would not be able to exclude (on grounds contained in the *Sex Discrimination Act*) a student or staff member from merely attending a religious service conducted as part of the educational institution's activities. Any such exclusion would risk significant harm to that student or staff member in the context of the activities of the educational institution. The risk of harm speaks against a construction of s 37(1)(c) of the Act that would extend the scope of the exception to mere participation.

## Amendment of section 23

4.181 **Recommendation 1** would contribute to implementation of the first two policy positions set out in the Terms of Reference by excluding religious educational institutions from the scope of the exception regarding accommodation in s 23(3)(b) of the *Sex Discrimination Act*.

4.182 This part sets out the existing effect of s 23 of the *Sex Discrimination Act*, and the anticipated legal effect of amending this provision under **Recommendation 1**.

### Legal impact of reform

4.183 Section 23 of the *Sex Discrimination Act* prohibits discrimination in the provision of accommodation. The grounds on which discrimination is prohibited in this context are sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding. It is unlawful under ss 23(1) and (2) to discriminate:

- by refusing an application for accommodation;
- in the terms or conditions on which accommodation is offered;
- by deferring an application for accommodation or according the applicant a lower order of precedence;
- by denying or limiting access to any benefit associated with accommodation;
- by evicting a person; or
- by subjecting a person to any other detriment in relation to accommodation.

4.184 A number of exceptions to these prohibitions are provided for in s 23(3) of the *Sex Discrimination Act*. Relevantly, under s 23(3)(b), none of the prohibitions in s 23 apply in respect of accommodation provided by a 'religious body'. The term 'religious body' is not defined in the Act. Consequently, it is not immediately clear the extent to which the exception in s 23(3)(b) might apply in relation to some or all religious educational institutions.



4.185 Section 23(3A) of the *Sex Discrimination Act* provides that the exception in s 23(3)(b) does not apply in connection with the provision of Commonwealth-funded aged care accommodation.

4.186 Similarly, under **Recommendation 1**, the exception in s 23(3)(b) of the *Sex Discrimination Act* would expressly not apply in relation to accommodation provided by an educational institution. Consequently, to the extent that a religious educational institution qualifies as a ‘religious body’, it would no longer be lawful for the institution to discriminate in the provision of accommodation in the ways outlined above.

4.187 For example, it would be unlawful for a religious educational institution to refuse an application for boarding school accommodation, to refuse to provide accommodation at a school camp, or to refuse to provide accommodation to an employee, on the basis of an attribute protected under s 23 of the *Sex Discrimination Act*.

4.188 However, all educational institutions would continue to be subject to the exceptions in s 34 of the *Sex Discrimination Act* regarding accommodation, including an exception in relation to accommodation ‘provided solely for persons of one sex who are students at an educational institution’.<sup>261</sup>

4.189 In addition, educational institutions with charitable status would still be the subject of an exception in s 23(3)(c) of the *Sex Discrimination Act* in relation to accommodation provided ‘solely for persons of one sex or solely for persons of one or more particular marital or relationship statuses’.<sup>262</sup> For example, a university college with charitable status could continue to provide accommodation solely for students of a particular relationship or marital status, as long as the college did not distinguish between applicants on the grounds of sexual orientation, gender identity, or intersex status.

4.190 Under **Recommendation 1**, boarding schools could also continue to rely on the exceptions in s 35 of the *Sex Discrimination Act* in relation to some aspects of employment and contract work, where the duties of the particular position involve the residential care of children. These exceptions apply to the grounds of sex and marital or relationship status only. For example, a boarding school could continue to hire staff of a particular sex to care for children in the boarding school.

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261 *Sex Discrimination Act 1984* (Cth) s 34(2). See Australian Human Rights Commission, *Submission 384*.

262 Law Council of Australia, *Submission 428*.

## Submissions

4.191 The recommended amendment to s 23 of the *Sex Discrimination Act* reflects Proposal 4 in the *Consultation Paper*.

4.192 Support for Proposal 4 was received from human rights organisations, legal practitioner organisations, unions, LGBTQ+ organisations, and some religious organisations.<sup>263</sup> The primary reason given by stakeholders in support of this proposal was that it is necessary to give full effect to the Australian Government's policy position and thereby ensure the safety, wellbeing, and fundamental rights and freedoms of students and staff in religious educational institutions.

4.193 Very few submissions gave reasons for specifically opposing the proposed amendment of s 23(3)(b) of the *Sex Discrimination Act*. For example, one submission suggested that the *Consultation Paper* lacked clarity as to why the amendment was required, and that the proposed amendment demonstrated a prejudice against religious bodies.<sup>264</sup>

## Consistency with international law

4.194 The analysis of international law compatibility set out above in relation to the repeal of s 38 of the *Sex Discrimination Act* similarly applies to excluding religious educational institutions from the operation of s 23(3)(b) of the Act. This reform would be consistent with Australia's international legal obligations, and would maximise the realisation of relevant human rights and restrict some rights only in strict accordance with limitation criteria under international law.

## State and territory laws

4.195 Amending s 23 of the *Sex Discrimination Act* as recommended would achieve greater consistency with the law in most states and territories. Most state and territory anti-discrimination laws contain exceptions to prohibitions on discrimination by educational authorities and educational institutions on the ground of sex, where the institution provides accommodation either solely for, or mainly for, students

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263 Anglican Social Responsibilities Commission, Diocese of Perth, *Submission 98*; Victorian Pride Lobby, *Submission 123*; Queer Department of the National Union of Students and Queer Office of University of Technology Sydney Students' Association, *Submission 252*; Equality Australia, *Submission 375*; Australian Human Rights Commission, *Submission 384*; Independent Education Union, *Submission 387*; NSW Council for Civil Liberties, *Submission 407*; Australian Council of Trade Unions, *Submission 411*; Law Council of Australia, *Submission 428*.

264 Ambrose Centre for Religious Liberties, *Submission 394*.

of a particular sex.<sup>265</sup> Accommodation exceptions for educational authorities and institutions rarely expressly apply to staff.<sup>266</sup>

4.196 Only in the NT, Queensland, and WA do laws contain accommodation exceptions for religious bodies similar to s 23(3)(b) of the *Sex Discrimination Act*.<sup>267</sup> The NT exception applies only to accommodation that is ‘wholly within or directly attached to religious premises’, and ‘religious premises’ is narrowly defined to mean ‘a church, temple, synagogue, mosque or any other similar place of worship’.<sup>268</sup>

4.197 Some jurisdictions include accommodation exceptions for charities, voluntary organisations,<sup>269</sup> and organisations that do not seek pecuniary profit for its members.<sup>270</sup> These exceptions variously relate to the grounds of sex, marital or domestic status, pregnancy, and caring responsibilities.

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265 *Anti-Discrimination Act 1991* (Qld) s 89; *Anti-Discrimination Act 1992* (NT) s 40(2); *Discrimination Act 1991* (ACT) s 39(2); *Equal Opportunity Act 1984* (WA) s 32(2); *Equal Opportunity Act 2010* (Vic) s 61. NSW law does not contain relevant exceptions. Tasmanian law contains an exception that applies to all educational institutions, in relation to adult students and staff, on the ground of gender, where accommodation is provided to less than five adults: *Anti-Discrimination Act 1998* (Tas) s 27.

266 See, eg, *Equal Opportunity Act 1984* (WA) s 32(2).

267 *Anti-Discrimination Act 1991* (Qld) s 90; *Anti-Discrimination Act 1992* (NT) s 40(3); *Equal Opportunity Act 1984* (WA) s 21(3)(b).

268 *Anti-Discrimination Act 1992* (NT) ss 40(3)(a)–(b), 5–6.

269 *Equal Opportunity Act 1984* (WA) s 21(3)(c); *Anti-Discrimination Act 1991* (Qld) s 91.

270 *Equal Opportunity Act 1984* (SA) ss 40(4), 85ZH(5).



# 5. Implications of Reform

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## Introduction

5.1 This chapter sets out some anticipated implications of the reforms contemplated under [Recommendation 1](#) for religious educational institutions and their communities. The chapter then summarises some of the alternative reforms suggested by stakeholders and considered by the ALRC when developing [Recommendation 1](#).

5.2 Importantly, the ALRC anticipates that [Recommendation 1](#) would not inhibit religious educational institutions from being able to build communities of faith, including because of [Recommendation 7](#).

5.3 The narrowing of exceptions in the *Sex Discrimination Act* under [Recommendation 1](#) may have a range of implications for the operation of religious educational institutions — at least in the minority of states in which anti-discrimination legislation contains exceptions equivalent to s 38 of the *Sex Discrimination Act*.<sup>1</sup> Implications would relate to operational aspects, including:

- the provision of education or training; and
- employment practices.

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1 See [Chapter 4](#) and [Chapter 12](#).

5.4 This chapter proceeds in three parts. The first two parts examine the implications of **Recommendation 1** for the provision of education or training, and employment practices, respectively. The final part summarises some of the alternative reforms suggested by stakeholders.

## Provision of education

5.5 Under **Recommendation 1**, it would become unlawful for an educational authority conducting a religious educational institution to discriminate against a student or prospective student on the basis of sexual orientation, gender identity, marital or relationship status, or pregnancy in the provision of education or training. Discrimination on the grounds of sex,<sup>2</sup> intersex status, potential pregnancy, and breastfeeding is already unlawful, as s 38(3) of the *Sex Discrimination Act* does not provide an exception on these grounds. Accordingly, under **Recommendation 1**, the same obligations would apply under the *Sex Discrimination Act* to all educational authorities, including educational authorities conducting religious educational institutions.

5.6 Religious educational institutions would no longer be afforded a general exception regarding discrimination in ‘good faith in order to avoid injury to the religious susceptibilities of the adherents of that religion or creed’, including to:

- refuse a prospective student’s application for admission as a student;
- discriminate in the terms or conditions on which the educational institution is prepared to admit a prospective student;
- deny or limit a student’s access to any benefit provided by the educational authority;
- expel the student; or
- subject the student to any other detriment.<sup>3</sup>

5.7 Religious educational institutions, religious bodies, and peak educational bodies stated in their submissions that religious educational institutions aim to take a pastoral and inclusive approach and are not motivated to discriminate against students.<sup>4</sup> Similarly, a number of submissions emphasised that religious educational institutions do not seek to exclude, expel, or mistreat students on the

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2 It is not unlawful for an institution to refuse to accept an application for admission as a student if the educational institution is conducted solely for students of a different sex from the sex of the applicant: *Sex Discrimination Act 1984* (Cth) s 21(3).

3 As per the prohibitions in ss 21(1)–(2) of the *Sex Discrimination Act 1984* (Cth), where the prohibitions would no longer be subject to s 38(3) of the Act.

4 Australian Christian Churches, *Submission 80*; Not published, *Submission 246*; Catholic Secondary Principals Australia, *Submission 363*; Not published, *Submission 391*; Australian National Imams Council, *Submission 401*; National Catholic Education Commission, *Submission 409*.

basis of protected attributes under the *Sex Discrimination Act*.<sup>5</sup> Such statements suggest that religious educational institutions are well positioned to accommodate the practical implications of **Recommendation 1** in the provision of education and training.

### Continued ability to function as a distinctly religious institution

5.8 Importantly, religious educational institutions operating in the states and territories in which anti-discrimination laws no longer contain exceptions relating to students appear to continue to function successfully and effectively. Support for this contention includes the following:

- there has been continued growth in student enrolments in non-government schools in those jurisdictions;<sup>6</sup>
- there is no evidence that religious educational institutions have closed or had families withdraw from the schools in response to the removal of the exceptions (see below);<sup>7</sup>
- there have been very small numbers of complaints alleging discrimination by religious educational institutions (see below);<sup>8</sup> and
- the ALRC has received feedback to this effect from consultations with administrators and staff of religious educational institutions in those jurisdictions (see below).

5.9 In relation to students, the ALRC did not hear any views that the narrowing of relevant exceptions in anti-discrimination laws in other jurisdictions had caused specific problems for religious educational institutions. In consultations, some government agencies, peak educational bodies, religious educational institutions, individuals, and non-government organisations expressed the view that religious educational institutions continue to thrive in jurisdictions where exceptions have been narrowed, and that narrower exceptions are appropriate

5 See Australian Christian Churches, *Submission 80*; Anglican Church Diocese of Sydney, *Submission 189*; Presbyterian Church of Victoria, *Submission 195*; Freedom for Faith, *Submission 203*; Presbyterian Church Australia in NSW, *Submission 235*; Islamic Council of Victoria, *Submission 301*; Presbyterian Christian Schools NSW (Low-Fee Christian Schools Board), *Submission 356*; Lutheran Education Australia, *Submission 402*; National Catholic Education Commission, *Submission 409*.

6 For example, Christian schools in Queensland major cities, and non-denominational and Islamic schools in Victorian major cities were amongst those with the largest enrolment growth in the independent education sector in Australia between 2016 and 2021: Independent Schools Australia, *Enrolment Trends: Independent School Sector Deep Dive* (Report, 2022) 31.

7 See 'Employment practices' below at [5.26]–[5.50].

8 The numbers of formal complaints about discrimination on grounds protected under the *Sex Discrimination Act* against religious educational institutions are low. For example, the Queensland Human Rights Commission has reported that such complaints make up just 0.02% of their overall complaints received, numbering just 23 complaints since 2009: Queensland Human Rights Commission, *Submission 125*. Other submissions noted that there may be disincentives for parents to make complaints about discrimination in schools, such that not all problems may be reported or publicly known: see, eg, Rainbow Families Queensland, *Submission 127*. See also **Chapter 3**.

for maximising the realisation of all rights.<sup>9</sup> The Queensland Human Rights Commission highlighted that changes to anti-discrimination laws in Queensland in 2002 had not resulted in large numbers of complaints being made against religious educational institutions, either by students or employees, in the two decades since the changes came into effect.<sup>10</sup>

Despite being the subject of considerable public discussion in recent years, in [the Queensland Human Rights Commission's] experience the complaints against religious educational institutions on the basis of sex, pregnancy, sexuality, gender identity, intersex status, or relationship status are very rare, and the few that have been received have been mostly resolved through the conciliation process.<sup>11</sup>

5.10 In correspondence with the ALRC, Equal Opportunity Tasmania advised that low numbers of complaints have been made against religious educational institutions in Tasmania.<sup>12</sup>

5.11 Consultations with educators in religious educational institutions in Tasmania similarly affirmed that narrower exceptions for religious schools had resulted in an overall positive impact, and that the presence of LGBTQ+ students in those institutions did not undermine the faith basis of these institutions.

5.12 Nevertheless, some submissions expressed concern that institutions would not be able to establish an authentic faith community if students were permitted to embrace lifestyles that contradict the beliefs of the community.<sup>13</sup> The ALRC notes that most submissions from schools and related bodies that expressed concerns about narrowing exceptions in the *Sex Discrimination Act* were from states and territories in which religious educational institutions are still the subject of broad exceptions in anti-discrimination laws. This arguably suggests that the concerns held have not been realised in practice in those jurisdictions where broad exceptions no longer apply.

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9 For a discussion of some experiences under Tasmanian anti-discrimination laws which contain narrower exceptions than Commonwealth anti-discrimination laws, see also Equality Tasmania, *Submission 423*.

10 Queensland Human Rights Commission, *Submission 125*.

11 Ibid.

12 Letter from Commissioner Sarah Bolt to the ALRC, 28 September 2023.

13 Healinglife Church and Ministries, *Submission 9*. This view was also expressed by some members of the public: see, eg, P Murray, *Submission 248*; E Rahme, *Submission 180*.



## Guidance for religious educational institutions

5.13 The ALRC heard from religious educational institutions and religious organisations that practical approaches and inclusive practices already enable these institutions to demonstrate care towards all students.<sup>14</sup> In addition to existing policies and practices, guidance is available to schools and teachers to assist them in creating supportive environments for LGBTQ+ students. These resources cover a range of topics, including diversity, inclusion, and how to support transgender, gender diverse, and sexually diverse young people.<sup>15</sup> There are also useful examples of how religious bodies have developed their own specific guidance on how to manage the intersections between belief and these issues, based on guidance issued by state bodies. For example, in a recent report, the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity has highlighted the ‘good practice of guidance for religious schools, issued by Anglican, Jewish, and Methodist hierarchies to address bullying against LGBT pupils’,<sup>16</sup> referring also to examples of guidance included in the UK’s submission to the report.<sup>17</sup>

5.14 Guidance documents also touch on legal rights and requirements, the roles and responsibilities of schools and teachers, and inclusive language and terminology.<sup>18</sup> These resources state that building safe and inclusive environments for LGBTQ+ students should be a priority for schools. Policies, procedures, and guidance can be located through Commonwealth, state, and territory government websites — some states have consolidated all relevant information into a single location.<sup>19</sup> Further information is available through state-based Human Rights and Equal Opportunity Commissions.<sup>20</sup> Additional support is also offered through government funded safe and inclusive school initiatives.<sup>21</sup>

14 Australian Christian Churches, *Submission 80*; Not published, *Submission 246*; Catholic Secondary Principals Australia, *Submission 363*; Not published, *Submission 391*; Australian National Imams Council, *Submission 401*; National Catholic Education Commission, *Submission 409*.

15 See [Appendix G](#).

16 Human Rights Council, *Freedom of Religion or Belief, and Freedom from Violence and Discrimination Based on Sexual Orientation and Gender Identity*, 53rd sess, UN Doc A/HRC/53/37 (7 June 2023) [57] fn 136.

17 United Kingdom, *Input to the United Nations Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity Regarding: The Perceived Contradictions between Freedom of Religion or Belief and Sexual Orientation and Gender Identity* (2023) 2.

18 See [Appendix G](#).

19 Department for Education, Children and Young People (Tas), ‘LGBTIQ+ Equality and Inclusion in Education’ <[www.decyp.tas.gov.au/students/lesbian-gay-bisexual-transgender-intersex/](http://www.decyp.tas.gov.au/students/lesbian-gay-bisexual-transgender-intersex/)>; Department of Education (Qld), ‘Inclusive Education’ <[www.education.qld.gov.au/students/inclusive-education](http://www.education.qld.gov.au/students/inclusive-education)>.

20 Equal Opportunity Commission Western Australia, *Guidelines for Supporting Sexual and Gender Diversity in Schools: Sexuality Discrimination and Homophobic Bullying* (2013); Queensland Human Rights Commission, *Trans @ School: A Guide for Schools, Educators, and Families of Trans and Gender Diverse Children and Young People* (2020).

21 See, eg, ACT Government, ‘Safe and Inclusive Schools Initiative’ <<https://saisact.info>>; Victorian Government, ‘Safe Schools’ <[www.vic.gov.au/safe-schools](http://www.vic.gov.au/safe-schools)>; Tasmanian Government, ‘Working It Out’ <[www.workingitout.org.au/](http://www.workingitout.org.au/)>; Department of Education (Cth), ‘Student Wellbeing Hub’ <[www.studentwellbeinghub.edu.au](http://www.studentwellbeinghub.edu.au)>.

## Enrolment contracts

5.15 Under **Recommendation 1**, enrolment contracts could still be used, for example, to make explicit the responsibilities of the student, parents or carers, and the institution in the education of the student. However, if the enrolment contract (or an incorporated statement of belief) were to impose (or propose to impose) a condition, requirement, or practice on a parent, carer, or student that would not constitute direct discrimination — but would or may have a disadvantaging effect — the imposition or proposed imposition would be lawful only if the condition, requirement, or practice were reasonable in all of the circumstances.<sup>22</sup>

5.16 The exception under s 21(3) of the *Sex Discrimination Act* (regarding admission to a single-sex school) would continue to apply to all educational institutions under **Recommendation 1**.<sup>23</sup> Some submissions discussed how religious educational institutions could best accommodate the enrolment of transgender and non-binary students at single-sex schools.<sup>24</sup> The ALRC heard in consultations that religious educational institutions are well equipped to accommodate the needs of gender diverse students, and already do so. For example, institutions have related policies in place, and assess each student's situation on a case-by-case basis, with the best interests of the student being central.

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22 See *Sex Discrimination Act* s 7B(2). See also *Arora v Melton Christian College* [2017] VCAT 1507. In that case, parents were asked to sign an enrolment form agreeing to comply with school processes, including published uniform requirements, but those requirements were found to be unreasonable, and the school was found to have indirectly discriminated against a prospective student on the basis of the student's religion (Sikhism). See further below **Case study: Uniform requirements**. See also the discussion on the interaction between statements of belief and anti-discrimination legislation in Parliamentary Joint Committee on Human Rights (Cth), *Religious Discrimination Bill 2021 and Related Bills* (Inquiry Report, 4 February 2022) ch 6. See **Chapter 4** for discussion of the impact of **Recommendation 1** on the right to freedom of expression.

23 The Federal Court is currently considering the meaning of the term 'gender identity', and the construction and scope of provisions dealing with gender identity discrimination in the *Sex Discrimination Act*: see *Roxanne Tickle v Giggle for Girls Pty Ltd* [2023] FCA 553. The ALRC notes that this decision may have implications for how provisions under this Act are interpreted.

24 Association of Heads of Independent Schools of Australia, *Submission 196*; Transgender Victoria, *Submission 211*. See also Queer Department of the National Union of Students and Queer Office of University of Technology Sydney Students' Association, *Submission 252*.

### Case study: Enrolment contracts

Enrolment contracts and underpinning statements of belief have been implemented by some religious educational institutions to unify their communities around expressly stated values, beliefs, and expectations, and to indicate to prospective students and their parents the nature of the school's culture and religious ethos.

In recent years, the implementation of enrolment contracts by some religious educational institutions has attracted community and public concern, and resulted in discrimination complaints, reflecting the need for institutions to exercise caution in assessing the content and implementation of such contracts.

During consultations, the ALRC heard from former members of one school community who illustrated issues that can arise when enrolment contracts depart from values and beliefs accepted by a school community.<sup>25</sup>

On 28 January 2022, the school issued a revised enrolment contract to parents and guardians of existing students of the school, requiring all families to sign the document.<sup>26</sup>

The contract described homosexuality as immoral, and required students to be enrolled only as the sex assigned to them at birth.<sup>27</sup> It included a term that the school could terminate a student's enrolment based on sexual orientation, gender identity, or sexual activity.<sup>28</sup> In a statement to the media on 30 January 2022, the Principal stated:

We are seeking to maintain our Christian ethos and to give parents and students the right to make an informed choice about whether they can support and embrace our approach to Christian education.

[The school] does not judge students on their sexuality or gender identity and we would not make a decision about their enrolment in the [school] simply on that basis ...

The [school] offers our faith-based education as a choice among many other schooling options available to parents. Our society gives people freedom to be a part of groups and organisations with shared beliefs. The [school], through the freedoms afforded to it by law, has outlined our common beliefs and practices, so that parents can choose for their children to be educated at [the school] and join our faith-based community.<sup>29</sup>

25 This case study is based on publicly available information and documents shared by consultees, including a letter from school parents to the Principal. For the purposes of this case study, the ALRC has removed details of the identity of the school.

26 *Revised Enrolment Contract for all Current Students* (Version 2022/1).

27 Ibid sch 1, Declaration of Faith.

28 Ibid cl 122(d)(iii).

29 'Media Statement' (Media Release, 30 January 2022).

After the school received a formal complaint from parents and guardians of current students,<sup>30</sup> and the matter was referred to the Non-State School Accreditation Board, the contract was withdrawn, and the school issued an amended enrolment contract.<sup>31</sup> Following the withdrawal of the enrolment contract, the Principal stated, in a media statement:

We deeply regret that some students feel that they would be discriminated against because of their sexuality or gender identity, and I apologise to them and their families on behalf of the [school].

As stated previously, the [school] does not and will not discriminate against any student because of their sexuality or gender identity. It is central to our faith that being gay or transgender in no way diminishes a person's humanity or dignity in God's eyes.<sup>32</sup>

Key issues identified by parents and guardians in their formal complaint to the school included the following issues:

- the Board and Principal revised the contract without consultation;
- the contract reflected indifference to Christian viewpoints that had previously been accepted by the school community; and
- the content of the contract and its implementation created division and deep hurt within the school community.<sup>33</sup>

Consultees stated that a number of staff chose to leave the school because of the situation, and several students made discrimination complaints to the Queensland Human Rights Commission.

## Teaching religious doctrine

5.17 The ALRC does not recommend amendments to the *Sex Discrimination Act* with respect to the teaching of religious doctrine specifically.<sup>34</sup> Under **Recommendation 1**, the teaching of religious doctrine would not be differentiated from other aspects of the provision of education by a religious educational institution.

30 Letter to the school (January 2022).

31 *Revised Enrolment Contract for all Current Students* (Version 2022/2).

32 'Media Statement' (Media Release, 3 February 2022).

33 Letter to the school (January 2022).

34 The ALRC proposed in the *Consultation Paper* to amend the *Sex Discrimination Act* to clarify that the content of the curriculum is not subject to the Act. This proposal received strong opposition from some stakeholders on the basis that it was unnecessary, and received only limited support from others. Others emphasised the need to exercise a duty of care towards students and staff when teaching religious doctrine to avoid harm and discrimination. For a discussion of submissions on this issue, see Australian Law Reform Commission, 'What We Heard' (Background Paper ADL2, December 2023) [74].

5.18 The Australian Human Rights Commission submitted that ‘religious education in the context of a particular faith tradition is a fundamental part of why these schools exist and a factor that distinguishes them from government schools’. The Commission submitted that providing religious education in good faith is consistent with international human rights law, and concluded that it is ‘difficult to imagine’ that it could constitute direct or indirect discrimination under the *Sex Discrimination Act*.<sup>35</sup>

5.19 Other chapters of this Report provide further detail on relevant existing obligations regarding what is taught to students.<sup>36</sup> For example, there are existing common law duty of care obligations towards students<sup>37</sup> and expectations that all schools teach the Australian Curriculum (which includes curricula on inclusion, identity, sexuality, and relationships).<sup>38</sup> Accordingly, it is not anticipated that implementation of **Recommendation 1** would increase existing obligations on religious educational institutions regarding what is taught. As is already the case, best practice guidance on creating child safe organisations under the National Principles for Child Safe Organisations can guide religiously affiliated schools and early learning centres in meeting their legal obligations.<sup>39</sup>

### Uniform requirements, facilities, and use of preferred pronouns

5.20 Like all other educational institutions, religious educational institutions would retain their ability to impose standards of dress under **Recommendation 1**. Existing governmental guidance covering most states and territories can guide religious educational institutions on modifying or developing policies and practices to support adjustments for gender diverse students, including with respect to uniforms, facilities, and the use of preferred pronouns.<sup>40</sup>

5.21 While there is no case law examining claims of direct or indirect discrimination against students on attributes protected under s 21 of the *Sex Discrimination Act*, there are instructive cases that highlight the importance of implementing reasonable accommodations with respect to uniforms on other grounds including race and religion.

35 Australian Human Rights Commission, *Submission 384*.

36 See **Chapter 2** and **Chapter 13**.

37 A range of stakeholder views were expressed in submissions regarding the important role that the duty of care obligation plays in protecting vulnerable students from the risk of potential harm. See Australian Law Reform Commission, ‘What We Heard’ (Background Paper ADL2, December 2023) [74]–[78].

38 As an alternative to the Australian Curriculum, schools can teach another curriculum recognised by the Australian Curriculum and Assessment Reporting Authority: see **Chapter 2**. Under the Australian Curriculum’s health and physical education, and science curricula, schools are required to teach students about maintaining respectful and safe relationships, sexual health, and sexual relationships from a reproductive perspective. Curricula on inclusion, valuing diversity, defining personal identities, and recognising discrimination and harassment are also incorporated into the health and physical education curriculum: see Australian Curriculum, Assessment and Reporting Authority, ‘Key Ideas: Health and Physical Education Propositions’ <<https://australiancurriculum.edu.au/f-10-curriculum/health-and-physical-education/key-ideas/>>. See also **Chapter 2**.

39 See **Chapter 2**.

40 See, eg, above at [5.13]–[5.14].

### Case study: Uniform requirements

In *Australian Christian College Moreton Ltd v Taniela*,<sup>41</sup> the Queensland Civil and Administrative Tribunal (Appeals) affirmed the previous decision of the Tribunal that a religious school and its principal had indirectly discriminated against a student on the basis that they had uncut hair, by rigidly applying the school's uniform policy without exception when required to accommodate religious needs. Consistent with Cook Island and Niuean tradition, the student was to grow their hair from birth and undergo a hair-cutting ceremony at an age determined appropriate by his parents and at the right time for the child. While direct discrimination was not found, indirect discrimination was found on the basis of race.

In *Arora v Melton Christian College*,<sup>42</sup> the Victorian Administrative Appeals Tribunal found that the refusal of a religious school to enrol a prospective Sikh student — who had long hair and wore a patka head covering — on the basis that he could not conform to the school's uniform policy constituted direct and indirect discrimination on the ground of religion. In applying the reasonableness test in relation to indirect discrimination, the Tribunal found that:

- the school had not made reasonable adjustments to its uniform policy, in consultation with its community, to accommodate the needs of the prospective student;
- the school's transparency about its uniform policy was not sufficient (along with other measures) to demonstrate reasonableness. Specifically, the school prospectus set out its uniform policy which expressly stated the disallowance of non-Christian head coverings. The prospectus included a statement that parental agreement of the school's policies was required for a student's enrolment application to be accepted;
- it was not reasonable to accept enrolment applications from students of non-Christian faiths only on the condition that they do not look like they practise a non-Christian religion; and
- while the school's uniform policy allowed for exceptions for medical reasons, it did not allow for exceptions for religious reasons.

41 *Australian Christian College Moreton Ltd v Taniela* [2022] QCATA 118. See also *Kamaljit Kaur Athwal v State of Queensland* [2022] QSC 209. In this case, the applicant was an initiated Sikh who was required to carry five articles of faith, including a Kirpan (or ceremonial knife). The *Weapons Act 1990* (Qld) provided an exception for the carrying of a knife in a public place for a 'genuine religious purpose', however, this did not extend to school grounds. As a parent of a school-going child, the applicant argued the Act prevented her, and other initiated Sikhs, from entering school grounds and successfully sought a declaration that the Act was inconsistent with the *Racial Discrimination Act 1975* (Cth).

42 *Arora v Melton Christian College* [2017] VCAT 1507.

In finding the school's uniform policy to be unreasonable, the Tribunal took into consideration the school's open enrolment policy, that over 50% of the school community did not identify explicitly as Christian, and that many of the families at the school had no religious beliefs.

The Tribunal also took into consideration the practical disadvantages caused to the prospective student, such as not being able to

access the emotional and social advantages associated with attending a school that his cousins also attended or the practical advantages associated with attending a school that is close to his home and between the family home and the closest train station where his mother [could] catch the train to and from work.<sup>43</sup>

## Student leadership and student groups

5.22 A small number of submissions from religious bodies and educational institutions expressed the view that it would be inappropriate for students in leadership positions to be LGBTQ+, as this could undermine a particular school's ethos.<sup>44</sup> The ALRC also received confidential submissions from former students of religious educational institutions stating the devastating impact of being denied leadership roles because they were LGBTQ+.<sup>45</sup>

5.23 Under **Recommendation 1**, denying a student a leadership opportunity on the basis of attributes protected under s 21(2) of the *Sex Discrimination Act* would amount to unlawful direct discrimination. As is presently the case for all other educational institutions, religious educational institutions would need to ensure that their student leadership policies and appointment practices do not constitute direct discrimination, and do not cause (and are not likely to cause) a disadvantaging effect (indirect discrimination), unless reasonable in the circumstances.

5.24 Similarly, under **Recommendation 1**, it would be unlawful to refuse, in a directly discriminatory way, a student request to form an LGBTQ+ student club. Any religious requirement, condition, or practice of the institution regarding student clubs that is likely to have a disadvantaging effect on grounds covered under s 21 of the *Sex Discrimination Act* would need to be reasonable in the circumstances, to avoid breaching the prohibition on indirect discrimination.<sup>46</sup>

43 Ibid [6].

44 Presbyterian Church of Australia, *Submission 186*; Not published, *Submission 298*; Australian Christian Lobby, *Submission 299*.

45 See, eg, Australian Law Reform Commission, 'What We Heard' (Background Paper ADL2, December 2023) [51].

46 Whether a religious educational institution insists upon all student clubs being approved as consistent with religious doctrines may be a relevant factor: see, eg, *Gay Rights Coalition of Georgetown University Law Center v Georgetown University*, 536 A 2d 1 (DC Cir, 1987).



5.25 The NSW Advocate for Children and Young People referred in its submission to the important role that LGBTQ+ student groups can play in enabling students to connect with and support each other in safe and inclusive ways, a view that was shared by the Commissioner for Children and Young People in SA.<sup>47</sup> Others referred to a right to assembly for LGBTQ+ students who may wish to form a club as an extra-curricular activity.<sup>48</sup> Other submissions expressed concern that removal of exceptions for religious educational institutions would impede their ability to deny the formation or recognition of LGBTQ+ clubs, on the basis that these clubs may advocate against or act in a manner that is contrary to the religious beliefs of the institution.<sup>49</sup>

### Case study: LGBTQ+ affirming groups in universities

The following is an excerpt from Meagan Pearson's book, *Proportionality, Equality Laws and Religion: Conflicts in England, Canada, and the USA*, concerning *Gay Rights Coalition v Georgetown University*,<sup>50</sup> a case from the United States:

a gay and lesbian student society wished to receive official recognition at a Catholic university. This was opposed on the basis that it would endorse acts contrary to Catholic teaching. The deciding judgment separated the various elements of the society's claim and held the society's real need was for the practical benefits of recognition (such as access to the university resources in the form of room bookings, a post box and so on), but that this could be achieved without university endorsement of their *message*. ... the judge, by preventing the case from being dominated by arguments on the rights and wrongs of Catholic policy, allowed a compromise to be reached which benefited both sides. ... The decision did not artificially end the debate by imposing a conclusion. Both sides could continue to express their different moral views through their policies and actions. After the case was decided ... the law was amended so that the non-discrimination law did not cover religious institutions such as Georgetown. Georgetown, however, still stuck to the terms of the agreements. A workable compromise and dialogue must therefore have been established.<sup>51</sup>

47 NSW Advocate for Children and Young People, *Submission 209*; Commissioner for Children and Young People SA, *Submission 360*.

48 Uniting Network Australia, *Submission 408*.

49 See, eg, Institute for Civil Society, *Submission 399*. For submissions that discuss how removing exceptions for religious educational institutions may require institutions to adhere to practices that are contrary to religious beliefs, see generally A Deagon, *Submission 4*; Australian Christian Churches, *Submission 80*; D Khlentzos, *Submission 175*; Anglican Church Diocese of Sydney, *Submission 189*; Australian Christian Higher Education Alliance, *Submission 208*.

50 *Gay Rights Coalition of Georgetown University Law Center v Georgetown University*, 536 A 2d 1 (DC Cir, 1987).

51 Megan Pearson, *Proportionality, Equality Laws, and Religion: Conflicts in England, Canada, and the USA* (Routledge, 2017) 71.



As highlighted by Pearson,

while this case did not use a proportionality analysis, proportionality is inherently capable of ensuring ‘respectful’ judgement results, since proportionality requires rights to be optimised when they conflict.<sup>52</sup>

## Employment practices

5.26 Currently, exceptions applicable to religious educational institutions under s 38 of the *Sex Discrimination Act* do not apply to discrimination in relation to:

- the terms or conditions on which employment is offered;
- limiting an employee’s opportunities for promotion or training; or
- subjecting an employee to any other detriment.

5.27 **Recommendation 1** would, as is presently the case for all other employers under Commonwealth law, make it unlawful for religious educational institutions to discriminate against employees on the basis of attributes protected under s 14 of the *Sex Discrimination Act*:

- in the arrangements made for the purpose of determining who should be offered employment;
- in determining who should be offered employment;
- in the terms or conditions on which employment is offered;
- in the terms or conditions of employment that the employer affords the employee;
- by denying the employee access, or limiting the employee’s access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment;
- by dismissing the employee; or
- by subjecting the employee to any other detriment.

5.28 Similar prohibitions would also apply in relation to a ‘contract worker’ under s 16 of the *Sex Discrimination Act*.<sup>53</sup>

52 Ibid.

53 See **Chapter 12** for further detail. A ‘contract worker’ is defined in s 4 of the *Sex Discrimination Act* to mean ‘a person who does work for another person pursuant to a contract between the employer of the first-mentioned person and that other person’.

5.29 Religious educational institutions would no longer be afforded a general exception to discriminate against a member of staff or contract worker in connection with employment, including where discrimination is 'in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed' on grounds contained in the *Sex Discrimination Act*, and on the basis that the discrimination is in 'good faith in order to avoid injury to the religious susceptibilities of the adherents of that religion or creed'.

5.30 Based on statements made in consultations and confidential submissions, there is some evidence that these changes would be consistent with the way most religious educational institutions currently operate.

5.31 Concerns were raised in some consultations and submissions, including by parents, that the repeal of ss 38(1)–(2) of the *Sex Discrimination Act* would impact the ability of some religious educational institutions to function as authentic communities of faith, as distinct from secular educational institutions.<sup>54</sup> However, these concerns were not supported by evidence provided to the ALRC. For example, the ALRC was not made aware of any specific examples where laws in jurisdictions with narrower exceptions for religious educational institutions had resulted in such impacts.<sup>55</sup> Similarly, analysis of submissions made by peak educational bodies, religious bodies and organisations, and academics to three other relevant inquiries did not reveal specific examples that would indicate detriment to religious educational institutions through the absence or narrowing of exceptions.<sup>56</sup> In contrast, the ALRC received submissions (some confidential) from former staff in religious educational institutions recounting harms they had experienced on the basis of their LGBTQ+ identity.<sup>57</sup> In addition, the Independent Education Union has documented a number of cases of alleged discrimination on relevant grounds.<sup>58</sup> The ALRC also heard of specific benefits to staff and administrators in religiously affiliated schools when protections against discrimination were introduced.

54 For example, several stakeholders expressed concern that the presence of LGBTQ+ staff or staff in de facto relationships in religious educational institutions would undermine the religious authenticity of the institution. See, eg, D Walter, *Submission 199*; Bishops of Australasian-Middle East Christian Apostolic Churches, *Submission 388*; Institute for Civil Society, *Submission 399*.

55 See also John Tobin, 'Should Discrimination in Victoria's Religious Schools Be Protected? Using the *Victorian Charter of Human Rights and Responsibilities Act* to Achieve the Right Balance' (2010) 36(2) *Monash University Law Review* 16, 43.

56 These submissions were made in relation to the following draft exposure consultations and Inquiry: Attorney-General's Department (Cth), *Religious Discrimination Bills – First Exposure Draft* (Draft Exposure Consultation, 2 October 2019) <[www.ag.gov.au/rights-and-protections/consultations/religious-discrimination-bills-first-exposure-drafts](http://www.ag.gov.au/rights-and-protections/consultations/religious-discrimination-bills-first-exposure-drafts)>; Attorney-General's Department (Cth), *Religious Discrimination Bills – Second Exposure Draft* (Draft Exposure Consultation, 31 January 2020) <[www.ag.gov.au/rights-and-protections/consultations/religious-discrimination-bills-second-exposure-drafts](http://www.ag.gov.au/rights-and-protections/consultations/religious-discrimination-bills-second-exposure-drafts)>; Parliamentary Joint Committee on Human Rights (Cth) (n 22).

57 See, eg, Australian Law Reform Commission, 'What We Heard' (Background Paper ADL2, December 2023) [25], [52], [108].

58 See [Chapter 3](#) at [3.53].

5.32 Under **Recommendation 1**, a school could not refuse to hire a teacher on the ground that they were LGBTQ+. Similarly, a university could not refuse to consider a lecturer's application for promotion because they were in a same-sex relationship, or divorced and in a new relationship. Both examples demonstrate direct discrimination.

5.33 **Recommendation 7** would allow religious educational institutions to give preference to staff on the ground of religion. However, the effect of this recommendation would be that any religious requirements that have a disadvantaging effect on staff based on attributes protected under s 14 of the *Sex Discrimination Act* would be unlawful, unless they are reasonable under s 7B of the Act (indirect discrimination).

5.34 Religious educational institutions would not be able to rely on a term in an employment contract — that has the same effect as the current exception in s 38(1) of the *Sex Discrimination Act* — to discriminate against a staff member on attributes protected under s 14 of the *Sex Discrimination Act*, as this would be unlawful.

## Staff codes of conduct

5.35 **Recommendation 1** would not impact the ability of a religious educational institution to uphold a reasonable code of conduct that binds existing staff.

5.36 Several common law duties have been held to be implied terms in all employment contracts, including the duty to obey, and the duty of fidelity and loyalty.<sup>59</sup> These duties place some limits on staff conduct inside and outside the workplace, and are relevant to the extent that religious educational institutions can impose conduct requirements on staff, and terminate or otherwise take action against staff for non-compliance.

5.37 Religious bodies and religious advocacy groups expressed concern that proposed law reforms would permit staff in religious educational institutions to act or advocate against the teachings of the religion on relationships.<sup>60</sup> Under **Recommendation 1**, it would not be unlawful for an institution to take action against a staff member for failing to:

- perform the requirements of their role (which might include, for example, teaching the school's religious beliefs); or
- adhere to reasonable codes of conduct or directions (which may include the extent to which staff may be permitted to discuss their private life with students);

unless the staff member was directly or indirectly discriminated against on grounds prohibited under the *Sex Discrimination Act*.

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59 For further discussion of these duties, see **Chapter 13**.  
 60 Institute for Civil Society, *Submission* 399.

5.38 Some religious educational institutions suggested in consultations that ‘don’t ask, don’t tell’ policies might be appropriate in managing tensions between an institution’s expectation that staff adhere to a statement of belief and the need to respect a staff member’s rights to privacy and work. However, human rights commissions, equality organisations, unions, and individuals identified such policies as harmful to LGBTQ+ staff.<sup>61</sup> Specifically, ‘don’t ask, don’t tell’ policies were described as having a chilling effect that silences the rights and voices of LGBTQ+ people, including LGBTQ+ people of faith.<sup>62</sup> Religious educational institutions would need to consider how best to maximise the realisation of rights in this context and ensure that a code of conduct that has a disadvantaging effect is reasonable in the circumstances.

### Case study: The impact of ‘don’t ask, don’t tell’ policies

The following is an excerpt from a submission made to the ALRC:

I taught at Catholic high schools for 25 years. I was a year co coordinator for the last 13 years. When my partner and I decided after 18 years together to have a child I knew that I had to resign my position. I lived a professional life in the ‘don’t ask, don’t tell.’ It was made clear to me by a friend who worked for the [Catholic Education Office] that I could not remain. It would get messy and I would never be able to acknowledge my daughter, access caregivers leave without maintaining an elaborate lie. No I was not removed, I resigned realising I could no longer maintain the double life and care for my family. I knew that even though a practising Catholic, the upholding of Catholic ethos in my contract would be held against me. I gave up my career to raise my beautiful daughter and now work as an art therapist. I suffered a great loss of identity in not being able to continue my career.<sup>63</sup>

## Religious leaders, observances, and practices

5.39 **Recommendation 1** would not affect the existing exceptions in s 37(1) of the *Sex Discrimination Act* in relation to staff involved in:

- the training or education of people seeking to become certain religious leaders; and
- the selection of persons to perform functions in connection with, or otherwise to participate in, ‘any religious observance or practice’.<sup>64</sup>

61 See, eg, D Patterson, *Submission 206*; Rainbow Families NSW, *Submission 217*; Equality Australia, *Submission 375*; Australian Human Rights Commission, *Submission 384*; Australian Education Union, *Submission 395*; Not published, *Submission 410*; Australian Council of Trade Unions, *Submission 411*.

62 Not published, *Submission 410*. For a discussion of evidence that suggests staff self-censure in religious educational institutions in order to avoid dismissal, see Tobin (n 55) 42.

63 Personal account, quoted in Rainbow Families NSW, *Submission 217*.

64 See **Chapter 4**.

5.40 The ALRC anticipates that schools would continue to be permitted to segregate staff by sex for participation in religious observances, such as prayers. Theological colleges would also continue to be permitted to select staff on the basis of sex or sexual orientation (for example) where the staff member was to be involved in the training of people seeking ordination as ministers.

### Hiring staff on the basis of sex for classes separated by sex

5.41 One concern raised by some stakeholders (in relation to Jewish and Muslim schools, in particular) was the impact that repealing s 38 of the *Sex Discrimination Act* might have on the ability of religious educational institutions to separate students by sex for religious reasons in classes and other activities, and to hire teachers on the basis of sex to teach or supervise segregated classes. However, the repeal of s 38(3) would have no impact on these practices in relation to students, and hiring practices should be adequately protected under other existing exceptions in the *Sex Discrimination Act*.

5.42 In relation to students, s 21(3) of the *Sex Discrimination Act* provides a specific exception allowing educational institutions to limit enrolment to students of one sex, allowing the operation of single-sex schools. However, there is no specific exception in the Act otherwise excepting religious educational institutions from the prohibition on discrimination on the ground of sex in relation to students: sex is not an attribute covered by s 38(3).

5.43 Nevertheless, a number of co-educational schools, some religiously affiliated and others not affiliated with any religion, separate students by sex for some or all classes, or during religious services.<sup>65</sup> To the extent that separating students by sex does not result in detriment or less favourable treatment for students of either sex, it is not discriminatory and so is lawful.<sup>66</sup>

5.44 Given there is no existing exception for religious educational institutions on the ground of sex in s 38(3) of the *Sex Discrimination Act*, the repeal of that section under **Recommendation 1** would not affect the lawfulness of segregation of students on the basis of sex — any actions that are lawful now would remain lawful.

65 Executive Council of Australian Jewry, *Submission 377*; Australian National Imams Council, *Submission 401*. Examples include Pittwater House in New South Wales, Haileybury College in Victoria, and, previously, Keira High in Wollongong: Jordan Baker, “‘Best of Both Worlds?’: The Co-Ed School Separating Boys and Girls”, *The Sydney Morning Herald* (online, 13 January 2019) <[www.smh.com.au/education/best-of-both-worlds-the-co-ed-school-separating-boys-and-girls-20190111-p50qvw.html](http://www.smh.com.au/education/best-of-both-worlds-the-co-ed-school-separating-boys-and-girls-20190111-p50qvw.html)>.

66 For a discussion of different treatment resulting in detriment in a single-sex setting, see *Haines v Leves* (1987) 8 NSWLR 442. This case discussed discrimination on the ground of sex arising from differences in the curricula leading to different opportunities for tertiary study for girls and boys in single-sex state schools. However, the NSW Court of Appeal emphasised that equality of treatment does not necessarily mean exactly the same treatment: at 458 (Street CJ), 470–1 (Kirby P). For circumstances in which the Court of Appeal of England and Wales found sex segregation within a co-educational school to amount to discrimination under the *Equality Act 2010* (UK), see *HM Chief Inspector of Education, Children’s Services and Skills v the Interim Executive Board of Al-Hijrah School* [2017] EWCA Civ 1426.

5.45 However, for some institutions, religious practices or doctrines require that single-sex classes should be taught by a teacher of the same-sex, and the ALRC has heard from consultees that a small number of co-educational schools hire and assign duties on this basis. Some of those consulted noted that, where possible, they simultaneously advertise for male and female staff positions, however, this is not always practicable.

5.46 Taken in isolation, repealing ss 38(1)–(2) of the *Sex Discrimination Act* would potentially change the legal position in relation to these practices concerning hiring of staff. This reform would take away a specific exception that currently allows religious educational institutions to discriminate in relation to staff on the ground of sex where this is done in good faith, in order to avoid injury to the religious susceptibilities of adherents of the religion.

5.47 However, there is a reasonable argument that these types of positions could fall within the more general exception in s 30(1) of the *Sex Discrimination Act*. That provision allows what would otherwise be unlawful discrimination in employment or contracting on the ground of sex (only) where it is a ‘genuine occupational qualification’ to be a person of a particular sex. As discussed further in **Chapter 12**, the illustrative examples in s 30(2) of the Act include examples of situations where it is not literally *necessary* that a person be of a particular sex to perform the role, but ‘the character of the work is such that it is better or preferably done by someone with a particular attribute, for reasons of, say, modesty, empathy or authenticity’.<sup>67</sup>

5.48 There is a reasonable argument that staff positions that teach or supervise students of a particular sex in a religious educational institution are analogous to the examples in s 30(2) of the *Sex Discrimination Act*. This does not mean, however, that *any* religious requirement could justify specifying sex to be a genuine occupational requirement for a particular role. For example, if a religious educational institution were to specify that it would only hire a man for the position of school principal on the basis that this accords with Male Headship Doctrines,<sup>68</sup> this would not be analogous to the examples given in s 30(1)(b), and would be contrary to the objects of the *Sex Discrimination Act*. Furthermore, the International Labour Organisation has stated that religious doctrines such as Male Headship should not form the basis of any genuine occupational requirement for leadership positions.<sup>69</sup>

67 Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination Law and Equal Opportunity Law* (The Federation Press, 3rd ed, 2018) 576.

68 Under Male Headship Doctrines, men are seen as the only appropriate leaders in both homes and the Church: see Francisco Perales and Gary Bouma, ‘Religion, Religiosity and Patriarchal Gender Beliefs: Understanding the Australian Experience’ (2019) 55(2) *Journal of Sociology* 323, 325. The ALRC heard from female survey respondents who had experienced or observed gender-based discrimination in religious educational institutions where there was pressure to subscribe to Male Headship Doctrines: see, eg, ALRC Survey, 2023 (Student in a theological college in the last 5 years; 65+ years old); ALRC Survey, 2023 (Student in a school or theological college; 25–34 years old). One male respondent shared the view that male applicants tend to be preferred for headship (leadership) positions: ALRC Survey, 2023 (Student in a school in the last 5 years; 18–24 years old).

69 International Labour Conference, *Equality in Employment and Occupation, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 4B)* (83rd Session, 1996) [120].

5.49 It should be noted that there may be circumstances in which some of these hiring practices could be shown to fall within s 7D of the *Sex Discrimination Act* (special measures intended to achieve equality).

5.50 If the Australian Government considers that it is desirable to provide further clarity to the small number of schools that hire staff of a particular sex for classes separated by sex, it could make a regulation under s 30(2)(h) of the *Sex Discrimination Act*, bringing such practices clearly within the scope of s 30 of the Act. For example, the regulation could declare that it is a genuine occupational qualification in an educational institution for staff of one sex to teach or supervise students of the same-sex where it is: (i) in good faith; and (ii) reasonably necessary to uphold the established doctrines, tenets, beliefs, practices, or teachings of the relevant religion or creed.

## Alternative reforms suggested by stakeholders

5.51 The ALRC considered several alternative reforms suggested by stakeholders, but has concluded that **Recommendation 1** is the most appropriate reform for the reasons outlined in **Chapter 4**. In summary, **Recommendation 1** responds to the Terms of Reference, is the option most consistent with Australia's international human rights obligations, and maximises the realisation of relevant rights.

5.52 This section addresses some alternative reforms to the *Sex Discrimination Act* proposed by stakeholders and sets out, in summary, why the ALRC has not adopted these proposals.

5.53 Several stakeholders identified that various recommendations made by the Expert Panel in the Religious Freedom Review formed the basis for their own alternative reform suggestions.<sup>70</sup> In particular, Recommendation 7 of the Religious Freedom Review stated:

The Commonwealth should amend the Sex Discrimination Act to provide that religious schools may discriminate in relation to students on the basis of sexual orientation, gender identity or relationship status provided that:

- (a) the discrimination is founded in the precepts of the religion
- (b) the school has a publicly available policy outlining its position in relation to the matter
- (c) the school provides a copy of the policy in writing to prospective students and their parents at the time of enrolment and to existing students and their parents at any time the policy is updated, and

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<sup>70</sup> Presbyterian Church of Australia, *Submission 186*; Anglican Church Diocese of Sydney, *Submission 189*; M Fowler, *Submission 201*; Presbyterian Church Australia in NSW, *Submission 235*; Australian Christian Lobby, *Submission 299*; Catholic Education Archdiocese of Canberra and Goulburn, *Submission 328*; Executive Council of Australian Jewry, *Submission 377*; Catholic Education Tasmania, *Submission 397*; Institute for Civil Society, *Submission 399*; National Catholic Education Commission, *Submission 409*.



- (d) the school has regard to the best interests of the child as the primary consideration in its conduct.<sup>71</sup>

5.54 The Terms of Reference for this Inquiry are significantly different from those of the Religious Freedom Review.<sup>72</sup>

5.55 Three suggested alternative reform approaches are examined in the following sections. In summary, the ALRC considers that these alternative approaches do not respond directly to the Terms of Reference for this Inquiry and would not maximise the realisation of all relevant rights to the same extent as **Recommendation 1**.

### **Deem certain acts to be ‘not discrimination’**

5.56 In relation to students, an alternative approach proposed by some stakeholders was that reforms to the *Sex Discrimination Act* should state that certain acts performed by religious educational institutions are ‘not discrimination’ for the purposes of the Act. Specifically, some stakeholders sought to deem the teaching of religious doctrine or the imposition of institutional policies, rules, or codes of moral conduct as ‘not discrimination’, on the basis that these acts seek to preserve the religious ethos of a religious educational institution.<sup>73</sup>

5.57 For example, the Institute for Civil Society specified, in relation to students, that:

Proposed amendments to the [Sex Discrimination Act] should state that the following specific conduct by religious education institutions and persons acting on their behalf is not discrimination under the SDA...

1. Conduct by or on behalf of a religious educational institution in teaching or expressing to a student, in good faith, the religious beliefs of the religious educational institution, whether in formal instruction or not and whether as part of the curriculum or not, is not discrimination under the [Sex Discrimination Act]. ...<sup>74</sup>

5.58 In addition to the ‘in good faith’ test incorporated by the Institute for Civil Society in its reform proposal, Freedom for Faith proposed that additional tests be used to qualify a new exception that certain acts be deemed ‘not discrimination’:

[The following provision should be enacted:] (3A) For the avoidance of doubt, it is no detriment to a student, nor does it amount to less favourable or disadvantageous treatment of a student, for an educational institution to establish rules or codes of moral conduct, or to engage in teaching activity if those rules or codes or that activity are established, or that activity is engaged in: (a) in good faith in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed; and (b) by or with the authority of,

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71 *Religious Freedom Review: Report of the Expert Panel* (Report, 18 May 2018) rec 7.

72 Department of the Prime Minister and Cabinet (Cth), ‘Religious Freedom Review Terms of Reference’ <[www.pmc.gov.au/publications/religious-freedom-review-terms-reference](http://www.pmc.gov.au/publications/religious-freedom-review-terms-reference)>.

73 See, eg, Freedom for Faith, *Submission 203*; Institute for Civil Society, *Submission 399*.

74 Institute for Civil Society, *Submission 399*.



an educational institution that is conducted in accordance with those doctrines, tenets, beliefs or teachings.<sup>75</sup>

5.59 The above reform approach — whether applied in relation to admission only, or more broadly — would in effect allow discrimination against students on the basis of attributes protected under the *Sex Discrimination Act*, and so would have a similar effect to existing s 38(3) of the Act. Consequently, this proposed reform would not align with the first policy position set out in the Terms of Reference. In addition, under the above reform approach, institutional rules would not be subject to any test of reasonableness in relation to any disadvantaging effect on students on the basis of attributes protected under the *Sex Discrimination Act*. Consequently, this approach would not facilitate a fact-specific analysis of the proportionality of any disadvantage in light of the legitimate aims of the institution. As a result, this approach would not achieve the realisation of human rights to the same extent as [Recommendation 1](#) would.

### Publicise reliance on exceptions

5.60 Several stakeholders proposed that existing exceptions for religious educational institutions should be retained or replaced with new exceptions, and that religious educational institutions should be required to publish policies if the institution seeks to rely on those exceptions. This proposal reflects aspects of Recommendation 7 of the Religious Freedom Review and the reform approach outlined above.

5.61 Some stakeholders justified this alternative reform on the basis of transparency and balancing rights:

Transparency opens up the use of exemptions to scrutiny. While religious organisations may be making use of an exemption they also may not be. It is only when a dispute arises, where an individual believes that the exemption applied by the religious organisation was done so unlawfully, that public debate and therefor scrutiny can occur. Equally where a religious organisation chooses not to make use of an exemption this too would be a matter of public record. Those who interact with these religious organisations would then have the necessary knowledge to make informed decisions about their continued interactions. ... Transparency [would] also allow those schools which do not make use of the exemptions to distinguish themselves from those that do. Parents could then vote with their feet and enrol their children in schools which conform to their values.<sup>76</sup>

75 Freedom for Faith, *Submission 203*. This reform approach drew upon a personal view expressed by the former ALRC President, the Hon Justice Sarah Derrington AM, during the ALRC's *Review into the Framework of Religious Exemptions in Anti-Discrimination Legislation* — a previous iteration of this Inquiry. It should be noted that this view responded to different policy positions in the Terms of Reference for the previous ALRC inquiry, and is therefore less relevant to the [Terms of Reference](#) for this Inquiry.

76 R Barker, *Submission 166*. See also S French, *Submission 305*.

5.62 A reliance on existing or new exceptions to prohibitions on discrimination would in effect facilitate discrimination against students on the basis of attributes protected under the *Sex Discrimination Act*. The publication of policies would not necessarily prevent discrimination, but rather would have the potential to entrench and normalise discrimination. Consequently, this proposed reform would not fulfil the first policy position set out in the Terms of Reference. While this proposed reform would promote the ability of religious educational institutions to exercise their institutional autonomy, it would not promote the realisation of all relevant rights to the same extent as **Recommendation 1**.

### **Delay reform until religious discrimination legislation is enacted**

5.63 Some stakeholders expressed the view that religious freedom would be curtailed unless religious discrimination legislation was enacted prior to the repeal of exceptions available to religious educational institutions under the *Sex Discrimination Act*. For example, Freedom for Faith stated:

Discrimination laws, and the clauses in those laws which recognise religious freedom rights, are currently an important way that religious freedom is protected in Australia (noting the absence of a Religious Discrimination Act at the federal level).<sup>77</sup>

5.64 The National Catholic Education Commission drew attention in its submission to the need for religious educational institutions to have clarity in how they can operate in accordance with their beliefs:

The protracted debate and delay in introducing proactive legislation to protect religious freedom in Australia is discouraging for communities of faith and creates uncertainty for faithbased schools in their management and operation. ... Removing these existing protections in the absence of a broader religious freedom framework, apart from being a discordant and fractured approach to a deeply important principle, makes religious schools vulnerable to having their freedom to teach and operate in accordance with their beliefs severely limited, as the legislative changes proposed in the consultation paper demonstrate. It also makes it impossible to view the legislative response to issues holistically.<sup>78</sup>

5.65 In the ALRC's view, there is no reason why reforms to the *Sex Discrimination Act* should not be implemented prior to the enactment of a Religious Discrimination Act, if the Australian Government were so minded. It is relevant to note that the reforms recommended in this Report are based on the same policies that would underpin the Religious Discrimination Act and that the reforms are not conditional in any way on the content of that Act. Religious institutions are currently the subject of exceptions to prohibitions in Commonwealth law on discrimination against staff on the basis of religion.<sup>79</sup> Furthermore, under **Recommendation 7**, religious educational institutions

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77 Freedom for Faith, *Submission 203*.

78 National Catholic Education Commission, *Submission 409*.

79 *Fair Work Act 2009* (Cth) ss 153(2)(b), 195(2)(b), 351(2)(c), 772(2)(b).

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would continue to be able to give preference, in good faith, to persons of the same religion in the selection of staff, in order to build a community of faith.

5.66 Consequently, there is no compelling reason to delay reform of the *Sex Discrimination Act* pending a future Religious Discrimination Act. Rather, **Recommendation 1** would maximise, more immediately, the realisation of a range of rights.



## 6. Scope of Protection

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### Introduction

6.1 This chapter contains recommended reforms regarding the scope of protection from discrimination on the basis of attributes protected under the *Sex Discrimination Act*. These recommendations for reform work alongside [Recommendation 1](#) to respond to the first two policy positions set out in the Terms of Reference, that religious educational institutions:

- must not discriminate against a student on the basis of sexual orientation, gender identity, marital or relationship status, or pregnancy; and
- must not discriminate against a member of staff on the basis of sex, sexual orientation, gender identity, marital or relationship status, or pregnancy.

6.2 This chapter proceeds in three parts. Each part relates to [Recommendation 2](#), [Recommendation 3](#), and [Recommendation 4](#), respectively.

6.3 [Recommendation 2](#) clarifies that existing exceptions regarding the training of certain religious leaders should be retained, with language updated to be more inclusive of different religions.

6.4 [Recommendation 3](#) would expand protections from discrimination on the basis of attributes protected under the *Sex Discrimination Act* to include all persons employed, engaged, or otherwise utilised by a religious educational institution who

fall within the definition of ‘worker’ in s 4 of the Act (for example, pre-service teachers and volunteers).

6.5 **Recommendation 4** would expand protections from discrimination under the *Sex Discrimination Act* to include students and staff who associate with, or are believed to associate with, a person who has or is believed to have a particular attribute protected under the *Sex Discrimination Act*.

6.6 Discussion of the recommendations below is informed by relevant principles of international human rights law (see **Chapters 10** and **11**), input received from stakeholders (see Background Paper ADL2), and analysis of related domestic laws (see **Chapters 12** and **13**).

## Training religious leaders

**Recommendation 2** Further to Recommendation 1, existing exceptions in s 37(1)(b) of the *Sex Discrimination Act 1984* (Cth) regarding the training of certain religious leaders should be retained and amended to incorporate language that encompasses the diversity of descriptions of religious leaders across the broad range of religions. Extrinsic materials accompanying the amending Bill should clarify that the amendment is not intended to effect any substantive change regarding the nature of the positions covered, but rather to be more inclusive of the diversity of descriptions of religious leaders across the broad range of religions.

6.7 The ability to select individuals for and train individuals in positions of religious authority or power in accordance with the requirements and standards of the relevant religion is a matter recognised in international human rights law as central to freedom of religion or belief.<sup>1</sup>

6.8 **Recommendation 2** would retain the existing exception in the *Sex Discrimination Act* covering such positions, but recommends that the language of the exception be updated to make it more inclusive of the diversity of descriptions of religious leaders across the broad range of religions practiced in Australian society.

6.9 This means that organised religions would remain exempt from the prohibition on discrimination on all grounds contained in the *Sex Discrimination Act*, when choosing and training ministers and other religious leaders (such as bishops, elders,

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<sup>1</sup> See *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, GA Res 36/55, 36th sess, UN Doc A/RES/36/55 (16 December 1976, adopted 25 November 1981) art 6(g) ('Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief'); Heiner Bielefeldt, Special Rapporteur, *Elimination of All Forms of Religious Intolerance*, 68th sess, UN Doc A/68/290 (7 August 2013) [57]–[59]. However, it must be noted that not all organised religions have such positions.

imams, pastors, priests, preachers, and rabbis) in accordance with the requirements and standards of the relevant religion.

6.10 **Recommendation 2** is not intended to broaden the scope of the existing exception in relation to the types of leadership positions covered. Accordingly, implementation of **Recommendation 2** need not occur at the same time as implementation of **Recommendation 1**, and should not delay implementation of **Recommendation 1**.

6.11 It is formally outside the Terms of Reference to recommend amendments to s 37(1)(a) of the *Sex Discrimination Act*. However, the wording of each of s 37(1)(a) and s 37(1)(b) is so similar that the Australian Government should also consider whether an equivalent amendment should be made to s 37(1)(a) so that the language which describes religious leadership positions in s 37(1)(a) is consistent with the language in s 37(1)(b).

## The existing law

6.12 Section 37(1) of the *Sex Discrimination Act* provides:

- (1) Nothing in Division 1 or 2 affects:
  - (a) the ordination or appointment of priests, ministers of religion or members of any religious order;
  - (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order;
  - (c) the selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice; or
  - (d) any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

6.13 These exceptions are mirrored closely across state and territory anti-discrimination legislation (see **Appendix F**). In 2022, an additional provision was inserted into NT anti-discrimination legislation, providing an exception to prohibitions on discrimination for ‘the training or education of people seeking appointment as leaders in a religious organisation’.<sup>2</sup>

6.14 There has been no relevant judicial consideration of the scope of ss 37(1)(a)–(b) of the *Sex Discrimination Act*, nor of equivalent provisions in state or territory legislation.

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2 *Anti-Discrimination Act 1992* (NT) s 51(ba).

## Analysis underlying the recommendation

6.15 Section 37(1)(b) allows some discrimination on grounds contained in the *Sex Discrimination Act* by religious educational institutions (predominantly theological colleges). On its face, this is contrary to the Australian Government's policy position set out in the Terms of Reference. However, retaining this exception is consistent with Australia's international human rights obligations. It would also maintain consistency with existing state and territory anti-discrimination legislation.

6.16 Given the diversity of religions practiced in Australian society, it is appropriate to update the language used in s 37(1)(b) to be more reflective of that diversity, without widening its scope of application.

6.17 As discussed further in **Appendix I**, an important aspect of the right to freedom of religion or belief is respecting the autonomy of religious organisations to manage their internal affairs. Such autonomy is particularly important in relation to the selection, appointment, or designation by succession of religious leaders who exercise religious authority (such as through sacraments or ceremonies) within the community. This is recognised in art 6 of the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* which emphasises that the right to freedom of thought, conscience, religion, or belief includes the freedom to 'train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief'.<sup>3</sup>

6.18 The importance of this protection was explained by former Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt, who has stated that:

Religious communities, in particular minority communities, need an appropriate institutional infrastructure, without which their long-term survival options as a community might be in serious peril, a situation which at the same time would amount to a violation of freedom of religion or belief of individual members (see A/HRC/22/51, para. 25). Moreover, for many (not all) religious or belief communities, institutional questions, such as the appointment of religious leaders or the rules governing monastic life, directly or indirectly derive from the tenets of their faith. Hence, questions of how to institutionalize religious community life can have a significance that goes far beyond mere organizational or managerial aspects. Freedom of religion or belief therefore entails respect for the autonomy of religious institutions.<sup>4</sup>

6.19 Bielefeldt has highlighted that 'in many (not all) denominations, positions of religious authority, such as bishop, imam, preacher, priest, rabbi or reverend, remain reserved to males', and that this collides with the principle of equality between men and women.<sup>5</sup> However, it is not the state's role 'to shape or reshape religious

3 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.

4 Heiner Bielefeldt, Special Rapporteur, *Elimination of All Forms of Religious Intolerance*, 68th sess, UN Doc A/68/290 (7 August 2013) [57].

5 Ibid [58].



traditions, nor can the State claim any binding authority in the interpretation of religious sources or in the definition of the tenets of faith'.<sup>6</sup> For this reason, selection and training of people in positions of religious authority within such communities needs to be determined by the institution in accordance with its own requirements. This need for institutional autonomy is reflected in several international jurisdictions in exceptions to prohibitions on discrimination in relation to training and selection of religious leaders.<sup>7</sup> Instances where states have interfered with the appointment or recognition of religious leaders have been found to have breached international law.<sup>8</sup>

6.20 In the *Consultation Paper*, the ALRC put forward general propositions, based on the existing exceptions in ss 37(1)(a)–(c) of the *Sex Discrimination Act*, that

Religious educational institutions should be permitted to train religious ministers and members of religious orders ... unfettered by sex discrimination laws.<sup>9</sup>

[and]

Religious educational institutions should be able to select staff involved in the training of religious ministers and members of religious orders ... unfettered by sex discrimination laws.<sup>10</sup>

6.21 These propositions received broad support in submissions.<sup>11</sup> For example, the Anglican Social Responsibilities Commission (Diocese of Perth), noted that, while its members would like to see the elimination of discrimination in these areas within its own Church, it recognises

that this legislation has to apply to a range of different religious beliefs across Australia and that there are different theological interpretations even within the Anglican Church on such issues.

In the circumstances, such matters need to be decided within each religious community based on their own religious criteria without the need for courts or tribunals to be involved in assessing the appropriateness of their doctrines or tenets. While such discrimination can be very harmful to individuals, they are internal matters which do not impinge on the rights of the wider community outside that religion.<sup>12</sup>

6 Ibid [59].

7 See further Nazila Ghanea, Thiago Alves Pinto and Gehan Gunatillake, *The Relationship between FoRB and SOGIE Rights* (Report, 2022) 17.

8 See, eg, *Hasan and Chaush v Bulgaria* (European Court of Human Rights, Application No 30985/96, 26 October 2000).

9 *Consultation Paper*, Proposition A.2.

10 *Consultation Paper*, Proposition B.2.

11 See, eg, Australian Federation of Islamic Councils, *Submission 84*; Anglican Social Responsibilities Commission, Diocese of Perth *Submission 98*; Anglican Youthworks, *Submission 176*; Uniting Network Australia, *Submission 408*; Australian Council of Trade Unions, *Submission 411*.

12 Anglican Social Responsibilities Commission, Diocese of Perth *Submission 98*.

6.22 At the same time, two stakeholders suggested that the wording of s 37(1)(a) and s 37(1)(b) of the *Sex Discrimination Act* should be amended to reflect the diversity of religious practices in Australia.<sup>13</sup> For example, the University of Divinity's submission noted that the

term 'religious ministers and members of religious orders' is predominantly Christian religious language that does not reflect the pluralism of contemporary Australian society, a society that includes aunts and uncles, elders, priests, pastors, imams, rabbis to name a few terms.<sup>14</sup>

6.23 A number of submissions from theological colleges and other religious organisations argued in favour of broadening the exception, to include training for religious work in other capacities, such as in the capacity of a lay worker or volunteer involved in propagating the faith, or teachers in religious schools.<sup>15</sup> On the other hand, the Uniting Network Australia suggested that the concepts of religious minister or religious leader should be carefully defined, and the exception should only apply to courses directed to training for those positions, not other courses offered by a religious university.<sup>16</sup>

6.24 The ALRC has concluded that the scope of the existing exception in s 37(1)(b) of the *Sex Discrimination Act* is consistent with Australia's obligations under international law, and should not be broadened to include training for positions of lower authority or hierarchical status than is the case for a priest or minister of religion in a Christian religion. It is important that the exception in s 37(1)(b) of the Act does not undermine the intention of **Recommendation 1**, for example, by extending its scope to the training of students for any leadership or advocacy role within a religion.

## Updating the language used

6.25 In updating the language used in s 37(1)(b), it may be appropriate to include the term 'religious leader', reflecting the use of the term 'leader' in the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* and the Human Rights Committee's General Comment No 22.<sup>17</sup> However, it should be made clear, through extrinsic materials or otherwise, that the amendments are not intended to broaden the scope of the exception, but to cover positions equivalent to 'priest, minister, or members of any religious order'. Alternatively, s 37(1)(b) could retain reference to 'priests, ministers of religion or

13 University of Divinity, *Submission 115*; Australian Christian Higher Education Alliance, *Submission 208*.

14 University of Divinity, *Submission 115*.

15 Ibid; Moore Theological College Governing Board, *Submission 99*; Presbyterian Church of Australia, *Submission 186*; Sydney Missionary and Bible College, *Submission 205*; Australian College of Theology (on behalf of 32 organisations), *Submission 207*.

16 Uniting Network Australia, *Submission 408*.

17 Human Rights Committee, *General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993, adopted 30 July 1993) [4].

members of a religious order' and insert a phrase such as 'or equivalent positions howsoever called in any religion'.

## Protection for all workers

**Recommendation 3** Further to Recommendation 1, the *Sex Discrimination Act 1984* (Cth) should be amended to extend protection against discrimination beyond employees and 'contract workers' working for or at religious educational institutions, to all persons employed, engaged, or otherwise utilised by a religious educational institution who fall within the definition of 'worker' as provided in s 4 of that Act.

6.26 Part II Div 1 of the *Sex Discrimination Act* is headed 'Discrimination in work'. Within Div 1, the provisions of greatest relevance to religious educational institutions are the prohibitions on discrimination in the context of 'employment' (s 14) and the prohibitions on discrimination against a 'contract worker' (s 16).

6.27 The term 'employment' is defined in the *Sex Discrimination Act* to include 'work under a contract for services'.<sup>18</sup> Consequently, the concept of 'employment' in the Act appears (somewhat unusually) to include the engagement of a self-employed independent contractor who provides services. The protections against discrimination in employment, therefore, ordinarily apply to independent contractors who provide services, as well as to staff 'employed' in the more usual sense of that term. The definition of 'employment' in s 4 of the Act also expressly includes 'part-time and temporary employment'.

6.28 The term 'contract worker' is defined as 'a person who does work for another person pursuant to a contract between the employer of the first-mentioned person and that other person'.<sup>19</sup> Consequently, the provisions regarding discrimination against contract workers ordinarily apply to employees of any entity that contracts with a religious educational institution to provide services.

6.29 Section 38 of the *Sex Discrimination Act* contains two exceptions relevant to discrimination in work:

- 'in connection with employment as a member of the staff of' a religious educational institution; and
- in relation to discrimination 'in connection with a position as a contract worker that involves the doing of work in' a religious educational institution.

6.30 The repeal of s 38 of the Act (under **Recommendation 1**) would consequently afford greater protection from discrimination to any person in 'employment', and to any 'contract worker', at a religious educational institution.

<sup>18</sup> *Sex Discrimination Act 1984* (Cth) s 4.

<sup>19</sup> *Ibid.*

6.31 However, there may remain a gap in protection for people who work in certain other capacities, including

- **pre-service teachers:** tertiary students who are studying to become qualified teachers routinely spend time working in educational institutions in order to gain practical work experience as part of their studies and are not otherwise remunerated for that work; and
- **volunteers:** educational institutions sometimes engage the services of volunteers for various purposes.

6.32 The ALRC received a submission from a pre-service teacher who highlighted the vulnerability of not having protection under Commonwealth anti-discrimination law:

Preservice teachers are treated in a similar way to staff, but are not staff. A pre-service teacher's lack of seniority means that they are a group particularly susceptible to discriminatory behaviour, especially from their practicum supervisors ... who write their report and have discretionary power to pass or fail us, thus determining whether they can even complete their teaching degree.<sup>20</sup>

6.33 While **Recommendation 3** was not formally proposed in the *Consultation Paper*, the ALRC did discuss the concept in subsequent consultations, and did not hear any views opposing this reform.

6.34 Like employees and contract workers, pre-service teachers and volunteers perform work in and for an institution. Those who perform work in this capacity should be protected from discrimination. There is no cogent reason why pre-service teachers or volunteers should not be subject to the same protections from discrimination as employees and contract workers. Consequently, **Recommendation 3** aims to extend protections to a broader category of 'workers'.

6.35 The wording of **Recommendation 3** is limited to religious educational institutions and reflects the parameters of the Terms of Reference. The ALRC is not aware of any reason such a reform should apply to religious educational institutions only, and not to other educational institutions, or other employers more generally. The Australian Government should consider broader reform in this regard pursuant to **Recommendation 11**. The ALRC does not recommend that the *Sex Discrimination Act* be amended to protect workers in religious educational institutions only, but rather any amendment should apply more broadly (for example, to all educational institutions).

## Consistency within the Sex Discrimination Act

6.36 Commonwealth anti-discrimination laws generally do not currently apply to pre-service teachers and volunteers (as they are not included in the definition of 'employment'). The Australian Human Rights Commission has recommended that Commonwealth anti-discrimination laws 'be amended to protect volunteers and interns'.<sup>21</sup> It highlighted that 'as modern work practices have changed, these exclusions have become less justifiable' and that 'leaving such a vulnerable cohort of people excluded from protections against unlawful discrimination is unacceptable'.<sup>22</sup>

6.37 The Religious Discrimination Bill 2021 (Cth) (which was not ultimately passed into law by the Commonwealth Parliament) contained a broad definition of 'employment' as follows:

- (a) work under a contract of employment (within its ordinary meaning); or
  - (b) work that a person is otherwise appointed or engaged to perform;
- whether the work is on a fulltime, parttime, temporary or casual basis, or whether it is paid or unpaid.

6.38 One area of existing anti-discrimination law that does currently apply more broadly, including to volunteers and students gaining work experience, relates to sexual harassment under the *Sex Discrimination Act*. Following the passage of the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth), s 4 of the *Sex Discrimination Act* imports the broad definition of 'worker' found in s 7(1) of the *Work Health and Safety Act 2011* (Cth):

- 7(1) A person is a **worker** if the person carries out work in any capacity for a person conducting a business or undertaking, including work as:
- (a) an employee; or
  - (b) a contractor or subcontractor; or
  - (c) an employee of a contractor or subcontractor; or
  - (d) an employee of a labour hire company who has been assigned to work in the person's business or undertaking; or
  - (e) an outworker; or
  - (f) an apprentice or trainee; or
  - (g) a student gaining work experience; or
  - (h) a volunteer; or
  - (i) a person of a prescribed class.

21 Australian Human Rights Commission, *Free & Equal: A Reform Agenda for Federal Discrimination Laws* (Position Paper, December 2021) 252.

22 Ibid.

6.39 **Recommendation 3** would create greater consistency within the *Sex Discrimination Act* by applying the existing definition of ‘worker’ in s 4 of the Act to determine the class of persons protected by prohibitions on discrimination currently contained in ss 14 and 16 of the Act, at least in relation to religious educational institutions. As discussed above, the Australian Government should consider broader reform to achieve greater consistency of coverage in relation to employment in other contexts, not just in religious educational institutions. As part of any such broader reform, the Australian Government should consider repealing s 16, on the basis that all ‘workers’ could be protected under s 14.

6.40 Other exceptions in the *Sex Discrimination Act* currently refer to employees or contract workers. For example, s 30 of the Act, which provides a genuine occupational qualification exception in relation to the protected attribute of sex, applies to employees, commission agents, and contract workers. If **Recommendation 3** is implemented, then these other exceptions in the Act should also apply to ‘workers’.

6.41 There are several ways in which **Recommendation 3** could be implemented. For example, a new provision to prohibit discrimination against ‘workers’ in (at least) religious educational institutions could be inserted into the *Sex Discrimination Act*. Alternatively, ss 14 and 16 of the Act could be amended such that their combined effect is to provide protection to ‘workers’, including student teachers and volunteers who would not ordinarily qualify as ‘employees’ or ‘contract workers’.

## Consistency with state and territory laws

6.42 State and territory anti-discrimination laws vary in their prohibition on discrimination against pre-service teachers and volunteers (see below **Table 6.1**). Under **Recommendation 3**, the *Sex Discrimination Act* would be consistent with anti-discrimination laws in the ACT,<sup>23</sup> the NT,<sup>24</sup> Tasmania,<sup>25</sup> and SA.<sup>26</sup> Reforms proposed by the Law Reform Commission of WA (should they be implemented)

23 The *Discrimination Act 1991* (ACT) dictionary includes in the definition of ‘employment’, ‘work as an unpaid worker’ which would include work undertaken by pre-service teachers and volunteers.

24 Section 4 of the *Anti-Discrimination Act 1992* (NT) includes in the definition of ‘work’, work carried out by ‘a student or other person gaining work experience, whether formal or informal’ and ‘a volunteer’.

25 The *Anti-Discrimination Act 1998* (Tas) does not employ or define the term ‘work’ or ‘worker’. However, the scope of s 22(1) of that Act likely encompasses pre-service teachers as volunteers, as it prohibits discrimination against a person undertaking or engaged in any activity in connection with employment or education and training, and ‘employment’ is defined in s 3 as including ‘employment or occupation in any capacity, with or without remuneration’.

26 Section 5 of the *Equal Opportunity Act 1984* (SA) includes an unpaid worker in the definition of ‘employee’. ‘Unpaid worker’ is defined in s 5 as ‘a person who performs work for an employer for no remuneration’. While the term ‘work’ is not defined under the Act, ‘unpaid worker’ likely encompasses both pre-service teachers and volunteers.

would also be consistent with the prohibitions on discrimination against pre-service teachers and volunteers contemplated under **Recommendation 3**.<sup>27</sup>

6.43 **Recommendation 3** would align, to some degree, with Queensland law. Queensland law includes protections for students undertaking work experience as well as volunteers, but expressly excludes protection for pre-service teachers who are, in effect, students undertaking work, where:

- the work placement is being provided to a student enrolled in a course provided by a registered higher education provider; and
- the experience is a mandatory or assessable part of the course.<sup>28</sup>

6.44 Expanding the scope of protection to pre-service teachers and volunteers would be inconsistent with laws in NSW, Victoria, and WA which do not currently prohibit discrimination against unpaid workers.<sup>29</sup>

**Table 6.1: Existing protection for pre-service teachers and volunteers in state and territory anti-discrimination laws**<sup>30</sup>

	Pre-service teachers	Volunteers
ACT		
NSW		
NT		
Qld		
SA		
Tas		
Vic		
WA		

 Protection       No protection

27 The proposed reforms, if implemented, would expand the definition of 'employment' in the *Equal Opportunity Act 1984* (WA) to include 'work by a student gaining work experience', 'work under a vocational placement', and 'work by a volunteer or unpaid worker': see Law Reform Commission of Western Australia, *Project 111: Review of the Equal Opportunity Act 1984 (WA)* (Final Report, May 2022) 133, rec 59.

28 The definition of 'work' in the *Anti-Discrimination Act 1991* (Qld) includes work under a work experience arrangement and work on a voluntary basis: *Anti-Discrimination Act 1991* (Qld) sch 1 (definition of 'work'). Section 4(2) of the *Education (Work Experience) Act 1996* (Qld) excludes work of a pre-service teacher from the definition of 'work experience arrangement'.

29 Part 6 of the *Equal Opportunity Act 2010* (Vic) includes protections from sexual harassment for volunteers and unpaid workers. However, that Act does not also include protection from discrimination for such workers: see *Equal Opportunity Act 2010* (Vic) s 4 (definition of 'employment').

30 Beyond prohibitions on sexual harassment.

## Consistency with international law

6.45 **Recommendation 3** seeks to ensure the effectiveness of protections that would be afforded under **Recommendation 1**. Accordingly, the analysis of international law relating to **Recommendation 1** in **Chapter 4** similarly applies to **Recommendation 3**.<sup>31</sup> In summary, **Chapter 4** suggests that realisation of rights to equality and non-discrimination, education, work, health and life, privacy, children's rights, and freedom of expression would be promoted and not restricted in any way by **Recommendation 1**.

6.46 The assessment in **Chapter 4** of restriction of the right to manifest religion and the associated parental liberty also applies to **Recommendation 3**.<sup>32</sup> This reform would not represent an unjustifiable limitation on the freedom to manifest religion or belief, or the associated parental liberty. Consequently, the ALRC considers that **Recommendation 3** is consistent with Australia's international law obligations, as it would maximise the realisation of relevant human rights and restrict some rights only in strict accordance with limitation criteria under international law.

6.47 Another indication of consistency with international law is that **Recommendation 3** is generally consistent with the current legal position in the majority of Australian states and territories.

6.48 Further, if the principle underpinning **Recommendation 3** were implemented in relation to all educational institutions (rather than just in relation to religious educational institutions), the reform would not disadvantage religious educational institutions in particular.

## Protection for associates

**Recommendation 4** Further to Recommendation 1, the *Sex Discrimination Act 1984* (Cth) should be amended in relation to a religious educational institution, such that Part II of the Act applies in relation to discrimination against a person who:

- associates with (whether as a relative or otherwise); or
- is believed to associate with;

another person who has or is believed to have a particular protected attribute in the same way as it applies in relation to discrimination against a person on the ground of that protected attribute.

31 See **Chapter 4** at [4.42]–[4.134].

32 See **Chapter 4** at [4.96]–[4.115] and [4.116]–[4.129].



6.49 **Recommendation 4** would extend the scope of protection for staff and students at religious educational institutions to include protection from discrimination due to a staff member's or student's association (or perceived association) with another person who has, or is believed to have, a protected attribute.

6.50 Under **Recommendation 4**, protection against discrimination would be extended to situations in which:

- A may or may not associate with B (a relative or other type of associate);
- B may or may not have a protected attribute; and
- C discriminates against A because:
  - A is, or is believed to be, associated with B; and
  - B has, or is believed to have, a protected attribute.

6.51 In this Report, the ALRC refers to such situations as 'associative discrimination'.

6.52 The framing of the Terms of Reference calls for reforms to prohibit associative discrimination. Specifically, the Terms of Reference provide that a religious educational institution:

- must not discriminate against a student **on the basis of** sexual orientation, gender identity, marital or relationship status, or pregnancy; and
- must not discriminate against a member of staff **on the basis of** sex, sexual orientation, gender identity, marital or relationship status, or pregnancy.

6.53 The phrase 'on the basis of' is sufficiently broad to apply to the attributes of any person, and not only to the attributes of the aggrieved person who has been discriminated against. This construction is broader than existing prohibitions on discrimination in the *Sex Discrimination Act*, which require that the ground of discrimination must relate directly to the aggrieved person. For example, s 5A(1)(a) of the Act prohibits discrimination 'on the ground of the sexual orientation of the aggrieved person'.<sup>33</sup>

6.54 Under **Recommendation 4**, liability for discrimination would arise when a person believes that there is an association between a student or staff member and another person, and believes this other person has a protected attribute, whether or not the other person in fact has the attribute. In the context of religious educational institutions, associative discrimination may occur, for example, if a student was denied enrolment at a school on the basis of the relationship status of the students' parents or guardians.

6.55 Several existing provisions in the *Sex Discrimination Act* include an 'imputed characteristic' as a basis for prohibited discrimination. Extending protection to situations in which a student or staff member is discriminated against on the basis of an imputed association, and on the basis of an imputed attribute, would be consistent with this.

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33 *Sex Discrimination Act 1984* (Cth) s 5A(1)(a).

## Submissions

6.56 Proposal 6 in the *Consultation Paper* stated that the *Sex Discrimination Act* should be amended to prohibit discrimination against students and prospective students on the basis of their family member or carer having a protected attribute. Human rights organisations, legal practitioner organisations, LGBTQ+ organisations, unions, and some religious organisations provided full or qualified support for Proposal 6.<sup>34</sup> Some consultations and submissions supported introducing protection more generally for all personal associates with one or more protected attributes.<sup>35</sup>

6.57 Several justifications were given in submissions for broadening protections to cover associates, including:

- to promote consistency with state and territory anti-discrimination laws;<sup>36</sup>
- to address harm experienced by students and staff in educational institutions because they are associated with a person with a protected attribute;<sup>37</sup>
- to prevent children from experiencing any detriment because of the attributes or actions of people who have responsibility for them;<sup>38</sup>
- because staff should not be forced to hide their association with others out of fear they will face discrimination;<sup>39</sup> and
- because staff should not fear repercussions for supporting or mentoring a gay student who is being bullied by other students.<sup>40</sup>

6.58 The Queensland Human Rights Commission submitted that prohibitions on discrimination are needed for both students and staff on the basis of their associations.<sup>41</sup>

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34 Australian Discrimination Law Experts Group, *Submission 75*; Victorian Pride Lobby, *Submission 123*; Queensland Human Rights Commission, *Submission 125*; Name withheld, *Submission 347*; Equality Australia, *Submission 375*; Australian Education Union, *Submission 395*; Public Interest Advocacy Centre, *Submission 405*; Not published, *Submission 410*; Australian Council of Trade Unions, *Submission 411*; Law Council of Australia, *Submission 428*.

35 Australian Council of Trade Unions, *Submission 411*.

36 Public Interest Advocacy Centre, *Submission 405*; Law Council of Australia, *Submission 428*.

37 Australian Discrimination Law Experts Group, *Submission 75*; Equality Australia, *Submission 375*.

38 Commissioner for Children and Young People WA, *Submission 373*; Equality Australia, *Submission 375*; Law Council of Australia, *Submission 428*.

39 Queensland Human Rights Commission, *Submission 125*.

40 Australian Discrimination Law Experts Group, *Submission 75*.

41 Queensland Human Rights Commission, *Submission 125*.

**Case study: Where associates may need protection***Parent of a student attending a religious educational institution*

A parent in a same-sex relationship felt her daughter had been ‘inadvertently discriminated against’ at a religiously affiliated school. The parent described the school as ‘not inclusive’, for example, by failing to prevent the repeated use of the terms ‘lesbian’ and ‘gay’ as slurs. The daughter did not feel comfortable to discuss her family in the school community.<sup>42</sup> If an educational institution were found to have engaged in discriminatory conduct against the student because of her parents’ relationship, that would currently not be unlawful under the *Sex Discrimination Act*, but would be unlawful under **Recommendation 4**.

*Staff members of a religious educational institution*

Some staff members expressed concern that they had been treated less favourably by a religious educational institution, including through potential loss of employment, because they had offered support to LGBTQ+ students who had experienced bullying.<sup>43</sup> If it were found that a staff member had been discriminated against because they ‘associated with’ an LGBTQ+ student, that would currently not be unlawful under the *Sex Discrimination Act*, but would be unlawful under **Recommendation 4**.

6.59 A small number of submissions opposed extending the scope of protection from discrimination to associates. The Australian Catholics Bishops Conference submitted that such reform would be piecemeal and may complicate the position of religious schools.<sup>44</sup> The submission expressed caution that religious educational institutions should not be the only organisations subject to such a law and that the economic implications of such a reform should be considered. In addition, while generally supportive of the ALRC’s proposal to extend protection to associates, the Public Interest Advocacy Centre highlighted practical considerations tied to the scope of application of any new protection for associates.<sup>45</sup>

**Implications of reform**

6.60 Prohibiting associative discrimination in the *Sex Discrimination Act* may have a range of implications for the operation of religious educational institutions — at least in the minority of states that currently retain exceptions for religious educational institutions in their state anti-discrimination law.

42 Personal account included in the submission by Rainbow Families NSW, *Submission 217*.

43 Personal account included in the submission by *ibid*; Name withheld, *Submission 347*.

44 Australian Catholic Bishops Conference, *Submission 406*.

45 Public Interest Advocacy Centre, *Submission 405*.

6.61 Implementation of **Recommendation 4** would mean, for example, that a student or prospective student could not be discriminated against on the basis that a family member or carer is believed to have a protected attribute (for example, if one or both of their parents is LGBTQ+, divorced, or living in a de facto relationship).

6.62 **Recommendation 4** would also mean that a staff member of a religious educational institution could not be discriminated against on the basis that they supported an LGBTQ+ student who was being bullied, if the nature of the support being offered in a particular case were found to be a form of 'association' with the student.

6.63 The potential for discrimination against a person on the basis of their association with another person believed to have a protected attribute is particularly relevant in the context of schools because of the close involvement that family members of students ordinarily have with schools.

6.64 Given the Terms of Reference, **Recommendation 4** is expressed as applying to religious educational institutions only. However, the ALRC is not aware of any reason that protection for associates should not apply to all educational institutions, and indeed to all persons. Formally recommending the prohibition of associative discrimination more generally in the *Sex Discrimination Act* would be beyond the Terms of Reference.<sup>46</sup> However, the ALRC, along with stakeholders such as the Australian Human Rights Commission and the Australian Discrimination Law Experts Group,<sup>47</sup> support broader reform in this regard, and the Australian Government should consider introducing protections for associates more generally.

6.65 Extending the scope of protection from discrimination on the basis of attributes protected under the *Sex Discrimination Act* to associates acknowledges that 'the prejudice, stigma and discriminatory conduct directed at people who have, or are assumed to have, a protected attribute is often also experienced by people who are related to, or associated with, them'.<sup>48</sup>

6.66 As several submissions highlighted, associative discrimination is a socially abhorrent form of discrimination which is potentially as harmful for its victims as any other form of discrimination. This is particularly the case where the victim is a child, and the child has a close association with a person whose imputed protected attribute has motivated discriminatory conduct. Additionally, even in situations where the association is not a close one, a prohibition on associative discrimination serves to protect the right of a person to freely associate with others.

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46 This was also noted in submissions: see Queensland Human Rights Commission, *Submission 125*; Public Interest Advocacy Centre, *Submission 405*.

47 Australian Discrimination Law Experts Group, *Submission 75*; Australian Human Rights Commission, *Submission 384*.

48 Law Reform Commission of Western Australia (n 27) 109.

## Consistency with Australian anti-discrimination laws

6.67 Protection for associates applies consistently to both direct and indirect discrimination across some Commonwealth and most state and territory anti-discrimination laws.<sup>49</sup> All existing statutory prohibitions on associative discrimination apply broadly to all circumstances, and not only to any one sector (such as religious educational institutions). Consequently, if the Australian Government were to introduce into the *Sex Discrimination Act* protection for associates only in the context of religious educational institutions, and not in other contexts, that would be inconsistent with existing Commonwealth, state, and territory anti-discrimination laws.

### Commonwealth laws

6.68 **Recommendation 4** would promote consistency between the *Sex Discrimination Act* and other Commonwealth anti-discrimination laws. The *Disability Discrimination Act* and *Racial Discrimination Act* both prohibit associative discrimination (see **Appendix H**).<sup>50</sup>

6.69 Commonwealth anti-discrimination laws incorporate protection for associates through two distinct approaches:

- inclusion of a specific provision addressing the protection of associates; or<sup>51</sup>
- incorporation of protection for associates across several provisions that prohibit discrimination in relation to different activities (for example, employment, accommodation, and the provision of goods and services).<sup>52</sup>

6.70 Previous law reform proposals have similarly considered expanding the protection afforded to associates under Commonwealth anti-discrimination law. The Exposure Draft Human Rights and Anti-Discrimination Bill 2012 (Cth), which sought to consolidate Commonwealth anti-discrimination laws into one statute, extended the definition of ‘discrimination’ to include an associate of a person having one or more protected attributes. In its response to the *Consultation Paper*, the Australian Human Rights Commission acknowledged this previous law reform proposal and submitted that given

the long history of consideration of these matters and the current extensive level of protection for associates in other federal, state and territory laws, the [Australian Human Rights] Commission considers that there are good reasons

49 See *Discrimination Act 1991* (ACT) s 7(1)(c); *Anti-Discrimination Act 1977* (NSW) ss 7(1), 24(1), 38B(1), 39(1), 49B(1), 49ZG(1), 49ZYA(1); *Anti-Discrimination Act 1992* (NT) s 19(1)(r); *Anti-Discrimination Act 1991* (Qld) s 7(p); *Equal Opportunity Act 1984* (SA) ss 29(2)(d), 29(2a)(e), 29(3)(d), 29(4)(d), 51(d), 66(f), 85A(d), 85T(2)(d), 85T(4)(d), 85T(5)(b), 85T(6)(d), 85T(7)(c); *Anti-Discrimination Act 1998* (Tas) s 16(s); *Equal Opportunity Act 1984* (WA) ss 35O(2), 36(1a), 66A(1a), 66V(2); *Equal Opportunity Act 2010* (Vic) s 6(g); *Racial Discrimination Act 1975* (Cth) ss 11, 12(1), 13, 15(1)–(3); *Disability Discrimination Act 1992* (Cth) s 7(1).

50 *Racial Discrimination Act 1975* (Cth) ss 11, 12(1), 13, 15(1)–(3); *Disability Discrimination Act 1992* (Cth) s 7(1).

51 This is the approach taken in the *Disability Discrimination Act 1992* (Cth).

52 This is the approach taken in the *Racial Discrimination Act 1975* (Cth).

to make a single, simple reform to protect associates in relation to all [Sex Discrimination Act] grounds.<sup>53</sup>

### State and territory laws

6.71 **Recommendation 4** would be consistent with anti-discrimination laws in the ACT, the NT, Queensland, Tasmania, and Victoria. These states and territories protect individuals from discrimination on the basis of their association with a person who possesses, or is believed to possess, any protected attribute (including sexual orientation, gender identity, marital or relationship status, or pregnancy).<sup>54</sup> While NSW, SA, and WA afford associates protection in relation to a range of attributes related to this Inquiry,<sup>55</sup> exceptions to these associational protections apply to religious educational institutions.<sup>56</sup>

6.72 State and territory anti-discrimination laws prohibit associative discrimination through two distinct approaches:

- listing ‘association’ under a protected attributes provision;<sup>57</sup> or
- embedding protection for associates across several provisions that prohibit discrimination on the basis of different protected attributes.<sup>58</sup>

### Definition of ‘associate’

6.73 The term ‘associate’ is defined variously under Commonwealth, state, and territory anti-discrimination laws (see [Appendix H](#)). The following types of personal associations and relationships are included in statutory definitions across Australian anti-discrimination laws:

- association (not defined);
- domestic relationship (for example, member of the same household);

53 Australian Human Rights Commission, *Submission 384*.

54 *Discrimination Act 1991* (ACT) s 7(1)(c); *Anti-Discrimination Act 1992* (NT) s 19(1)(r); *Anti-Discrimination Act 1991* (Qld) s 7(p); *Anti-Discrimination Act 1998* (Tas) s 16(s); *Equal Opportunity Act 2010* (Vic) s 6(q). The ALRC notes that anti-discrimination laws in these jurisdictions make ‘association’ a protected attribute and that potential reform to the *Sex Discrimination Act* to protect associates would necessarily be structured differently.

55 Most relevant to this Inquiry, under the *Anti-Discrimination Act 1977* (NSW), protected grounds that extend to associates include sex, transgender, homosexuality, and marital or domestic status. The *Equal Opportunity Act 1984* (SA) protects associates on the grounds of sex, gender identity, sexual orientation, marital or domestic partnership status, and pregnancy. Under the *Equal Opportunity Act 1984* (WA), associates are protected on the ground of sexual orientation. A recent review by the Law Reform Commission of WA has recommended the introduction of a new protected attribute of personal association into the *Equal Opportunity Act 1984* (WA) which would extend protection for associates to all grounds protected by the Act: see Law Reform Commission of Western Australia (n 27) 11, 109–10, rec 50.

56 Through the operation of the following exceptions that are applicable to religious educational institutions: *Anti-Discrimination Act 1977* (NSW) ss 38C(3)(c), 38K(3), 40(3)(c), 46A(3), 49ZH(3)(c), 49ZO(3); *Equal Opportunity Act 1984* (SA) s 34(3); *Equal Opportunity Act 1984* (WA) s 73.

57 This is the approach taken in the ACT, the NT, Queensland, Tasmania, and Victoria.

58 This is the approach taken in NSW, SA, and WA.

- relative (for example, by blood, marriage, civil union, civil partnership, domestic partnership, de facto partnership, affinity, adoption, or dependence);
- near relative (for example, spouse, domestic partner, parent, child, grandparent, grandchild, sister, or brother);
- carer; and
- any or some other type of association (for example, through business or commerce, sporting, or recreational relationship).

6.74 **Recommendation 4** does not suggest that the term ‘associate’ should be specifically defined in the *Sex Discrimination Act*. The term should be understood broadly, with the express aim of protecting a wide range of associates, including LGBTQ+ families. This broad construction was supported by many stakeholders. For example, submissions from human rights commissions, religious organisations, unions, legal practitioner organisations, LGBTQ+ organisations, academics, and other groups indicated that protection should extend to a broad range of associates of students, beyond family members.<sup>59</sup> Several consultees similarly supported understanding the concept of ‘associates’ as broadly as possible in recognition that LGBTQ+ families may be unique in the way they present and may not otherwise be identified as a family. The Queensland Human Rights Commission stated in its submission that the term ‘associate’ could be left undefined in legislation.<sup>60</sup>

6.75 Given the broad construction of ‘associate’ intended in **Recommendation 4**, a legislative note setting out a non-exhaustive list of persons who may ordinarily be considered to ‘associate’ with a person may be a helpful interpretive aid.

## Consistency with international law

6.76 **Recommendation 4** seeks to ensure the effectiveness of protections to students and staff afforded under **Recommendation 1**. Accordingly, the analysis of international law in relation to **Recommendation 1** in **Chapter 4** similarly applies in relation to **Recommendation 4**.<sup>61</sup> In summary, the analysis of each right examined in **Chapter 4** suggests that realisation of rights to equality and non-discrimination, children’s rights, education, health and life, privacy, work, and freedom of expression would be promoted.

59 Australian Discrimination Law Experts Group, *Submission 75*; Victorian Pride Lobby, *Submission 123*; Queensland Human Rights Commission, *Submission 125*; Pride in Law, *Submission 251*; Liberty Victoria, *Submission 253*; Victorian Equal Opportunity and Human Rights Commission, *Submission 255*; Equality Australia, *Submission 375*; Australian Human Rights Commission, *Submission 384*; Education Union, *Submission 387*; Australian Education Union, *Submission 395*; Public Interest Advocacy Centre, *Submission 405*; Not published, *Submission 410*; Australian Council of Trade Unions, *Submission 411*; Independent Law Council of Australia, *Submission 428*.

60 Queensland Human Rights Commission, *Submission 125*.

61 See **Chapter 4** at [4.42]–[4.134].

6.77 Additionally, implementation of **Recommendation 4** would be consistent with Australia's obligation under the CRC, as highlighted by the Law Council of Australia in its submission.<sup>62</sup> Article 2(2) of the CRC states that state parties are to

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.

6.78 If the Australian Government were to implement the principle underpinning **Recommendation 4** in relation to all educational institutions (and not just to religious educational institutions), this reform would not disadvantage religious educational institutions in particular.

6.79 The assessments in **Chapter 4** of the restriction on the right to manifest religion or belief and the associated parental liberty also apply to **Recommendation 4**.<sup>63</sup> This reform would not represent an unjustifiable limitation on these rights. Consequently, the ALRC considers that **Recommendation 4** is consistent with Australia's obligations under international law as it would maximise the realisation of relevant human rights and restrict some rights only in strict accordance with limitation criteria under international law.

6.80 Another indication of consistency with international law is that the approach taken in **Recommendation 4** is generally consistent with the existing legal position in the majority of Australian states and territories.

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62 Law Council of Australia, *Submission 428*.

63 See **Chapter 4** at [4.96]–[4.115] and [4.116]–[4.129].



# 7. Consequential Amendments

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## Introduction

7.1 This chapter contains two recommendations relating to technical issues in, and amendments to, the *Fair Work Act*. The aim of the recommendations in this chapter is to enhance the extent to which the relevant provisions in the *Fair Work Act* operate more consistently with provisions of the *Sex Discrimination Act*, increasing the overall coherence of the law. The recommendations in this chapter are necessary to give full effect to the intent of [Recommendation 1](#).

7.2 This chapter proceeds in two parts. The first part sets out how existing exceptions to prohibitions on discrimination in the *Fair Work Act* are different to the exceptions in the *Sex Discrimination Act*. [Recommendation 5](#) seeks to make the exceptions more consistent between the two Acts in relation to religious educational institutions, particularly in light of the narrower exceptions that would apply under the *Sex Discrimination Act* if [Recommendation 1](#) were implemented.

7.3 The second part discusses current uncertainty regarding the extent to which indirectly discriminatory terms in modern awards and enterprise agreements are currently prohibited under the *Fair Work Act*. By amending the definition of ‘objectionable term’ in the *Fair Work Act*, [Recommendation 6](#) seeks to clarify, in relation to religious educational institutions, that terms relating to the personal beliefs or private life of employees are prohibited to the extent that the terms would be indirectly discriminatory under the *Sex Discrimination Act*. This recommendation would more closely align the provisions of the *Fair Work Act* with the *Sex Discrimination Act*, and would reduce the scope for a term of a modern award or enterprise agreement to, in effect, override prohibitions on indirect discrimination in the *Sex Discrimination Act*.

7.4 The recommendations in this chapter are expressed as applying only in relation to religious educational institutions, reflecting the Terms of Reference for this Inquiry. However, the Australian Government should consider broader reform along these lines in a future review under [Recommendation 11](#).

## Exceptions in the Fair Work Act

**Recommendation 5** Further to Recommendation 1, s 153, s 195, s 351, and s 772 of the *Fair Work Act 2009* (Cth) should be amended such that, in relation to a religious educational institution, insofar as the exceptions in sub-s (2) of each provision provide for a broader exception than that provided for under the *Sex Discrimination Act 1984* (Cth), the broader aspect of the relevant exception has no effect.

7.5 **Recommendation 5** relates to the following provisions of the *Fair Work Act*:

- s 153 sets out when a term of a modern award is discriminatory;
- s 195 sets out when a term of an enterprise agreement is discriminatory;
- s 351 prohibits adverse action against employees for discriminatory reasons; and
- s 772 prohibits termination for discriminatory reasons.

7.6 As discussed in **Chapter 13**, the prohibited grounds of discrimination under those provisions include a number of grounds that overlap with grounds contained in the *Sex Discrimination Act*, and also include the ground of religion.

7.7 However, the existing exceptions in each of those provisions are different from the exceptions in, for example, the *Sex Discrimination Act*. If s 38 of the *Sex Discrimination Act* were to be repealed in accordance with **Recommendation 1**, then the differences between the exceptions in the *Fair Work Act* and the *Sex Discrimination Act* would be exacerbated.

7.8 For example, each of ss 153, 195, 351, and 772 of the *Fair Work Act* includes relevant exceptions:

- if the reason for the discrimination is the inherent requirements of the particular position; and
- regarding employees of religious institutions specifically, if discrimination is in good faith to 'avoid injury to the religious susceptibilities of adherents of that religion or creed'.

7.9 In contrast, the *Sex Discrimination Act* does not include any exceptions that expressly relate to the 'inherent requirements' of a particular position, and the only provisions in the *Sex Discrimination Act* that refer to 'religious susceptibilities' are s 38 (which would be repealed if **Recommendation 1** were implemented), and s 37(1)(d) (which would not apply to religious educational institutions if **Recommendation 1** were implemented).

7.10 Section 351(2)(a) of the *Fair Work Act* also contains an exception to the prohibition on taking adverse action for discriminatory reasons where that action is ‘not unlawful under any anti-discrimination law in force in the place where the action is taken’. The effect of this section is discussed further in [Chapter 13](#) — in essence, if particular conduct is not prohibited under an anti-discrimination Act applicable in the relevant jurisdiction, then that conduct is also not prohibited under s 351 of the *Fair Work Act*. Accordingly, the circumstances in which an employee is protected against discriminatory adverse action varies between each state and territory.

7.11 An additional complication relating to the exception in s 351(2)(a) of the *Fair Work Act* is that, in order to prove a contravention of s 351, an employee may in effect need to prove the elements of liability in s 351 of the *Fair Work Act*, the elements of liability under any other applicable Commonwealth anti-discrimination Act (such as the *Sex Discrimination Act*), and the elements of liability under any applicable anti-discrimination law of the relevant state or territory. The elements of liability (including applicable exceptions) may differ significantly between each of these laws. It is beyond the Terms of Reference to make recommendations in this Inquiry regarding the complexity of s 351(2)(a). However, the Australian Government should consider further reform in this area under [Recommendation 11](#).

7.12 In contrast, the *Sex Discrimination Act* does not include any equivalent exception to that found in s 351(2)(a) of the *Fair Work Act*, but rather the *Sex Discrimination Act* applies in the same way to conduct in each state and territory.

7.13 Section 195(2)(c) of the *Fair Work Act* contains a further exception relating to terms in enterprise agreements that constitute ‘a special measure to achieve equality’. The scope of this exception is in some ways different to the scope of the equivalent provision in s 7D of the *Sex Discrimination Act*.<sup>1</sup> However, those differences are not relevant for the purposes of [Recommendation 5](#).

7.14 Further, there are a number of exceptions in Part II of the *Sex Discrimination Act* (which deals with prohibitions on discrimination) that are not contained in the *Fair Work Act*. For example, exceptions apply under the *Sex Discrimination Act* when:

- it is a genuine occupational requirement to be of a particular sex (s 30);
- granting rights or privileges in connection with pregnancy, childbirth or breastfeeding (s 31);
- providing accommodation for employees, having regard to the number of persons in the employee’s household (s 34); and
- in several other circumstances.

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1 For example, s 195(4)(b) of the *Fair Work Act* provides that the exception applies only if ‘a reasonable person would consider that the term is necessary in order to achieve substantive equality’. In addition, s 195(2)(c) includes reference to action that is ‘not unlawful under any anti-discrimination law in force in a place where the action may occur’, but this aspect is only relevant if the term meets the requirements in s 195(4)(b). Accordingly, s 195(2)(c) is not anticipated to operate any more broadly than s 7D of the *Sex Discrimination Act*.

7.15 These differences between the exceptions in the *Sex Discrimination Act* and the *Fair Work Act* make the law more complicated and confusing for those subject to the law. Although the prohibitions on discrimination under the two Acts overlap, the circumstances in which those prohibitions apply are different. In the interests of improving the coherence of the law,<sup>2</sup> **Recommendation 5** seeks to achieve greater consistency between the two Acts as they apply to religious educational institutions.

7.16 The *Sex Discrimination Act* sets out in some detail the circumstances in which it is appropriate for particular conduct to be lawful, despite any discriminatory impact that such conduct may have on attributes protected under that Act. Accordingly, the ALRC recommends that the relevant provisions of the *Fair Work Act* should be amended such that the exceptions it contains are no broader than the exceptions provided for in the *Sex Discrimination Act*. As a result, whether an employee alleges discrimination under the *Sex Discrimination Act* or on equivalent grounds under the *Fair Work Act*, the applicable exceptions would be no broader than those exceptions under the *Sex Discrimination Act*.

7.17 **Recommendation 5** is consistent with Australia's international law obligations.<sup>3</sup> Insofar as **Recommendation 5** would narrow the existing exceptions in the *Fair Work Act* in relation to attributes protected under the *Sex Discrimination Act*, the analysis of international law in relation to **Recommendation 1** applies equivalently to **Recommendation 5** in terms of its justification under international law.<sup>4</sup>

7.18 **Recommendation 5** is expressed as applying only in relation to religious educational institutions, and only in relation to achieving greater consistency with the *Sex Discrimination Act*, reflecting the parameters of the Terms of Reference for this Inquiry. Similar arguments regarding greater consistency and coherence in the law could also be made in relation to other employers, and in relation to other anti-discrimination legislation. The Australian Government should consider broader reform along these lines in a future review under **Recommendation 11**.

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2 See, eg, Australian Discrimination Law Experts Group, *Submission 75*; Catholic Secondary Principals Australia, *Submission 363*; Australian Human Rights Commission, *Submission 384*; Australian Section of the International Commission of Jurists & International Commission of Jurists Victoria, *Submission 404*; Law Council of Australia, *Submission 428*.

3 See **Chapter 8** and **Chapter 11**.

4 See **Chapter 4**, especially [4.42]–[4.135].

## Submissions

7.19 **Recommendation 5** builds on Proposal 5 in the *Consultation Paper*. Most of the submissions that addressed Proposal 5 supported the intent of the Proposal.<sup>5</sup> Some submissions expressed some caution regarding the technical detail of how it should be implemented.<sup>6</sup>

7.20 For example, Proposal 5 in the *Consultation Paper* related only to the exceptions in the *Fair Work Act* that refer to ‘injury to religious susceptibilities’, and not to the exceptions based on the ‘inherent requirements’ of a particular position. Some submissions emphasised the importance of ensuring that the ‘inherent requirements’ exceptions do not apply broadly to grounds covered by the *Sex Discrimination Act* in the context of employment.<sup>7</sup> Instead, the exceptions in the *Sex Discrimination Act* should more specifically and appropriately set out the circumstances in which conduct should not be considered unlawful discrimination. For example, the scenarios listed in s 30 of the *Sex Discrimination Act* arguably provide examples of circumstances in which it would be an ‘inherent requirement’ under the ILO 111 to be of a particular sex for a particular position.<sup>8</sup>

7.21 A small number of submissions opposed Proposal 5 in the *Consultation Paper*.<sup>9</sup> For example, the Australian Catholic Bishops Conference submitted that it would be inappropriate for religious educational institutions to be subject to different exceptions than those applicable to other employers under the *Fair Work Act*, and that the proposed amendments would create the potential for unknown complications.<sup>10</sup> As noted above, the ALRC suggests that government consider broader reform of the *Fair Work Act* as it applies to other employers as well.

5 See, eg, Australian Discrimination Law Experts Group, *Submission 75*; Anglican Social Responsibilities Commission, Diocese of Perth, *Submission 98*; Victorian Pride Lobby, *Submission 123*; L van Leent, M Jeffries, N Barnes and S Jowett, *Submission 158*; Australian Lawyers Alliance, *Submission 162*; Wear It Purple, *Submission 197*; Thorne Harbour Health, Brave Network and SOGICE Survivors, *Submission 213*; Queer Department of the National Union of Students and Queer Office of University of Technology Sydney Students' Association, *Submission 252*; Victorian Equal Opportunity and Human Rights Commission, *Submission 255*; Pride in Protest, *Submission 260*; Queer Unionists in Tertiary Education, *Submission 321*; Equality Australia, *Submission 375*; Australian Human Rights Commission, *Submission 384*; Independent Education Union, *Submission 387*; Australian Education Union, *Submission 395*; Public Interest Advocacy Centre, *Submission 405*; NSW Council for Civil Liberties, *Submission 407*; Australian Council of Trade Unions, *Submission 411*; Law Council of Australia, *Submission 428*.

6 See, eg, Australian Human Rights Commission, *Submission 384*; Independent Education Union, *Submission 387*; Australian Education Union, *Submission 395*; Australian Council of Trade Unions, *Submission 411*; Law Council of Australia, *Submission 428*.

7 Australian Human Rights Commission, *Submission 384*; Independent Education Union, *Submission 387*; Australian Education Union, *Submission 395*; Australian Council of Trade Unions, *Submission 411*.

8 See **Chapter 11** regarding the ILO 111. See also Law Council of Australia, *Submission 428*.

9 See, eg, Freedom for Faith, *Submission 203*; Institute of Public Affairs, *Submission 250*; Australian Catholic Bishops Conference, *Submission 406*.

10 Australian Catholic Bishops Conference, *Submission 406*.

## Indirect discrimination and ‘objectionable terms’

**Recommendation 6** Further to Recommendation 1, the definition of the phrase ‘objectionable term’ in s 12 of the *Fair Work Act 2009* (Cth) should be amended such that, in relation to a religious educational institution, it incorporates reference to a contravention of Part II of the *Sex Discrimination Act 1984* (Cth) in respect of a term that imposes a requirement that an employee abide by, or comply with, a code of practice or other condition dealing with the personal beliefs or private life of the employee.

7.22 **Recommendation 6** responds to the current potential for indirect discrimination (on grounds prohibited under the *Sex Discrimination Act*) to be facilitated through terms of a modern award or enterprise agreement applicable to staff at a religious educational institution. This recommendation is necessary to avoid the inclusion of terms in modern awards and enterprise agreements that require or permit indirect discrimination in relation to the personal beliefs or private life of employees — and to ensure that any such terms have no effect, even if they are included in a modern award or enterprise agreement.

7.23 Furthermore, **Recommendation 6** is necessary to ensure that the protections against discrimination sought to be provided under **Recommendation 1** (and **Recommendation 7**, to the extent that it relates to attributes protected under the *Sex Discrimination Act*) are not undermined. Currently, to the extent that indirectly discriminatory terms are included in modern awards or enterprise agreements and have effect, s 40(1)(g)(i) of the *Sex Discrimination Act* operates so as to exclude any indirectly discriminatory conduct that is required or permitted by those terms from being a contravention of Part II of the *Sex Discrimination Act*.

7.24 In relation to members of staff at religious educational institutions, s 40(1)(g)(i) of the *Sex Discrimination Act* is currently of relatively little significance because the exceptions in s 38 of the *Sex Discrimination Act* limit protection against discrimination for those members of staff in any event. However, if s 38 were to be repealed under **Recommendation 1**, the effect of s 40(1)(g)(i) would be of greater significance for those members of staff.

7.25 In essence, the existing provisions of the *Fair Work Act*, in combination with s 40(1)(g)(i) of the *Sex Discrimination Act*, may facilitate indirect discrimination of a kind that **Recommendation 1** (and, in part, **Recommendation 7**) are directed at prohibiting. To achieve the intent of the Terms of Reference, avenues for indirect discrimination must be closed.

7.26 The justification for **Recommendation 1** set out in **Chapter 4** applies equivalently to **Recommendation 6**. For example, the analysis of the ways in which **Recommendation 1** would give effect to Australia’s international human rights

obligations also applies in relation to **Recommendation 6**. By way of brief summary, **Recommendation 6** would maximise the realisation of relevant human rights, and any limitation on particular human rights would be justified by reference to the relevant criteria set out under international law.

7.27 From a practical perspective, the ALRC is aware that existing enterprise agreements relevant to staff members at some religious educational institutions do contain the kind of terms that **Recommendation 6** seeks to prohibit. For example, some terms of enterprise agreements for religiously affiliated schools that were shared with the ALRC by consultees are, on their face, neutral regarding protected attributes under the *Sex Discrimination Act*. However, these enterprise agreements require staff to maintain personal beliefs consistent with the particular school's statement of faith, and to avoid any conduct or lifestyle that is inconsistent with the statement of faith. Consequences for breach may include performance management or termination. Some statements of faith for religiously affiliated schools that were shared with the ALRC explicitly refer to attributes that are relevant under the *Sex Discrimination Act*, including marital status and sexual orientation. In this way, a term of an enterprise agreement may authorise indirect discrimination to the extent that the term requires or permits the school to impose a requirement, condition, or practice that is not 'reasonable in the circumstances' under s 7B of the *Sex Discrimination Act*.

7.28 The existing effect of s 40(1)(g)(i) of the *Sex Discrimination Act* is that the prohibitions on discrimination in that Act do not affect 'anything done by a person in direct compliance with ... a fair work instrument'. Each of a modern award and an enterprise agreement is a 'fair work instrument'.<sup>11</sup> Consequently, anything done in connection with employment at a religious educational institution that is 'in direct compliance with' a term of a modern award or enterprise agreement is not prohibited under the *Sex Discrimination Act*.

7.29 The courts have held that the scope of phrases such as 'in direct compliance with' must be interpreted narrowly. For example, to fall within the scope of that phrase, it is ordinarily not sufficient for the term of the relevant modern award or enterprise agreement to merely provide an employer with a discretion that might be exercised in a way that is indirectly discriminatory. Rather, the term must specifically make 'necessary',<sup>12</sup> 'sanction',<sup>13</sup> 'mandate',<sup>14</sup> 'obligate',<sup>15</sup> 'require',<sup>16</sup> or 'authorise'<sup>17</sup> the act relied upon by the employer.

11 *Fair Work Act 2009* (Cth) s 12 (definition of 'fair work instrument').

12 Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 157; *Howe v Qantas Airways Limited* [2004] FMCA 242 [51]; *Gibbs v Commonwealth Bank of Australia* [1996] HREOCA 34.

13 *Howe v Qantas Airways Limited* [2004] FMCA 242 [65].

14 *Lavery v Commissioner of Fire Brigades* [2003] NSWADT 93 [80], [87].

15 *Keech v Metropolitan Health Service (WA)* (2010) 215 FCR 393, 401.

16 *Waters v Public Transport Corporation* (1991) 173 CLR 349 [38].

17 *Construction, Forestry, Mining & Energy Union v Rio Tinto Coal Australia Pty Ltd* (2014) 232 FCR 560 [41], [46].



7.30 Furthermore, a legislative Note underneath s 40(1) of the *Sex Discrimination Act* states:

A person does not comply with an industrial instrument for the purpose of this subsection if that person purports to comply with a provision of that instrument that has no effect. Accordingly, the exemption under this subsection for acting in direct compliance with such an instrument would not apply in such circumstances.

7.31 This Note places critical significance on the question of whether the particular term of the relevant modern award or enterprise agreement has 'effect'. If the term has effect, then acting in direct compliance with that term is sufficient to defeat a related claim under the *Sex Discrimination Act*. Alternatively, if the term 'has no effect', then a person cannot rely upon compliance with that term to defeat any claim under the *Sex Discrimination Act*. **Recommendation 6** is premised on the assumption that this Note correctly describes the operation of s 40(1)(g) of the *Sex Discrimination Act*.

7.32 Under the *Fair Work Act*, a modern award must not contain a term that is discriminatory,<sup>18</sup> nor must it contain an 'objectionable term'.<sup>19</sup> Similarly, an enterprise agreement must not contain an 'unlawful term',<sup>20</sup> which includes a discriminatory term and an 'objectionable term'.<sup>21</sup> Any discriminatory term and any objectionable term in a modern award has 'no effect'.<sup>22</sup> Similarly, any discriminatory term and any objectionable term in an enterprise agreement has 'no effect'.<sup>23</sup>

7.33 Consequently, if it were more clearly established under the *Fair Work Act* that indirectly discriminatory terms are prohibited by virtue of s 153 of the *Fair Work Act* (in relation to modern awards), s 195 of that Act (in relation to enterprise agreements), or s 351 of that Act (in relation to adverse action — relevant to the definition of 'objectionable term'), then **Recommendation 6** would not be necessary. However, the extent to which those provisions cover indirect discrimination is not clear.

18 *Fair Work Act 2009* (Cth) ss 136(2), 153.

19 *Ibid* ss 136(2), 150.

20 *Ibid* ss 186(1), (4).

21 *Ibid* s 194.

22 *Ibid* s 137. The terms would have no effect because they would contravene s 136 of the *Fair Work Act*. The terms would contravene s 136 because they would also contravene ss 150 or 153 of the Act, and those sections are contained in Sub-div D of the relevant Part. Note also that an objectionable term in any 'workplace instrument' has no effect pursuant to s 356 of the *Fair Work Act*. A modern award would appear to fall within the definition of a 'workplace instrument' in s 12 of the Act.

23 *Ibid* s 253(1)(b). Note also that an objectionable term in any 'workplace instrument' has no effect pursuant to s 356 of the *Fair Work Act*. An enterprise agreement would appear to fall within the definition of a 'workplace instrument' in s 12 of the Act.



## Uncertainty regarding indirectly discriminatory terms

7.34 This section describes existing uncertainty as to whether indirectly discriminatory terms are currently prohibited under the *Fair Work Act*, either as discriminatory terms or as objectionable terms.

7.35 As discussed in **Chapter 13**, different views have been expressed regarding the scope of the various anti-discrimination provisions in the *Fair Work Act*. In particular, questions have been raised regarding the extent to which ss 153 and 195 of the *Fair Work Act* apply to terms of modern awards and enterprise agreements that would constitute indirect discrimination under other anti-discrimination legislation (including the *Sex Discrimination Act*).

7.36 The Federal Court has suggested that it is ‘highly unlikely that the Parliament intended that s 153(1) could be contravened by indirect discrimination’ (in relation to modern awards).<sup>24</sup> Similarly, a Full Bench of the Fair Work Commission has expressed a view that s 195 of the *Fair Work Act* (regarding terms of enterprise agreements) likely does not currently apply to indirect discrimination.<sup>25</sup> The Law Council of Australia cited these cases in its submission, and stated that the effectiveness of the reforms proposed in the *Consultation Paper* would be ‘undermined’ if the relevant provisions of the *Fair Work Act* prohibit direct discrimination only.<sup>26</sup>

7.37 The Australian Discrimination Law Experts Group submitted that the relevant provisions ‘might not encompass indirect discrimination’, but described the issue as ‘still unresolved’.<sup>27</sup> The Australian Human Rights Commission submitted that the preferable construction of the provisions is that they do include a prohibition on indirect discrimination, particularly in light of Australia’s obligations under the ILO 111, but acknowledged ‘real uncertainty in this area’.<sup>28</sup>

7.38 A decision of the Full Court of the Federal Court has ‘left open the possibility’ that a term of an enterprise agreement that indirectly discriminates against employees could be an ‘objectionable term’.<sup>29</sup> The Full Court’s reasoning was expressed as being contingent on whether the definition of ‘adverse action’ in the *Fair Work Act* includes indirect discrimination.

24 *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227 [56].

25 *Minister for Industrial Relations v Metropolitan Fire and Emergency Services Board* [2019] FWCFB 6255 [68]–[72].

26 Law Council of Australia, *Submission 428*.

27 Australian Discrimination Law Experts Group, *Submission 75*.

28 Australian Human Rights Commission, *Submission 384*.

29 *United Firefighters’ Union of Australia v Country Fire Authority* (2015) 228 FCR 497 [229]–[230], cited in *Re Metropolitan Fire and Emergency Services Board* [2019] FWC 106 [276].

7.39 The phrase ‘objectionable term’ is defined in s 12 of the *Fair Work Act* as a term that:

- (a) requires, has the effect of requiring, or purports to require or have the effect of requiring; or
- (b) permits, has the effect of permitting, or purports to permit or have the effect of permitting;

either of the following:

- (c) a contravention of Part 3-1 (which deals with general protections);
- (d) the payment of a bargaining services fee.

7.40 It has been held that for a particular term to meet the definition of an ‘objectionable term’, the term must specifically ‘authorise’, rather than merely ‘afford the possibility’ of, the prohibited conduct.<sup>30</sup>

7.41 Part 3-1 of the *Fair Work Act* (referred to in para (c) of the definition of ‘objectionable term’) includes s 351 of the *Fair Work Act*. Accordingly, a contravention of Part 3-1 for the purposes of the definition of ‘objectionable term’ includes a contravention of the prohibition on adverse action for discriminatory reasons in s 351. However, as discussed in the following paragraphs, it is uncertain the extent to which s 351 prohibits indirect discrimination.

7.42 The Federal Court has emphasised that the test in s 351 of the *Fair Work Act* — whether an employer has taken adverse action ‘because of’ a particular attribute of an employee — ‘focuses upon the actual reason or reasons which motivated the decision-maker and not upon subconscious reasons or motivations’.<sup>31</sup> In addition, the Federal Court has acknowledged that it ‘is conceivable the Parliament sought not to incorporate concepts of indirect discrimination into ss 351 and 342’.<sup>32</sup> Nevertheless, the Federal Court has suggested that the definition of ‘adverse action’ may include indirect discrimination in at least some circumstances.<sup>33</sup> The Fair Work Commission’s General Protections Benchbook contains a similar suggestion,<sup>34</sup> as does a Guidance Note from the Fair Work Ombudsman.<sup>35</sup> In this regard, the Department for

30 *Toyota Motor Corporation Australia Limited v Marmara* (2014) 222 FCR 152 [128]; *Re Metropolitan Fire and Emergency Services Board* [2019] FWC 106 [254], [262], citing *Australian Industry Group v Fair Work Australia* (2012) 205 FCR 339 [18].

31 *RailPro Services Pty Ltd v Flavel* (2015) 242 FCR 424 [82].

32 *Sayed v Construction, Forestry, Mining and Energy Union* (2015) 327 ALR 460 [155].

33 *Klein v Metropolitan Fire and Emergency Services Board* (2012) 208 FCR 178 [101], citing *Waters v Public Transport Corporation* (1991) 173 CLR 349, 358.

34 Fair Work Commission, ‘What Is Discriminating Between the Employee and Other Employees of the Employer?’ <[www.fwc.gov.au/what-discriminating-between-employee-and-other-employees-employer](http://www.fwc.gov.au/what-discriminating-between-employee-and-other-employees-employer)>, citing *Klein v Metropolitan Fire and Emergency Services Board* (2012) 208 FCR 178; *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500.

35 Fair Work Ombudsman, *FWO Discrimination Policy* (Guidance Note No 6, 21 December 2012).

Employment and Workplace Relations has stated that ‘employers can be in doubt as to exactly what is required from them to comply with anti-discrimination provisions’.<sup>36</sup>

## Impact of reform

7.43 Given the uncertainty described in the previous section, to ensure that indirectly discriminatory terms in modern awards and enterprise agreements do not have effect, in light of the operation of s 40(1)(g)(i) of the *Sex Discrimination Act*, it is recommended that the definition of ‘objectionable term’ in the *Fair Work Act* be amended.

7.44 If implemented, **Recommendation 6**, in relation to a religious educational institution, would include in the definition of ‘objectionable term’ a contravention of Part II of the *Sex Discrimination Act*, in circumstances where a term imposes a requirement that an employee abide by, or comply with, a code of practice or other condition dealing with the personal beliefs or private life of the employee. Given that indirect discrimination is clearly prohibited under Part II of the *Sex Discrimination Act*, amending the definition of ‘objectionable term’ in this way would confirm that indirectly discriminatory terms relating to the personal beliefs or private life of an employee, on grounds contained in the *Sex Discrimination Act*, are prohibited under the *Fair Work Act*. Consequently, such terms would have ‘no effect’, and compliance with such terms would not defeat any claim under the *Sex Discrimination Act*, notwithstanding s 40(1)(g)(i) of that Act.

7.45 That is, subject to the application of s 7B of the *Sex Discrimination Act*, modern awards or enterprise agreements would be prohibited from containing a term that requires or permits a religious educational institution to impose a condition, requirement, or practice that has, or is likely to have, a disadvantaging effect on grounds contained in the *Sex Discrimination Act*, in relation to the personal beliefs or private life of employees. Under the existing test in s 7B of the *Sex Discrimination Act*, a term would not indirectly discriminate if the relevant condition, requirement, or practice permitted or required to be imposed under the term was ‘reasonable in the circumstances’. The focus in **Recommendation 6** on terms relating to the ‘personal beliefs or private life’ of employees in part reflects the significance in this context of the right to privacy, which has been emphasised in some international case law.<sup>37</sup>

7.46 **Recommendation 6** is expressed as applying only in relation to religious educational institutions, in light of the Terms of Reference for this Inquiry. The Australian Government should consider broader reform regarding the interaction between the *Fair Work Act* and Commonwealth anti-discrimination Acts under **Recommendation 11**.

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36 Department of Employment and Workplace Relations (Cth), *Updating the Fair Work Act 2009 to Provide Stronger Protections for Workers against Discrimination* (Consultation Paper, April 2023) 6.

37 See **Appendix I**. See also Australian Human Rights Commission, *Submission 384* [212]–[213].

7.47 If the Australian Government chooses not to implement **Recommendation 6**, it could instead amend s 40 of the *Sex Discrimination Act* such that s 40(1)(g)(i) does not apply in relation to employment at a religious educational institution. However, this approach would provide a blunt and less focused solution to the problem, compared to the approach provided under **Recommendation 6**. The Australian Discrimination Law Experts Group submitted that s 40(1)(g)(i) of the *Sex Discrimination Act* should be amended to exclude religious educational institutions from its remit and, subject to a wider review, should be repealed.<sup>38</sup> The Australian Human Rights Commission also submitted that the effect of s 40(1)(g) of the *Sex Discrimination Act* could be contrary to the policy intention sought to be achieved by repealing s 38 of that Act.<sup>39</sup>

7.48 The ALRC has taken into account the existing process provided for under the *Australian Human Rights Commission Act* and the *Fair Work Act* by which discriminatory terms (including indirectly discriminatory terms) can be amended or removed from a modern award or enterprise agreement. However, that process has a number of disadvantages. First, and significantly, the process requires an employee (or their representative) to lodge a complaint. Perhaps partly for this reason, the current process has been utilised on very few occasions, and not at all for the last several years.<sup>40</sup>

7.49 Secondly, the complaint process is relatively circuitous, requiring a complaint to the Australian Human Rights Commission, and then a referral to the Fair Work Commission.<sup>41</sup> Thirdly, the complaint process can commence only after ‘a person has done a discriminatory act’ under a modern award or enterprise agreement that has already taken effect,<sup>42</sup> such that the complaint process does not prevent the inclusion of an indirectly discriminatory term in a modern award or enterprise agreement from the outset. Consequently, it is more likely that indirectly discriminatory terms will be included, and that religious educational institutions and their staff will act on the assumption that such terms are enforceable. In addition, prior to any variation of the indirectly discriminatory term by the Fair Work Commission, if an employer were to act ‘in direct compliance with’ an indirectly discriminatory term, the term may have the effect of overriding prohibitions on indirect discrimination in the *Sex Discrimination Act*.<sup>43</sup>

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38 Australian Discrimination Law Experts Group, *Submission 75*.

39 Australian Human Rights Commission, *Submission 384*.

40 The ALRC understands the most recent referral of an award by the Australian Human Rights Commission to the Fair Work Commission was in 2014: *Black Coal Mining Industry Award Review* (2014) AM2014/67.

41 *Australian Human Rights Commission Act 1986* (Cth) s 46PW.

42 *Ibid.*

43 *Sex Discrimination Act 1984* (Cth) s 40(1)(g)(i). See above at [7.28]–[7.33]

7.50 Fourthly, the Fair Work Commission has the power to vary a modern award or enterprise agreement only if the award or agreement 'requires' the employer to do a discriminatory act.<sup>44</sup> The Fair Work Commission does not expressly have power to vary an award or agreement that 'permits' the employer to do a discriminatory act. Finally, the complaint process does not expressly provide any further remedy for the employee in relation to the discriminatory act that has been done.

7.51 In contrast, if **Recommendation 6** were implemented and the definition of 'objectionable term' was amended to incorporate reference to indirectly discriminatory terms relating to the personal beliefs or private life of employees, the onus would be on the Fair Work Commission to satisfy itself, prior to approving an enterprise agreement, that it did not contain such a term. Similarly, the Fair Work Commission would have to have regard to any such term when assessing whether to make or vary a modern award, either on its own initiative or upon application. The recommended process would not depend on an employee having to take any particular action. Accordingly, **Recommendation 6** would significantly increase the likelihood of relevant indirectly discriminatory terms being excluded from modern awards and enterprise agreements, and so reduce the scope for religious educational institutions and their staff to be under a mistaken impression regarding the enforceable terms of the employment.

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44 *Fair Work Act 2009* (Cth) ss 161(3), 218(3). These provisions apply if the discriminatory act would be unlawful 'but for the fact that the act would be done in direct compliance' with the modern award or enterprise agreement. This is important in light of the effect of s 40(1)(g)(i) of the *Sex Discrimination Act*, for example.



# 8. Exceptions in Anti-Discrimination Law — Religious Grounds

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## Introduction

8.1 This chapter contains two recommendations in response to the third policy position set out in the Terms of Reference, read in light of the first two policy positions. The Australian Government's policy position is that religious educational institutions should be able to

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.

8.2 The ALRC's fundamental task is to recommend how this policy position is to be implemented in a way that is consistent with Australia's international legal obligations.

8.3 Current Commonwealth laws give wide scope for religious educational institutions to give preference to individuals in employment on religious grounds, and do not reflect the policy position set out in the Terms of Reference. There is no dedicated Commonwealth anti-discrimination law prohibiting religious discrimination or limiting the circumstances in which such discrimination is permitted to occur (pending enactment of the planned Religious Discrimination Act).<sup>1</sup> There are, however, prohibitions on religious discrimination under the *Fair Work Act* that are

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<sup>1</sup> This is in contrast to many states and territories: see **Chapter 12** and **Appendix E**. Under Commonwealth law, discrimination against some religious groups (such as Jews) has been held to be prohibited under the *Racial Discrimination Act* on the basis that such groups are a group with an 'ethnic origin' for the purposes of that Act: see, eg, *Jones v Scully* (2002) 120 FCR 243, 244.

subject to exceptions for religious institutions that are broader than the exception contemplated by the Terms of Reference.<sup>2</sup>

8.4 Implementation of the Australian Government's policy position therefore requires consideration of:

- the extent to which existing exceptions in the *Fair Work Act* that have the effect of permitting employers to give preference to employees and prospective employees on religious grounds are consistent with the third policy position set out in the Terms of Reference, and any reforms that are necessary to implement that policy position consistently with Australia's international legal obligations; and
- how the giving of preference on the basis of religion, in relation to staff of religious educational institutions, should be addressed in a future Religious Discrimination Act (which the Australian Government has expressed a commitment to enact).

8.5 This chapter contains a recommendation (**Recommendation 7**) to the effect that religious educational institutions should be excluded from the existing exceptions for religious institutions in the relevant provisions of the *Fair Work Act*, as well as the exception in s 351(2)(a) of the Act (in relation to adverse action), as they apply to the protected attribute of religion. Religious educational institutions would be able to continue to rely on the 'inherent requirements' exceptions in the *Fair Work Act*, and (to the extent relevant) the 'special measures' exception in s 195(2)(c) of the Act. In addition, a new exception specifically for religious educational institutions should be introduced into the *Fair Work Act*. Furthermore, an exception equivalent to the recommended exception for religious educational institutions should be included in a future Religious Discrimination Act.

8.6 A separate recommendation (**Recommendation 8**) relates to a consequential amendment to the definition of 'discrimination' in the *Australian Human Rights Commission Act*. **Recommendation 8** would align the applicable exceptions set out in that definition with the recommended exceptions in the *Fair Work Act* under **Recommendation 7**.

8.7 The ALRC has concluded that the Australian Government's policy position in relation to the selection of staff can, in accordance with the recommended reforms, be implemented in a manner which would maximise the realisation of relevant human rights and be consistent with Australia's international law obligations.<sup>3</sup>

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2 See **Chapter 13**.

3 Relevant human rights are discussed in **Chapter 11**. Australia's international legal obligations are discussed in **Chapter 10**.



8.8 The recommended reforms are further justified because they:

- are not inconsistent with the requirements of the *Australian Constitution*;<sup>4</sup> and
- fall within the spectrum of approaches taken in several comparable overseas jurisdictions that have adopted policy positions similar to those set out in the Terms of Reference.<sup>5</sup>

8.9 Additionally, the recommended reforms would, in broad terms, and in terms of the capacity of religious educational institutions to give preference in employment on the basis of religion, make Commonwealth law more consistent with laws in most states and territories, particularly if recent law reform recommendations in Queensland and WA are implemented.<sup>6</sup> However, this does not add significant weight to the justification for **Recommendation 7**.

8.10 This chapter proceeds in two parts, the first of which analyses **Recommendation 7** and the second of which analyses **Recommendation 8**. This analysis is informed by views expressed in submissions, relevant principles of international law, domestic laws, and approaches taken in several overseas jurisdictions.

## Building a community of faith

**Recommendation 7** The Australian Government's policy commitment, as expressed in the Terms of Reference, that a religious educational institution

- 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,

is best implemented in a manner that is consistent with the rights and freedoms recognised in the international agreements to which Australia is a party by amending the *Fair Work Act 2009* (Cth) so that:

- A. religious educational institutions are excluded from the exceptions contained in s 153(2)(b), s 195(2)(b), s 351(2)(a), s 351(2)(c), and s 772(2)(b) of the *Fair Work Act 2009* (Cth) as they apply in relation to the protected attribute of religion; and
- B. in relation to the selection of staff for employment at a religious educational institution, it is not contrary to s 153(1), s 195(1), or s 351(1) to give preference, in good faith, to a person of the same religion, where the giving of such preference:
  - is reasonably necessary to build or maintain a community of faith;

4 Constitutional law is discussed in **Chapter 13**.

5 See Australian Law Reform Commission, 'International Comparisons' (Background Paper ADL1, November 2023).

6 State and territory law is discussed in **Chapter 12** and **Appendix E**.

- is proportionate to the aim of building or maintaining a community of faith, including in light of any disadvantage or harm that may be caused to any person or persons not preferred; and
- does not amount to conduct that is unlawful under the *Sex Discrimination Act 1984* (Cth).

An equivalent exception for religious educational institutions to that set out in B should be included in a future Religious Discrimination Act.

The exceptions in s 153(2)(a), s 195(2)(a), s 351(2)(b), and s 772(2)(a) of the *Fair Work Act 2009* (Cth) (relating to inherent requirements) should, subject to Recommendation 5, continue to apply to religious educational institutions in relation to both prospective and existing employees.

8.11 In **Recommendation 7**, the ALRC recommends legislative amendments that would:

- exclude religious educational institutions from the existing exceptions for religious institutions in the *Fair Work Act* in relation to discriminatory terms in enterprise agreements and modern awards, discriminatory adverse action, and discriminatory termination, as they apply to the protected attribute of religion;
- exclude religious educational institutions from the exception in s 351(2)(a) of the *Fair Work Act* in relation to discriminatory adverse action as it applies to the protected attribute of religion; and
- introduce into the *Fair Work Act* a new exception to the prohibitions on discriminatory terms in enterprise agreements and modern awards, and on discriminatory adverse action, as they apply to the attribute of religion, in relation to the selection of staff for employment at a religious educational institution specifically.

8.12 Consistently with the Terms of Reference read in light of Australia's international legal obligations, the recommended exception for religious educational institutions would only apply to the giving of preference, in good faith, to members of the same religion in the selection of staff for employment, when the giving of such preference:

- is reasonably necessary to build or maintain a community of faith;
- is proportionate to that aim, including in light of any disadvantage or harm caused to those not preferred; and
- does not amount to conduct that is unlawful under the *Sex Discrimination Act*.

8.13 Under **Recommendation 7**, an equivalent exception should be included in a future Religious Discrimination Act.

8.14 In relation to the recommended reforms, the following sections analyse their legal impact, consistency with Australia's international law obligations, consistency

with the *Australian Constitution*, coherence with state and territory laws, and coherence with several overseas jurisdictions.

## Legal impact of reform

8.15 This section summarises existing Commonwealth law in relation to prohibitions on discrimination on the basis of religion, and exceptions to those prohibitions for religious educational institutions. It then outlines the anticipated legal effect of implementing the reforms under **Recommendation 7**. Existing Commonwealth law in relation to prohibitions on discrimination on the basis of religion, and exceptions to those prohibitions for religious educational institutions, are discussed in more detail in **Chapter 13**.

8.16 Prohibitions on discrimination on religious grounds are found in anti-discrimination legislation in six of the eight state and territory jurisdictions in Australia (the ACT, the NT, Queensland, Victoria, Tasmania, and WA).<sup>7</sup> However, in accordance with the Terms of Reference, the ALRC has considered reforms to Commonwealth laws only. As such, this section focuses on the anticipated impact of the reforms in **Recommendation 7** on the existing Commonwealth legislative landscape.

8.17 Under Commonwealth law, prohibitions on discrimination on religious grounds are currently primarily found in the *Fair Work Act*.<sup>8</sup> As discussed further in **Chapter 13**, the *Fair Work Act* prohibits discrimination in employment because of religion (as well as because of sex, sexual orientation, gender identity, intersex status, marital status, pregnancy, breastfeeding, and family responsibilities, amongst others). The various prohibitions relate to, respectively:

- discriminatory terms in modern awards and enterprise agreements (ss 153(1), 186(4), 194, and 195(1));
- adverse action on discriminatory grounds (s 351(1)); and
- termination on discriminatory grounds (s 772(1)(f)).

8.18 Certain exceptions operate as a defence to allegations of discrimination (including religious discrimination) under these provisions. These exceptions include:

- inherent requirements exceptions, under which conduct does not amount to discrimination if the reason for the discrimination is the inherent requirements of the particular position held by the employee (ss 153(2)(a), 195(2)(a), 351(2)(b), and 772(2)(a));
- exceptions for religious institutions — that is, institutions conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed — to the extent that the discrimination is in good faith and

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<sup>7</sup> See **Chapter 12** and **Appendix E**.

<sup>8</sup> In addition, under s 31(b) of the *Australian Human Rights Commission Act*, the Australian Human Rights Commission can inquire into complaints of discriminatory practices on the ground of religion, but no judicial remedies are available to complainants: see **Chapter 13**.

‘to avoid injury to the religious susceptibilities of adherents of that religion or creed’ (ss 153(2)(b), 195(2)(b), 351(2)(c), and 772(2)(b));

- in relation to adverse action, an exception for action that is not unlawful under an applicable Commonwealth, state, or territory anti-discrimination law (s 351(2)(a)); and
- in relation to the terms of enterprise agreements, an exception for special measures to achieve equality (s 195(2)(c)).

8.19 The legal impact of **Recommendation 7** on each of these exceptions is discussed below. This is followed by consideration of the legal impact of **Recommendation 7** in relation to a future Religious Discrimination Act.

### ***Inherent requirements exceptions***

8.20 Under **Recommendation 7**, religious educational institutions would be able to continue to rely on the inherent requirements exceptions in the *Fair Work Act*. The inherent requirements exceptions, in some ways, apply broadly. For example, these exceptions apply to all employers, in relation to all prohibited grounds of discrimination, and to all aspects of the employment relationship — from selection to termination. However, in other ways, the inherent requirements exceptions may be more restrictive for employers than the recommended new exception for religious educational institutions. For example, it may be more difficult to establish that being of a particular religion is an ‘essential’ element of a particular role (as is required for an inherent requirements exception to apply),<sup>9</sup> than it is to establish that giving preference to a staff member of the same religion is reasonably necessary and proportionate to the aim of building or maintaining a community of faith.

### ***Exceptions for religious institutions***

8.21 The existing exceptions in ss 153(2)(b), 195(2)(b), 351(2)(c), and 772(2)(b) of the *Fair Work Act* — relevant to staff members of religious institutions — are subject to requirements that the impugned term, action, or termination (as the case may be) is in ‘good faith’ and ‘to avoid injury to the religious susceptibilities of adherents of that religion or creed’. These exceptions apply in relation to all grounds of discrimination prohibited under the *Fair Work Act*.

8.22 The religious institutions exceptions in the *Fair Work Act* are broader than the exception for religious educational institutions contemplated by **Recommendation 7**. This is mainly because the existing exceptions:

- apply to all aspects of the employment relationship (not just the ‘selection’ of staff); and
- are not limited to giving preference to achieve the aim of building or maintaining a community of faith.

9 *Qantas Airways Ltd v Christie* (1998) 193 CLR 280. See further **Chapter 12** at [12.25].

8.23 Implementing **Recommendation 7** would mean that religious educational institutions could no longer rely on the religious institutions exceptions in ss 153(2)(b), 195(2)(b), 351(2)(c), and 772(2)(b) of the *Fair Work Act* as a defence to allegations of discrimination on the basis of religion. However, a new exception specifically for religious educational institutions would be available in relation to the selection of staff in the context of discriminatory terms in enterprise agreements and modern awards, and discriminatory adverse action on religious grounds. The recommended exception for religious educational institutions would apply in narrower circumstances than the existing religious institutions exceptions in the *Fair Work Act*. Specifically, and in relation to discrimination on the basis of religion, the exception for religious educational institutions in **Recommendation 7** would only apply:

- when giving preference, in good faith, to members of the same religion in the selection of staff for employment; and
- when the giving of such preference is reasonably necessary to build or maintain a community of faith, is proportionate to that aim, and does not amount to conduct that is unlawful under the *Sex Discrimination Act*.

8.24 Based on the Terms of Reference, and analysis of principles of international law, the *Consultation Paper* contained proposals regarding exceptions that could be introduced for religious educational institutions in relation to employment of staff on the ground of religion.<sup>10</sup>

8.25 There were very different views in submissions about the form that any such exception should take. However, many organisations and individuals accepted that it was appropriate in the Australian context for religious educational institutions to be permitted, to some degree, to give preference to staff on religious grounds, even if the religious requirement was not strictly an inherent requirement of the particular role.<sup>11</sup> In its submission, the Australian Human Rights Commission emphasised that the selection of staff had been an issue of particular importance to many educational institutions explored through evidence to previous parliamentary inquiries. For example, some educational institutions sought to maintain a ‘critical mass’ of staff of the same religion, while also welcoming staff of other faiths or none. Other

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<sup>10</sup> In the *Consultation Paper*, the ALRC proposed that religious educational institutions should be allowed to preference staff based on the staff member’s religious belief or activity where participation of the person in the teaching, observance, or practice of the religion is a genuine requirement of the role; the differential treatment is proportionate to the objective of upholding the religious ethos of the institution; and the criteria for preferencing would not amount to discrimination on another protected ground (Proposition C and associated proposals).

<sup>11</sup> This view was expressed in a large number of submissions from religious organisations. See also Australian Discrimination Law Experts Group, *Submission 75*; Australian Human Rights Commission, *Submission 384* (in support of a ‘genuine occupational requirement’ exception). Notable exceptions to this position include Victorian Equal Opportunity and Human Rights Commission, *Submission 255*; Kingsford Legal Centre, *Submission 339*; Independent Education Union, *Submission 387*.

educational institutions considered it important that they be permitted to select all staff on the ground of religion.<sup>12</sup>

8.26 However, some of these stakeholders, including the Australian Human Rights Commission, considered that while it would be appropriate to introduce an exception for religious educational institutions broader than inherent requirements, the scope of any such exception should be limited to minimise its potential impacts on other human rights.<sup>13</sup> This approach is consistent with **Recommendation 7** (and the Terms of Reference), as well as the ALRC's analysis below of Australia's international law obligations.

8.27 **Exception limited to selection:** In line with the Terms of Reference, the recommended exception for religious educational institutions is limited to the *selection* of staff. The ALRC intends the term 'selection' to cover recruitment of new staff, as well as any change in a staff member's role that amounts to the commencement of 'new employment' under Australian employment law. In contrast, mere variation of the original contract of employment (for example, promotion that does not involve the commencement of new employment) would not constitute 'selection' of staff, and the exception should not apply in that context. The more profound the agreed alteration in the employee's duties, the more likely it is that a court will find that a new contract has replaced a terminated contract.<sup>14</sup>

8.28 In accordance with **Recommendation 7**, if a religious educational institution recruited a person of a different religion, that institution would not be permitted to treat that staff member differently from other staff members during their employment (unless the differential treatment was because of an inherent requirement of the position). For example, the institution would not be permitted to deny the staff member opportunities for professional development or promotion on the basis of religion. Nor would the institution be permitted to terminate the staff member on the basis of religion. In that respect, it should also be noted that the exception currently available to religious educational institutions in s 772(2)(b) of the *Fair Work Act* does not necessarily permit the termination of an employee on the ground of religion. This is because a person who considers that their termination was 'harsh, unjust, or unreasonable' may, as an alternative to a complaint of unlawful termination on discriminatory grounds, succeed on an unfair dismissal complaint to the Fair Work Commission.<sup>15</sup>

12 Australian Human Rights Commission, *Submission 384*. See also Anglican Social Responsibilities Commission, Diocese of Perth, *Submission 98*; Lutheran Education Australia, *Submission 402*; National Catholic Education Commission, *Submission 409*.

13 Australian Discrimination Law Experts Group, *Submission 75*; Australian Lawyers Alliance, *Submission 162*; Australian Human Rights Commission, *Submission 384*; Public Interest Advocacy Centre, *Submission 405*.

14 See, eg, *Quinn v Jack Chia (Australia) Ltd* (1991) 1 VR 567, 576, and other cases cited in Mark Irving, *The Contract of Employment* (LexisNexis, 2nd ed, 2019) 487–9 [3.87].

15 See **Chapter 13**.

8.29 A number of consultees and submissions indicated that most religious educational institutions do not seek to discriminate against existing staff members.<sup>16</sup>

8.30 **Exception limited to pursuing the aim of building or maintaining a community of faith:** Under [Recommendation 7](#), and in accordance with the Terms of Reference, the recommended exception for religious educational institutions is limited to the giving of preference where this is reasonably necessary to build or maintain a community of faith.

8.31 A significant number of submissions expressed concerns about framing any exception for religious educational institutions by reference to particular types of positions or involvement in particular religious activities (for example, through a ‘genuine occupational qualification’ exception).<sup>17</sup> Some submissions stated that any requirement based on genuine occupational qualifications alone (without expressly requiring a proportionality analysis) would be inappropriate — for example because it would not reflect human rights principles.<sup>18</sup> In addition, some submissions suggested that an exception based on genuine occupational qualifications could introduce complications in hiring processes and would not give religious educational institutions enough flexibility to determine when giving preference based on religion is important.<sup>19</sup> For example, the Headmaster of Sydney Church of England Grammar School emphasised:

What is precious to Shore is the capacity to give preferred employment to staff who are Christian. We maintain that our faith perspective is integrated and comprehensive and cannot effectively be manifested if siloed to Chapel and Christian Studies. Faith is a matter not just of belief but of being, and we would want staff to be able to manifest faith in action in their academic, co-curricular and pastoral dealings with students. This by no means suggests that Shore will only employ Christian staff; it is rather a question of ability to avoid costly legal defence if it is alleged in future that Shore has employed someone simply because they are Christian. Our ideal of course is to employ highly able staff who are also Christian.<sup>20</sup>

8.32 In consultations, others suggested that exceptions for ‘genuine occupational qualifications’ or ‘inherent requirements’ could give rise to complications for religious educational institutions when, by necessity, positions are filled by persons of other religions or no religion because a suitably qualified person of the same religion had

16 See, eg, Independent Education Union, *Submission 387*.

17 See, eg, ADeagon, *Submission 4*; Australian Christian Higher Education Alliance, *Submission 208*; Thorne Harbour Health, Brave Network and SOGICE Survivors, *Submission 213*; Liberty Victoria, *Submission 253*; Australian Christian Lobby, *Submission 299*.

18 See, eg, Thorne Harbour Health, Brave Network and SOGICE Survivors, *Submission 213*; Pride in Law, *Submission 251*; Liberty Victoria, *Submission 253*; Equality Australia, *Submission 375*.

19 See, eg, ADeagon, *Submission 4*; University of Southern Queensland Law, Religion, and Heritage Research Program Team, *Submission 202*; Australian Christian Higher Education Alliance, *Submission 208*; Australian Christian Lobby, *Submission 299*; Bishops of Australasian-Middle East Christian Apostolic Churches, *Submission 388*; Australian Catholic Bishops Conference, *Submission 406*.

20 Shore (Sydney Church of England Grammar School), *Submission 424*.

not applied for the role. Concerns were expressed that this could be seen as setting a precedent that a particular role does not require the person to be of the same religion, even when the school sees the role, or a critical mass of roles within the school, as preferably being filled by such a person.

8.33 Some submissions argued that the phrase ‘community of faith’ was not defined clearly in the *Consultation Paper*, or was given a meaning that does not correspond with its natural usage.<sup>21</sup> The phrase ‘community of faith’ is not defined under domestic or international law. However, art 18(1) of the ICCPR provides that the right to freedom of religion or belief includes the freedom to manifest religion or belief ‘in community with others’. The ordinary meaning of ‘community’ suggests a group of people who have something in common. Accordingly, a community ‘of faith’ connotes a group of people who have a particular faith in common.

8.34 Some submissions from religious schools and religious bodies explained what they understood a ‘community of faith’ to be.<sup>22</sup> Presbyterian Christian Schools NSW (Low-Fee Christian Schools Board) submitted that the

purpose of our three Christian schools is not only to impart academic knowledge, but also to live in accordance with the Christ-centred values that are at the centre of our faith. In addition to teaching the prescribed curriculum, our schools provide religious activities that seek to demonstrate to students what a life lived in accordance with the tenets of the Presbyterian Church looks and feels like in practice. Having teachers and other staff at the school who can participate in these activities as a faith community, whether these staff are engaged in religious teaching or not, helps to realise each school’s religious purpose.<sup>23</sup>

8.35 Other submissions (especially those from smaller Christian institutions) emphasised the importance of such schools being able to build a community of faith through the staff they employ.<sup>24</sup> For example, Calvary Christian College explained that a

community, by definition, is a cohesive organism bound together by (amongst other things) a common culture. An educational institution cannot therefore be a community of faith if there are roles within it that are sanctioned through law to be exempted from adhering to, or worse actively advocate against, the very tenets on which that community is founded.<sup>25</sup>

8.36 However, many submissions from other types of religious educational institutions did not appear to prioritise building a community of faith within their

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21 P Taylor, *Submission 386*; National Catholic Education Commission, *Submission 409*.

22 See, eg, Presbyterian Christian Schools NSW (Low-Fee Christian Schools Board), *Submission 356*; National Catholic Education Commission, *Submission 409*. See further Australian Law Reform Commission, ‘What We Heard’ (Background Paper ADL2, December 2023) [26]–[30].

23 Presbyterian Christian Schools NSW (Low-Fee Christian Schools Board), *Submission 356*.

24 See, eg, *ibid*; Calvary Christian College (College Council), *Submission 192*; HillSide Christian College Association and Board of Governance, *Submission 338*.

25 Calvary Christian College (College Council), *Submission 192*.



institution, suggesting that not all religious educational institutions may wish to pursue this aim.

**8.37 No discrimination on grounds contained in the *Sex Discrimination Act*:**

To ensure that the first two policy positions set out in the Terms of Reference are achieved, the exception for religious educational institutions in [Recommendation 7](#) explicitly requires that giving preference to staff on the ground of religion must not amount to conduct that is prohibited under the *Sex Discrimination Act*. The more scope that the law provides for institutions to give preference to prospective staff on religious grounds, the greater the potential for religious requirements to be imposed that might amount to direct or indirect discrimination on grounds contained in the *Sex Discrimination Act*.

8.38 In consultations, the ALRC regularly heard views that permitting differential treatment on the ground of religion would necessarily mean that institutions could engage in conduct that would otherwise constitute discrimination on grounds contained in the *Sex Discrimination Act*, if that would be consistent with the religious doctrines of the institution. Such views underscore the importance of the position being clarified explicitly in legislation, as contemplated under [Recommendation 7](#).

8.39 Several submissions expressed a view that in giving preference to staff on the ground of religion, religious educational institutions should not be permitted to discriminate on other grounds.<sup>26</sup> For example, the Australian Discrimination Law Experts Group submitted that any exceptions in the *Fair Work Act* permitting religious educational institutions to give preference on the ground of religion ‘should ensure that the conduct not be discrimination (direct or indirect) on any other grounds, to cut off the alternative route to discrimination that this inquiry is intended to prohibit’.<sup>27</sup>

8.40 If no express statement on the interaction between the giving of preference on religious grounds and discrimination on grounds contained in the *Sex Discrimination Act* was included in the exception for religious educational institutions, ordinary rules of statutory interpretation in Australia would appear to lead to the same outcome as if such a statement had been included.<sup>28</sup> However, making this explicit is important for users of the legislation (including school administrators and those who think they may have been discriminated against), to whom this may not otherwise be apparent. An explicit provision prohibiting discrimination on grounds contained in the *Sex Discrimination Act* would make it clear that, regardless of the extent to which institutions are permitted to prefer staff on religious grounds, the giving of preference must not amount to conduct that is unlawful under the *Sex Discrimination Act*, whether on the basis of direct discrimination or indirect discrimination.

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26 See, eg, Australian Discrimination Law Experts Group, *Submission 75*; Anglican Social Responsibilities Commission, Diocese of Perth, *Submission 98*; Rainbow Families NSW, *Submission 217*; Equality Australia, *Submission 375*; Diversity Council Australia, *Submission 398*; Public Interest Advocacy Centre, *Submission 405*.

27 Australian Discrimination Law Experts Group, *Submission 75*.

28 See further [Chapter 13](#).

8.41 Some consultees expressed concern that including in a substantive legislative provision an explicit statement regarding the relationship between exceptions in the *Fair Work Act* and prohibitions on discrimination on grounds contained in the *Sex Discrimination Act* might have an impact on how other anti-discrimination provisions without such a qualification are interpreted. If the Australian Government was to share these concerns, the words ‘for the avoidance of doubt’ could be used to clarify the purpose of the recommended express provision.

8.42 Although beyond the Terms of Reference, in principle it would be preferable for the recommended exception to provide, expressly, that giving preference must not amount to conduct that is unlawful under any Commonwealth anti-discrimination law (not just the *Sex Discrimination Act*). For example, the law in the EU expressly provides that, in relying on the exception permitting difference of treatment based on religion or belief, employers must not discriminate on other grounds.<sup>29</sup> This requirement is also included in the specific exception for religious educational institutions in, for example, Victoria.<sup>30</sup>

### **Adverse action and the s 351(2)(a) exception**

8.43 Under **Recommendation 7**, religious educational institutions would be excluded from s 351(2)(a) of the *Fair Work Act*, which provides an exception to discriminatory adverse action taken because of religion.

8.44 As discussed in **Chapter 13**, s 351(2)(a) has been interpreted to mean that the protection afforded to employees by adverse action provisions in the *Fair Work Act* is no greater than that provided under other existing Commonwealth, state, or territory laws in the place where the action was taken. That is, s 351(2)(a) effectively incorporates into the *Fair Work Act* exceptions to prohibitions on discrimination found under any applicable Commonwealth, state, or territory anti-discrimination laws, and has the effect of permitting action that is not prohibited under those laws. This provision has been interpreted to mean that:

- if discrimination in relation to a protected attribute is not prohibited under a Commonwealth, state, or territory law applicable in the place where the action is taken, an employer is not liable under s 351 of the *Fair Work Act* for any adverse action in relation to that attribute; and
- if an exception to a relevant prohibition on discrimination under the law of the state or territory in which the action took place is less restrictive on the employer than an exception provided under the *Fair Work Act*, the less restrictive exception effectively applies in proceedings under the Act.

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29 Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation [2000] OJ L 303/16 art 4(2). See further Australian Law Reform Commission, ‘International Comparisons’ (Background Paper ADL1, November 2023).

30 See further **Chapter 12** and **Appendix E**.

8.45 This exception has resulted in different protections being available to employees in relation to adverse action depending on the state or territory in which the action was taken.

8.46 As discrimination on the ground of religion is not prohibited in NSW or SA,<sup>31</sup> adverse action on religious grounds is, in effect, not prohibited under the *Fair Work Act* in relation to any employer in those states. This also means that, unless **Recommendation 7** is implemented, religious educational institutions in those states could continue to give preference to staff on religious grounds without regard to the related prohibitions in the *Fair Work Act*.

8.47 Additionally, existing exceptions to the prohibition on discrimination on religious grounds in the ACT, Queensland, Tasmania, and WA are potentially less restrictive for religious educational institutions than the exception for religious educational institutions outlined in **Recommendation 7**.<sup>32</sup> If s 351(2)(a) of the *Fair Work Act* remained unamended, the potentially broader exceptions in the ACT, Queensland, Tasmania, and WA would effectively apply in proceedings under the *Fair Work Act*. Therefore, in light of the position under state and territory anti-discrimination laws, the current operation of s 351(2)(a) would undermine the specific exception for religious educational institutions outlined in **Recommendation 7**.

8.48 As such, it is necessary to amend s 351(2)(a) of the *Fair Work Act* to specify that it does not apply to religious educational institutions in relation to adverse action because of an employee's religion. This would ensure that religious educational institutions in all states and territories (including those with no prohibition on discrimination on religious grounds, and those with less restrictive exceptions for religious educational institutions) would only be permitted to give preference to staff on religious grounds in accordance with the exceptions available under the *Fair Work Act*, as outlined in **Recommendation 7**.

### **Special measures to achieve equality**

8.49 **Recommendation 7** would not have any impact on the existing exception in s 195(2)(c) of the *Fair Work Act* regarding terms in enterprise agreements that constitute a 'special measure to achieve equality'. Accordingly, to the extent that the exception is relevant, religious educational institutions could continue to rely upon the exception. International law recognises that special measures may be appropriate in relation to persons who are 'generally recognised to require special protection or assistance',<sup>33</sup> or 'where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights'.<sup>34</sup> Special measures are sometimes referred to as 'positive action', 'affirmative action', or 'specific measures', and include time-limited 'targeted measures developed for the purpose of advancing

31 Ibid.

32 Ibid.

33 *Discrimination (Employment and Occupation) Convention*, opened for signature 25 June 1958, ILO No 111 (entered into force 15 June 1960) art 5 ('ILO 111').

34 Human Rights Committee, *General Comment No 18: Non-discrimination*, 37th sess, UN Doc HRI/GEN/1/Rev.9 (Vol I) (10 November 1989) [10].

or achieving equality and redressing disadvantage'.<sup>35</sup> Aspects of this international framework are reflected in s 195 of the *Fair Work Act*. For example, s 195(4)(a) provides that the purpose of a special measure must be to achieve 'substantive equality' for employees or prospective employees who have a particular attribute. In addition, s 195(6) provides that a term ceases to be a special measure after substantive equality has been achieved.

## Consistency with international law

8.50 This section analyses the extent to which the reforms contemplated under **Recommendation 7** are consistent with Australia's international legal obligations. As discussed in **Chapter 4**, the Terms of Reference do not directly request the ALRC to assess whether the Australian Government's policy position is itself consistent with international law. However, it is necessary for the ALRC to assess the Australian Government's policy position in light of international law, in order to recommend how to implement that policy position in law in a way that is consistent with international law.

8.51 As set out in **Chapter 10**, it is necessary for each human right to be treated on an equal footing with all other rights — this is on the basis that human rights are 'indivisible and interdependent and interrelated'.<sup>36</sup> While a small number of rights are absolute, most rights can be limited to a certain extent in accordance with criteria established under international law, to promote other objectives (including other human rights). Where multiple rights intersect, international law has developed mechanisms (including concepts of proportionality) to guide how maximum realisation of rights may be achieved. Those mechanisms are applied in this section to analyse consistency of the reforms in **Recommendation 7** with Australia's international legal obligations. In assessing the human rights compatibility of **Recommendation 7** through the lens of proportionality, the ALRC has considered, for example, the potential for harm that may be caused to staff not preferred, and the potential for harm to religious educational institutions, if existing legislative exceptions were amended as recommended.

8.52 The recommended reforms raise for consideration the following human rights:

- the right to equality and non-discrimination;
- the right to freedom of religion or belief;
- the right to work;
- the right to privacy;

35 Equal Rights Trust and Office of the United Nations High Commissioner for Human Rights, *Protecting Minority Rights: A Practice Guide to Developing Comprehensive Anti-Discrimination Legislation* (2022) xiv.

36 *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23 (12 July 1993, adopted 25 June 1993 by the World Conference on Human Rights) [5], endorsed by UN General Assembly, *World Conference on Human Rights*, GA Res 48/121, UN GAOR, UN Doc A/48/49 (20 December 1993).

- the right to freedom of expression;
- the rights to health and life;
- parental liberties;
- children's rights; and
- the right to education.<sup>37</sup>

8.53 If **Recommendation 7** were implemented, some of these rights would be enhanced, to some extent, compared to the existing legal position. These include the right to equality and non-discrimination, the right to work, the right to privacy, the right to freedom of expression, the right to health and life, children's rights, and the right to education. However, as occurs under existing law, some of these rights would remain limited to some extent for some people, but those limitations would be permissible under international law. The rights that may be limited by implementation of **Recommendation 7** include the right to equality and non-discrimination, the right to work, and the right to privacy. It is possible that the freedom to manifest religion or belief in community with others, and the associated parental liberty to ensure the religious and moral education of one's children in conformity with one's own convictions, would be limited to some extent for some people. However, if they were, the limitations would be permissible under international law.

8.54 After careful consideration, the ALRC has reached the conclusion that the policy position set out in the Terms of Reference (and reflected in **Recommendation 7**) is within the range of approaches that are permissible under international law. In particular, the reforms contemplated under **Recommendation 7** would be consistent with Australia's international legal obligations as they would maximise the realisation of relevant human rights, and would restrict the realisation of some rights only in accordance with international law.

8.55 The remainder of this section analyses **Recommendation 7** in light of each of the human rights listed above.

### ***Right to equality and non-discrimination***

8.56 The right to equality and non-discrimination recognises that 'all persons are equal before the law and are entitled without any discrimination to the equal protection of the law'.<sup>38</sup> **Recommendation 7** would enhance the right to equality and non-discrimination for some people (compared to the existing legal position under the *Fair Work Act*). However, if implemented, it would nevertheless limit realisation of the right for others, as is currently the case.

### ***Enhancement of the right***

8.57 Compared to existing law, **Recommendation 7** would substantially enhance the right to equality and non-discrimination for existing employees and, to a lesser

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<sup>37</sup> These rights are analysed in detail in **Chapter 11**.

<sup>38</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 26 ('ICCPR'). See further **Chapter 11**.

extent, prospective employees. This is because the exception in **Recommendation 7** would restrict the existing capacity of religious educational institutions to treat staff members differently on the basis of religion, because the exception would apply only:

- at selection, in relation to prospective employees (rather than at selection and throughout the employment relationship, in relation to existing employees);
- where the giving of preference is reasonably necessary to build or maintain a community of faith, and the effects of giving preference are proportionate to that aim (rather than being assessed by reference to the 'religious susceptibilities' of adherents); and
- where the conduct is not unlawful under the *Sex Discrimination Act*.

8.58 In particular, **Recommendation 7** would enhance realisation of the right to equality and non-discrimination for existing employees at religious educational institutions. For example, modern awards and enterprise agreements could not include terms that (directly) discriminate<sup>39</sup> on the basis of religion in relation to aspects of employment beyond selection, unless religion were an inherent requirement of a particular role. In addition, unless religion were an inherent requirement, religious educational institutions would not be permitted to take adverse action against an existing employee because of the employee's religion, including by:

- dismissing the employee;
- 'injuring' the employee in their employment;
- altering the position of the employee to the employee's prejudice; or
- discriminating between employees.<sup>40</sup>

8.59 Furthermore, religious educational institutions would not be permitted to terminate an employee because of the employee's religion (which is currently possible because of the exception provided by s 772(2)(b) of the *Fair Work Act*).

8.60 Subject to application of the inherent requirements exceptions, **Recommendation 7** would mean that religious educational institutions could not, for example:

- include in a modern award or enterprise agreement a term that stipulated that the institution has the power to terminate the employment of an employee if they change their religion;
- alter the terms or conditions of employment of an employee who changes their religion;
- decline to promote an employee who is not of the same religion as the institution; or
- terminate the employment of an employee who decided that they no longer held certain religious beliefs held by the institution.

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39 Whether terms that indirectly discriminate would be prohibited is uncertain: see the discussion in **Chapter 7** at [7.34]–[7.42].

40 See *Fair Work Act 2009* (Cth) s 342(1) item 1.

8.61 Impacts on a person's right to non-discrimination may be much more significant after a person is employed, compared to at the point of selection. The ALRC agrees with the submission of the Australian Human Rights Commission that

while faith-based schools could legitimately seek to prefer staff of their own faith in seeking to build a community of faith, it would be inappropriate to make decisions about the way in which staff were treated while employed, or about whether they should continue to be employed, based on their religious belief or activity, if their religious belief or activity was not an inherent requirement of the role. The burdens on staff who are already employed are much more significant, and the justification for imposing them is much weaker. ...

If a person is employed in a role for which having a particular religious belief is an inherent requirement, and the person ceases to hold that belief, the employer may be justified in responding to that. However, where having a religious belief is not an inherent requirement of the role, it would be fundamentally at odds with the individual freedom of belief of the staff member to cause them detriment in their employment or to terminate their employment on the basis of their religious belief or activity, including on the basis that their beliefs had changed. Once a person has already been employed, decisions to terminate their employment impact much more significantly on their rights. For example, the staff member may have moved to take up the position, or rearranged other aspects of their life in order to work in the role. The loss of employment may have significant adverse impacts on them and their family. An interference with the vested rights of employees requires a far greater justification.<sup>41</sup>

8.62 In relation to prospective employees, the right to equality and non-discrimination would also be enhanced in some ways under [Recommendation 7](#). For example, under the recommended exception in [Recommendation 7](#), giving preference to staff of a particular religion must be for the particular purpose of building or maintaining a community of faith. It is likely that this exception would apply in fewer cases than the existing exception relating to 'religious susceptibilities'. Consequently, it would be less likely that prospective employees are subjected to differential treatment on the basis of their religion.

8.63 In addition, under [Recommendation 7](#), religious educational institutions could not engage in conduct that is unlawful under the *Sex Discrimination Act*, such as refusing to employ a person because of the person's marital status or sexual orientation.

### ***Limitation on the right***

8.64 As is currently the case, the right to equality and non-discrimination would be limited under [Recommendation 7](#) for any prospective employees who are not preferred at selection because they are not of the same religion as the religious educational institution. Under the exception in [Recommendation 7](#), this situation could arise because a religious educational institution takes adverse action on the basis of religion by refusing to employ a particular prospective employee.

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41 Australian Human Rights Commission, *Submission 384*.



Any limitations on the right to equality and non-discrimination must be justified under international law. As demonstrated in the analysis that follows, the limitation on the right under **Recommendation 7** is justified under international law.

8.65 Under international law, the right to non-discrimination may be limited where differential treatment, including on the basis of religion, is justified. **Chapter 11** explains in detail when differential treatment on the ground of religion can be justified under the ICCPR and ILO 111. The following paragraphs briefly apply those principles.

8.66 **ILO 111:** Under the ILO 111, exceptions to the prohibition on discrimination in employment on the ground of religion exist where the differential treatment is based on the inherent requirements of a job, or constitutes a special measure.<sup>42</sup> **Recommendation 7** would have no impact on the scope or availability of the inherent requirements exceptions or the special measures exception currently found in the *Fair Work Act*. Retention of these exceptions aligns with Australia's obligations under the ILO 111.

8.67 Some submissions raised concern that inherent requirements exceptions may give religious educational institutions significant autonomy to decide for themselves whether a requirement is 'inherent' to the role, and that the exception could be used as a loophole to discriminate on grounds other than religion (including grounds contained in the *Sex Discrimination Act*).<sup>43</sup> However, the High Court has held that an inherent requirement is one that is 'essential' to the role, and that this must be determined objectively, albeit within the particular social context within which the work is carried out.<sup>44</sup> In addition, under **Recommendation 5**, the inherent requirements exception in relation to attributes protected under the *Sex Discrimination Act* would not be effective, to the extent that it is broader than what is permitted under the *Sex Discrimination Act*.

8.68 Other stakeholders expressed concern that it is inappropriate for secular authorities to determine whether particular religious beliefs or conduct constitute an 'inherent requirement' for a particular role in a religious educational institution.<sup>45</sup> It would, however, appear to be inconsistent with Australia's international legal obligations, and also with domestic jurisprudence, to permit religious educational institutions to determine unilaterally what requirements are 'inherent' to all staff positions, without effective oversight by state authorities.<sup>46</sup>

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42 ILO 111 arts 1, 5.

43 See, eg, Thorne Harbour Health, Brave Network and SOGICE Survivors, *Submission 213*; Equality Australia, *Submission 375*; Australian Education Union, *Submission 395*; Australian Council of Trade Unions, *Submission 411*; Law Council of Australia, *Submission 428*.

44 *Qantas Airways Ltd v Christie* (1998) 193 CLR 280; *X v Commonwealth* (1999) 200 CLR 177. See further **Chapter 12**.

45 A Deagon, *Submission 4*; Anglican Church Diocese of Sydney, *Submission 189*; Australian Christian Higher Education Alliance, *Submission 208*; Australian Christian Lobby, *Submission 299*.

46 See **Chapter 11**; *Qantas Airways Ltd v Christie* (1998) 193 CLR 280; *X v Commonwealth* (1999) 200 CLR 177.



8.69 The recommended exception in **Recommendation 7** may be slightly broader than the inherent requirements exception contemplated under the ILO 111. This is because the recommended exception would not be restricted to roles for which religion is an ‘essential’ element. Nevertheless, the recommended exception is appropriately qualified to minimise any limitation on other human rights, including the right to equality and non-discrimination. For example, the recommended exception expressly incorporates considerations of proportionality, and would not permit conduct that is unlawful under the *Sex Discrimination Act*. Accordingly, the ALRC considers that any limitation on the right to equality and non-discrimination under **Recommendation 7** would be compatible with Australia’s obligations under the ILO 111.

8.70 **ICCPR:** The limitation on the right in **Recommendation 7** would be justified under the ICCPR as an ‘objective and reasonable’ limitation on the right to equality and non-discrimination in line with jurisprudence and relevant guidance from treaty bodies (and regional human rights mechanisms), which sets out that any limitation must serve a legitimate aim and be proportionate to the legitimate aim sought.<sup>47</sup>

8.71 First, the limitation would serve a legitimate aim. It would enhance the capacity of religious educational institutions to build a community of faith. The building or maintenance of a community of faith is relevant to the collective manifestation of the individual right to freedom of religion or belief.<sup>48</sup> The right to freedom of religion or belief would thus be enhanced.

8.72 Second, the exception in **Recommendation 7** would be proportionate to the legitimate aim sought. The exception would be a narrow, qualified exception that permits the giving of preference only in particular circumstances.

8.73 Because the recommended exception would apply only in relation to ‘selection’ of staff members, rights such as equality and non-discrimination would be limited for prospective employees more than for existing employees.<sup>49</sup> The detriment experienced by prospective employees who are not preferred by a particular religious educational institution can be justified under international human rights law as being proportionate to the legitimate aim sought — which is the ability of religious educational institutions to build and maintain a community of faith. Further, the recommended exception in **Recommendation 7** incorporates an objective proportionality test with the aim of ensuring that any differential treatment of prospective staff on the basis of religion is proportionate to the purpose of building or maintaining a community of faith.

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47 See, eg, Committee on Economic, Social and Cultural Rights, *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), 42nd sess, UN Doc E/C.12/GC/20 (2 July 2009) [13]. See also **Chapter 11** at [11.21].

48 See further **Appendix I**.

49 For examples of reported impacts of discrimination on each of prospective employees and existing employees, see Australian Law Reform Commission, ‘What We Heard’ (Background Paper ADL2, December 2023) [25], [36], [38], [60], [108].

8.74 Several submissions supported the inclusion of a proportionality test within any exception permitting the giving of preference on religious grounds by religious educational institutions.<sup>50</sup> Some submissions noted that proportionality assessments should require genuine consideration of all relevant circumstances.<sup>51</sup>

8.75 In contrast, other submissions expressed the view that inclusion of a proportionality test would introduce high levels of uncertainty for religious educational institutions and would be contrary to the principle of institutional autonomy.<sup>52</sup> However, proportionality is a legal standard that has been increasingly explained and applied by the courts, and further guidance could be provided to religious educational institutions once developed by government bodies (see [Recommendation 10](#)) and peak educational bodies.

8.76 In light of the analysis above, the limitation on the right to equality and non-discrimination of persons not preferred at selection under the exception in [Recommendation 7](#) would be justifiable under the ICCPR. This is because the limitation is proportionate to the legitimate aim of building or maintaining a community of faith.

### **Right to work**

8.77 The right to work includes the right to the opportunity to gain work and to ‘the enjoyment of just and favourable conditions of work’ (including equal opportunity to be promoted).<sup>53</sup> However, ‘the right to work should not be understood as an absolute and unconditional right to obtain employment’.<sup>54</sup>

### **Enhancement of the right**

8.78 By restricting the capacity of religious educational institutions to discriminate in employment decisions, [Recommendation 7](#) would have an equivalent impact on the right to work as it would have on the right to equality and non-discrimination.<sup>55</sup>

50 See, eg, Australian Discrimination Law Experts Group, *Submission 75*; Queensland Human Rights Commission, *Submission 125*; Thorne Harbour Health, Brave Network and SOGICE Survivors, *Submission 213*; Liberty Victoria, *Submission 253*; Equality Australia, *Submission 375*; Australian Human Rights Commission, *Submission 384*; Independent Education Union, *Submission 387*; Diversity Council Australia, *Submission 398*; Australian Council of Trade Unions, *Submission 411*; Law Council of Australia, *Submission 428*.

51 Liberty Victoria, *Submission 253*; Equality Australia, *Submission 375*; Australian Council of Trade Unions, *Submission 411*.

52 M Fowler, *Submission 201*; Australian Christian Higher Education Alliance, *Submission 208*; Australian Christian Lobby, *Submission 299*.

53 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976) arts 6, 7 (‘ICESCR’). See also *Convention on the Elimination of all Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) art 11 (‘CEDAW’). The right to non-discrimination in work is protected under art 1 of the ILO 111. See further [Chapter 11](#).

54 Committee on Economic, Social and Cultural Rights, *General Comment No 18: The Right to Work*, 35th sess, UN Doc E/C.12/GC/18 (6 February 2006) [6].

55 See above at [\[8.55\]](#)–[\[8.76\]](#).

8.79 Under **Recommendation 7**, the right to work would be substantially enhanced for existing employees, compared to the current legal position under the *Fair Work Act*. As described above, existing employees would enjoy greater protection against discriminatory terms in modern awards and enterprise agreements, discriminatory adverse action, and discriminatory termination.

8.80 In addition, prospective employees would enjoy greater protection against discrimination on the basis of religion, and on the basis of attributes protected under the *Sex Discrimination Act*, when applying for work. For example, by explicitly prohibiting discrimination on the ground of sex, the recommended new exception in **Recommendation 7** would enhance women's right to work.<sup>56</sup>

### ***Limitation on the right***

8.81 However, if implemented, **Recommendation 7** would limit the right to work for some prospective employees in some circumstances (as currently occurs under the *Fair Work Act*). Specifically, in the same way that the right to equality and non-discrimination would be limited, the right to work would be limited under **Recommendation 7** for persons who are not preferred at selection because they are not of the same religion as the religious educational institution. To the extent that **Recommendation 7** would limit the right to work for prospective employees, this limitation must be justified under international law.

8.82 Under the ICESCR, the right to work may only be justifiably restricted if the limitation is

**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**.<sup>57</sup>

8.83 These criteria are now addressed in turn. First, the limitation on the right to work under the exception in **Recommendation 7** would be determined by law through amending legislation that would give effect to the recommended reforms.

8.84 Secondly, the limitation would be compatible with the nature of rights under the ICESCR.<sup>58</sup> For example, one aspect of the nature of rights under the ICESCR is the 'progressive realisation' obligation under art 2(1), which requires each state party to

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56 CEDAW art 11(1).

57 ICESCR art 4 (emphasis added). The Limburg Principles provide guidance on the interpretation of states' obligations under the ICESCR, including in relation to art 4: United Nations, *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, 43rd sess, UN Doc E/CN.4/1987/17 (8 January 1987). The Limburg Principles are derived from the Siracusa Principles: *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 41st sess, UN Doc E/CN.4/1985/4 (28 September 1984) ('Siracusa Principles').

58 See United Nations, *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, 43rd sess, UN Doc E/CN.4/1987/17 (8 January 1987) [56].

take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the [ICESCR].

8.85 **Recommendation 7** would support the progressive, full realisation of the right to work for employees and prospective employees in religious educational institutions by restricting the capacity of such institutions to discriminate in employment decisions by comparison with the current legal position under the *Fair Work Act*. In addition, limitations on the right to work in relation to persons not preferred already exist under the *Fair Work Act*, and this continued limitation would not jeopardise the essence of the right.

8.86 Thirdly, the limitation would be solely for the purpose of promoting the general welfare in a democratic society.<sup>59</sup> A degree of autonomy is required for religious educational institutions to build and maintain communities of faith. Building and maintaining communities of faith through the selection of staff who are of the same religion as the institution contributes to pluralism, which is essential in Australia's democratic and multicultural society and furthers the wellbeing of society as a whole.<sup>60</sup>

8.87 Additional relevant limitation criteria have been set out by the Committee for Economic, Social, and Cultural Rights. Given the potential for differential treatment, or discrimination, to impact on the right to work, in General Comment No 20 the Committee stated:

Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is **reasonable and objective**. This will include an assessment as to whether the **aim and effects of the measures or omissions are legitimate, compatible with the nature of the [ICESCR] rights and solely for the purpose of promoting the general welfare in a democratic society**. In addition, there must be a clear and reasonable relationship of **proportionality between the aim sought to be realised and the measures or omissions and their effects**.<sup>61</sup>

59 See *ibid* [52]–[55].

60 The principle that 'pluralism in education is essential for the preservation of democratic society' in the context of freedom of religion and education has been recognised by the European Court of Human Rights: see *Kjeldsen, Busk Madsen and Pedersen v Denmark* (European Court of Human Rights, Chamber, Application No 5095/71, 5920/72, 5926/72, 7 December 1976) [50]; Eugenia Relaño, 'Educational Pluralism and Freedom of Religion: Recent Decisions of the European Court of Human Rights' (2010) 32(1) *British Journal of Religious Education* 19, 23. The contribution of freedom of religion to a democratic society is also recognised: Lotta Lerwall, 'Ban on Faith-Based Schools?' in Hedvig Bernitz and Victoria Enkvist (eds), *Freedom of Religion: An Ambiguous Right in the Contemporary European Legal Order* (Hart Publishing, 2020) 151–2. See also A Deagon, *Submission 4*; Human Rights Law Alliance, *Submission 96*; M Fowler, *Submission 201*; Institute for Civil Society, *Submission 399*; National Catholic Education Commission, *Submission 409*.

61 Committee on Economic, Social and Cultural Rights, *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)*, 42nd sess, UN Doc E/C.12/GC/20 (2 July 2009) [13] (emphasis added).

8.88 These criteria are now addressed in turn. The limitation under **Recommendation 7** would be reasonable and objective for the following reasons.

8.89 First, as discussed above,<sup>62</sup> the limitation would be in the pursuit of a legitimate aim — to build or maintain a community of faith. Secondly, as discussed above,<sup>63</sup> the limitation would be compatible with the nature of rights under the ICESCR. Thirdly, as discussed above,<sup>64</sup> the limitation would be for the purpose of promoting the general welfare in a democratic society. Fourthly, as discussed above,<sup>65</sup> the limitation would be proportionate to the legitimate aim of building or maintaining a community of faith.

8.90 As such, the ALRC considers that limitation of the right to work under **Recommendation 7** would be justified under international law and, therefore, that **Recommendation 7** would reinforce the right to work.

### ***Right to privacy***

8.91 Under international law, the right to privacy means that no person shall be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence, or unlawful attacks on their honour and reputation.<sup>66</sup> Protection of the right to privacy from interference by private actors (including religious educational institutions) is required under international law.<sup>67</sup>

### ***Enhancement of the right***

8.92 The ALRC received submissions that highlighted how the right to privacy may be infringed in the context of employment practices,<sup>68</sup> including by institutions relying upon their ethos to justify enquiring into matters pertaining to the private lives of employees and prospective employees.<sup>69</sup>

8.93 **Recommendation 7** would have a similar impact on the right to privacy as it would have on the right to equality and non-discrimination — by restricting the territory in which discrimination can occur, infringements on the right to privacy would also be limited. Specifically, the right to privacy would be enhanced for employees and prospective employees under **Recommendation 7** because, by comparison with existing provisions under the *Fair Work Act*, it would narrow the circumstances in which religion, religious beliefs, religious practices, and attributes protected under the *Sex Discrimination Act* would be relevant to the lawful conduct of religious

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62 At [8.72].

63 At [8.84]–[8.85].

64 At [8.86].

65 At [8.73]–[8.76].

66 ICCPR art 17. See further **Chapter 11**.

67 See Human Rights Committee, *General Comment No 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant: International Covenant on Civil and Political Rights*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004, adopted 29 March 2004) [8].

68 M Fowler, *Submission 201*; Victorian Equal Opportunity and Human Rights Commission, *Submission 255*; Australian Human Rights Commission, *Submission 384*; Law Council of Australia, *Submission 428*.

69 Queensland Human Rights Commission, *Submission 125*.

educational institutions. In this way, [Recommendation 7](#) would reinforce the right to privacy.

### **Limitation on the right**

8.94 However, as currently occurs under the *Fair Work Act*, [Recommendation 7](#) would limit the right to privacy in the context of selection on the basis of religion, because it would be lawful for religious educational institutions to enquire into the religion of prospective employees, for example, when religion is an inherent requirement of the role, or when it would be permissible to give preference to a person of the same religion under the recommended new exception in [Recommendation 7](#).

8.95 As the right to privacy is not absolute, any interference with the right must be justified under international law.<sup>70</sup> Whether a limitation is justified involves considering whether the limitation is based in law, is proportionate to the aim sought, and is necessary in the circumstances.<sup>71</sup> Instructive jurisprudence from the ECtHR indicates that the specific role of the individual concerned (and whether persons in that position owe an increased duty of loyalty to their employer) is relevant to whether an interference with the person's right to privacy by a religious body is proportionate and necessary.<sup>72</sup>

8.96 For the reasons discussed above in relation to the right to equality and non-discrimination, the limitation on the right to privacy (in relation to the ground of religion in the selection of prospective staff) under [Recommendation 7](#) would be proportionate to the aim of building or maintaining a community of faith.

8.97 Consequently, the ALRC considers that the limitation on the right to privacy (in respect of religion) of some prospective employees under the exception in [Recommendation 7](#) would be justifiable under international law and, as such, [Recommendation 7](#) would reinforce the right to privacy.

### **Right to freedom of expression**

8.98 The right to freedom of expression includes the freedom to impart information and ideas through various forms of expression, and includes views and opinions that may be experienced as offensive to others, but not when expression amounts

70 ICCPR art 17; Human Rights Committee, *Views: Communication No 488/1992*, 50th sess, UN Doc CCPR/C/50/D/488/1992 (4 April 1994, adopted 31 March 1994) ('*Toonen v Australia*') [8.3]. See further [Chapter 11](#).

71 Human Rights Committee, *Views: Communication No 488/1992*, UN Doc CCPR/C/50/D/488/1992 (1994) ('*Toonen v Australia*'). See further [Chapter 11](#).

72 See *Schüth v Germany* (European Court of Human Rights, Court (Fifth Section), Application No 1620/03, 23 December 2010); *Obst v Germany* (European Court of Human Rights, Court (Fifth Section), Application No 425/03, 23 December 2010); *Fernández Martínez v Spain* (European Court of Human Rights, Grand Chamber, Application No 56030/07, 12 June 2014); *Travaš v Croatia* (European Court of Human Rights, Court (Second Section), Application No 75581/13, 30 January 2017). See further [Appendix I](#).

to vilification.<sup>73</sup> The right to freedom of expression is recognised as a stand-alone right that has a mutually reinforcing relationship with the right to freedom of religion or belief.<sup>74</sup>

### ***Enhancement of the right***

8.99 **Recommendation 7** would enhance the right to freedom of expression for some, but have little or no effect for others. If implemented, **Recommendation 7** would have no effect on the right to freedom of expression for prospective employees. However, for existing employees, **Recommendation 7** would enhance the right to freedom of expression. This is because, under the exception in **Recommendation 7**, religious educational institutions would have a more restricted capacity to discriminate against and therefore to silence (whether intentionally or not) employees in relation to religion by comparison with the existing legal position. On this basis, **Recommendation 7** would reinforce the right to freedom of expression for a greater number of staff in religious educational institutions.

### ***Limitation on the right***

8.100 Some religious bodies and religious advocacy groups expressed concern in submissions that reforms proposed in the *Consultation Paper* would permit staff in religious educational institutions to advocate against the institution's religious teachings regarding, for example, relationships.<sup>75</sup> However, the exercise by some persons of expression which is contrary to the expression of other persons is not a limitation upon the freedom of expression of those other persons. In any event, as discussed below,<sup>76</sup> under **Recommendation 7** religious educational institutions would still have a number of mechanisms available to appropriately manage staff conduct, including expression.

8.101 **Recommendation 7** would not limit the right to freedom of expression for religious educational institutions in any significant way. In the vast majority of circumstances, imparting information or expressing views (including religious views) would not constitute discriminatory conduct under the *Fair Work Act*.<sup>77</sup> The only provision of the *Fair Work Act* that might arguably prohibit the expression of a view by reason of **Recommendation 7** is the prohibition on adverse action. Adverse action is defined broadly, and in relation to existing employees includes any action that

73 ICCPR arts 19(2)–(3); Frank La Rue, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, 17th sess, UN Doc A/HRC/17/27 (16 May 2011) [25]. See further **Chapter 11**.

74 Office of the United Nations High Commissioner for Human Rights, 'Use Human Rights Frameworks to Promote Freedoms of Religion, Belief, and Expression: UN Experts' <[www.ohchr.org/en/press-releases/2023/03/use-human-rights-frameworks-promote-freedoms-religion-belief-and-expression](http://www.ohchr.org/en/press-releases/2023/03/use-human-rights-frameworks-promote-freedoms-religion-belief-and-expression)>.

75 See, eg, Calvary Christian College (College Council), *Submission 192*; Institute for Civil Society, *Submission 399*; I Benson, *Submission 413*.

76 See below at [8.136]–[8.138].

77 For a discussion regarding statements of religious belief and prohibitions on discrimination generally, see Parliamentary Joint Committee on Human Rights (Cth), *Religious Discrimination Bill 2021 and Related Bills* (Inquiry Report, 4 February 2022) ch 6.



‘alters the position of an employee to the employee’s prejudice’.<sup>78</sup> This phrase has been interpreted broadly by the High Court.<sup>79</sup> To the extent that imparting information or expressing a view could alter the position of an employee to the employee’s prejudice, it could therefore constitute adverse action. For example, hypothetically it may be possible to impart some information or express some view that would make the continuation of the employee’s employment untenable. The possibility that such a statement could constitute adverse action exists now, and would continue to exist under **Recommendation 7**.

8.102 There is nothing to suggest that freedom of expression is currently being exercised in religious educational institutions in a way that would amount to the taking of adverse action prohibited by the *Fair Work Act*. There is no reason to think that **Recommendation 7** would alter the extent to which expression would be used to that end and thus increase the possibility that, in practical terms, any limitation on freedom of expression would be experienced by persons involved in religious educational institutions. The small possibility of any such limitation is not sufficiently real to require further attention. In any event, if it were sufficiently real, the small possible limitation is readily justifiable for essentially the same reasons as those given in relation to the freedom of religion or belief (see below).<sup>80</sup>

8.103 Overall, **Recommendation 7** would reinforce the right to freedom of expression in accordance with Australia’s international legal obligations.

### ***Rights to health and life***

8.104 The right to health encompasses the right to ‘the enjoyment of the highest attainable standard of physical and mental health’.<sup>81</sup> It depends on the realisation of other rights, including the right to work, the right to equality and non-discrimination, and the right to education.<sup>82</sup> The right to health is also informed by the right to life,<sup>83</sup> which includes the right to enjoy life with dignity.<sup>84</sup>

8.105 As discussed in **Chapter 3** and **Chapter 4**, discrimination on the ground of attributes protected under the *Sex Discrimination Act* can have a detrimental impact on the health and wellbeing of students and staff at religious educational institutions,

78 *Fair Work Act 2009* (Cth) s 342(1) item 1 column 2 (c). *Fair Work Act* s 342(1), Item 1, Column 2, (c).

79 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 [4] (Brennan CJ, McHugh, Gummow, Kirby, and Hayne JJ). See further **Chapter 13**.

80 At [8.159].

81 ICESCR art 12(1). See also CEDAW art 10(h); CRC art 24; *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 5(e)(iv) (‘CERD’).

82 Committee on Economic, Social, and Cultural Rights, *General Comment No 14: The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 22nd sess, UN Doc E/C.12/2000/4 (11 August 2000) [3]. See further **Chapter 11**.

83 ICCPR art 6(1). See further **Chapter 11**.

84 Committee on Economic, Social, and Cultural Rights, *General Comment No 14: The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 22nd sess, UN Doc E/C.12/2000/4 (11 August 2000) [3].



and consequently also on the rights to health and to life. **Recommendation 7** would enhance the right to health and life for employees and prospective employees in comparison with the current legal position under the *Fair Work Act*. This is because **Recommendation 7** would significantly increase protection from discrimination on the ground of religion and would prohibit discrimination on grounds protected under the *Sex Discrimination Act*, thereby significantly narrowing the circumstances in which the right to health and life could be infringed. In this way, **Recommendation 7** would enhance the rights to health and life for staff (including mental health) by promoting dignity, and safe and inclusive workplaces that respect diversity.<sup>85</sup> This may also have flow-on effects for students who might benefit from being in an educational environment that more fully respects and protects the rights of all staff.

8.106 Accordingly, the ALRC considers that **Recommendation 7** would reinforce the rights to health and life, and that this proposed reform is compatible with Australia's international legal obligations in relation to these rights.

### ***Right to education***

8.107 The right to education is protected under international law as a standalone right,<sup>86</sup> and as a crucial means of realising other rights.<sup>87</sup>

8.108 **Recommendation 7** may enhance the right to education to the extent that it would provide greater scope for the selection of teachers who are most capable of facilitating the academic achievement of students. The implications of this may be particularly significant in disadvantaged communities where there may be a greater need for teachers with particular skills.

8.109 As such, the ALRC considers that **Recommendation 7** may reinforce the right to education, and that it would be compatible with Australia's international legal obligations.

### ***Children's rights***

8.110 Under international law, children's rights encompass a wide variety of rights, including the rights to health and life, and the right to education.<sup>88</sup>

8.111 As noted above in relation to the rights to health and life, **Recommendation 7** may enhance realisation of children's rights to health and life by enabling the creation of diverse and inclusive educational environments. This view was supported by submissions and survey responses from parents who expressed that having teachers who represent diverse identities can support student wellbeing within

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85 See Dainius Pūras, Special Rapporteur, *Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, 41st sess, UN Doc A/HRC/41/34 (12 April 2019) [26]–[27].

86 ICESCR art 13(1).

87 Committee on Economic, Social and Cultural Rights, *General Comment No 13: The Right to Education (Article 13 of the Covenant)*, 21st sess, UN Doc E/C.12/1999/10 (8 December 1999) [1]. See further **Chapter 11**.

88 CRC arts 6, 24(1), 28, 29(1). See further **Chapter 11**.

religious schools.<sup>89</sup> As discussed in [Chapter 4](#), evidence suggests that having diverse role models in the context of education is likely to promote the realisation of children's rights, including the right to health.

8.112 Further, as noted above, [Recommendation 7](#) may enhance realisation of a child's right to education by providing greater scope for the selection of teachers who are most capable of facilitating the academic achievement of students.

8.113 Consequently, [Recommendation 7](#) may reinforce children's rights, including the rights to health and life, and the right to education, and would be compatible with Australia's obligations under international law in relation to this right.

### ***Right to freedom of religion or belief***

8.114 The right to freedom of religion or belief encompasses:

- the freedom to have or to adopt a religion or belief of one's choice;
- a prohibition on coercion that would impair a person's freedom to have or to adopt a religion or belief of that person's choice; and
- the freedom to manifest one's religion or belief in worship, observance, practice, and teaching, individually or in community with others, in public or private.<sup>90</sup>

8.115 The first two aspects of the right to freedom of religion or belief are absolute. The third aspect of the right (that is, the freedom to manifest one's religion or belief) can be limited under criteria specified under international law.<sup>91</sup> These criteria are discussed in detail in [Chapter 4](#) and [Chapter 11](#).

8.116 Under [Recommendation 7](#), some staff members, including prospective employees, may feel less pressured to commit to religious beliefs or interpretations that they do not hold, or no longer hold, to retain their employment. This outcome could be characterised as an enhancement of the right to freedom of religion or belief for those staff members. In this chapter, these kinds of benefits for staff members have been taken into account through the lens of the right to non-discrimination and equality.<sup>92</sup>

8.117 Prospective staff members who, because of their religion, are not preferred at selection for employment under the recommended exception in [Recommendation 7](#) would experience a disadvantage. That disadvantage could be characterised as either an impingement on the right to freedom of religion or belief, or on the right to non-discrimination and equality. It is important to take into account such

89 See Australian Law Reform Commission, 'What We Heard' (Background Paper ADL2, December 2023) [69].

90 ICCPR arts 18(1)–(2).

91 ICCPR art 18(3). See also Human Rights Committee, *General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993, adopted 30 July 1993) [8]; Siracusa Principles.

92 See above at [\[8.57\]](#)–[\[8.63\]](#)

disadvantage, and in this chapter, it has been taken into account as an infringement on the right to non-discrimination and equality.<sup>93</sup>

8.118 This section considers whether **Recommendation 7** would limit the freedom to manifest religion or belief in community with others. The ALRC accepts that the right of individuals to manifest religion or belief includes a communal aspect, which is related to an institutional autonomy to govern the affairs of religious institutions.<sup>94</sup> Institutional autonomy is not in itself a human right, but rather ‘falls within the forum externum dimension of freedom of religion or belief’,<sup>95</sup> which includes the freedom to manifest religion in community with others.

8.119 A significant number of religious bodies, educational institutions, and individuals submitted that religious educational institutions should be able to give preference to staff on religious grounds, both at recruitment and throughout employment, without any restriction.<sup>96</sup> This was based on the view that giving preference to staff of the same religion is essential to the preservation of communities of faith, and full institutional autonomy is appropriate in this regard.<sup>97</sup> Any restriction on employment practices in this respect was described by these stakeholders as inappropriately limiting the freedom of religious educational institutions to build communities of faith and maintain their religious ethos.<sup>98</sup> Some submissions emphasised the importance of being able to employ staff who are authentic role models in accordance with the institution’s religion.<sup>99</sup> Other submissions expressed concern that a legislative exception for religious educational institutions to the prohibition on discrimination on religious grounds would provide non-religious bodies (such as courts) with too much discretion to determine how such an exception would apply in practice, thereby encroaching on the institutional autonomy of religious educational institutions.<sup>100</sup>

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93 See above at [8.64]–[8.76].

94 Nazila Ghanea, Special Rapporteur, *Landscape of Freedom of Religion or Belief*, 52nd sess, UN Doc A/HRC/52/38 (30 January 2023) [45].

95 Heiner Bielefeldt, Special Rapporteur, *Elimination of All Forms of Religious Intolerance*, 68th sess, UN Doc A/68/290 (7 August 2013) [60].

96 See, eg, A Deagon, *Submission 4*; P Quin, *Submission 79*; Anglican Church Diocese of Sydney, *Submission 189*; Australian Christian Higher Education Alliance, *Submission 208*; Australian Christian Lobby, *Submission 299*; Institute for Civil Society, *Submission 399*; National Catholic Education Commission, *Submission 409*.

97 Healinglife Church and Ministries, *Submission 9*; Association of Independent Schools of New South Wales, *Submission 154*; Presbyterian Church of Victoria, *Submission 195*; D & L Dyk, *Submission 351*.

98 A Deagon, *Submission 4*; Healinglife Church and Ministries, *Submission 9*; P Quin, *Submission 79*; Association of Independent Schools of New South Wales, *Submission 154*; Australian Christian Lobby, *Submission 299*.

99 The issue of authenticity within communities is addressed in Australian Law Reform Commission, ‘What We Heard’ (Background Paper ADL2, December 2023) [31], [40].

100 A Deagon, *Submission 4*; Anglican Church Diocese of Sydney, *Submission 189*; Australian Christian Higher Education Alliance, *Submission 208*; Australian Christian Lobby, *Submission 299*; Australian Catholic Bishops Conference, *Submission 406*.

8.120 It is important to distinguish between the imposition of restrictions on an institution generally, and the more specific concept of 'institutional autonomy' under international law that is relevant to human rights (for example, institutional autonomy that gives effect to the freedom to manifest religion or belief in community with others). The ALRC recognises that, under **Recommendation 7**, the current capacities given to religious educational institutions under existing exceptions to prohibitions on discrimination in the *Fair Work Act* would be restricted. There are two main reasons for this:

- First, the existing exceptions in the *Fair Work Act* apply to selection for employment as well as to the treatment of employees throughout the employment relationship (including, for example, in relation to pay and conditions, promotions, access to training and benefits, and termination). Under **Recommendation 7**, the existing religious institutions exceptions in the *Fair Work Act* would no longer apply in relation to religious educational institutions, and the recommended new exception in **Recommendation 7** would only apply at the point of selection. (The existing inherent requirements exceptions in the *Fair Work Act* would continue to apply to religious educational institutions throughout the employment relationship.)
- Second, in contrast to the broad scope of the existing religious institutions exceptions in the *Fair Work Act*, the recommended new exception in **Recommendation 7** would apply only where the giving of preference is reasonably necessary to build or maintain a community of faith; is proportionate to that aim; and does not amount to conduct that is unlawful under the *Sex Discrimination Act*.

8.121 Not all restrictions on institutions necessarily represent a limitation on the concept of 'institutional autonomy' under international law, despite institutional autonomy being relevant to, for example, the freedom to manifest religion or belief in community with others.<sup>101</sup> That freedom may be detrimentally affected to the extent that diminished institutional autonomy results in a diminished capacity to manifest religion or belief in community with others. This is because under international law, the concept of institutional autonomy is not itself a human right, and so does not provide institutions with any greater freedom than is otherwise provided for under human rights (such as the freedom to manifest religion or belief in community with others).

8.122 In the context of this Inquiry, the Terms of Reference refer to building a 'community of faith'. This concept appears to be aligned with the concept of manifesting religion or belief 'in community with others'. No jurisprudence or other commentary suggests that there is a distinction between these two concepts. The ALRC considers that it is appropriate to view the two concepts as substantially aligned.

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101 See further **Appendix I**.

8.123 The ALRC considers that, viewed in its proper context, the Australian Government's policy position, as implemented in accordance with **Recommendation 7**, would provide religious educational institutions with an appropriate level of institutional autonomy in relation to their employment practices. Put another way, religious educational institutions would be able to have their staff make an appropriate contribution to the institution's need to build a community of faith.

8.124 It is important at the outset to acknowledge that many mechanisms will be available to religious educational institutions to build a community of faith beyond the contribution that can be made by the employees of the institution. **Recommendation 7** only deals with the contribution that can be made by the employees. Specifically, **Recommendation 7** deals with the capacity of religious educational institutions to obtain from their employees an appropriate level of coherence with the religious ethos of the institution, so as to contribute to building and maintaining the institution's community of faith.

8.125 The policy underlying **Recommendation 7** is premised on the need to provide religious educational institutions with some capacity to select prospective employees on the basis of religion, in order to assist in achieving coherence between the beliefs of the institution and of its employees. In essence, the position of some stakeholders is that the limited capacity for differential treatment of employees on the basis of religion is insufficient, and that the limitation would impede a religious educational institution's autonomy to build a community of faith, and thus would impede the freedom of members of its community to manifest religion in community with each other.

8.126 In the ALRC's view, and in the context of the availability of other mechanisms for achieving an appropriate level of coherence between the beliefs of the employees and the ethos of the institution, the capacity given by **Recommendation 7** for the differential treatment of employees on the basis of religion is likely to be sufficient to enable religious educational institutions to obtain a reasonable contribution from their employees to the institution's capacity to build a community of faith. For example, religious educational institutions would continue to have the contractual capacity of an employer to require coherence, and the coherence that flows from the application of the inherent requirements exceptions.

8.127 The reasons for that conclusion are now further explained, commencing with the trend for less tolerance of discrimination against employees as expressed in the relevant international jurisprudence and the authoritative views of UN bodies.

**8.128 International jurisprudence and authoritative views by UN treaty bodies:** Under international jurisprudence and authoritative views expressed by UN treaty bodies, there has been a trend away from tolerating discrimination against non-ecclesiastical employees on the basis of their personal beliefs or private life. A number of international cases (discussed in detail in **Appendix I**) illustrate this trend. For example, in *Pavez Pavez v Chile*, the IACtHR stated that, in relation to the employment of a religious education teacher in a state school, institutional autonomy

becomes weaker and less robust, particularly in the field of education in public establishments, where the principles and values of tolerance, full respect for human rights, fundamental freedoms and non-discrimination are mandatory for the State.<sup>102</sup>

8.129 Notably, the court in *Pavez Pavez v Chile* was not satisfied that protecting the teacher from discrimination in her employment constituted

an actual or potential infringement of the autonomy of the religious community, or of the right to religion, or the right of parents or guardians to have their children or wards receive the religious education that is in accordance with their beliefs.<sup>103</sup>

8.130 While this Inquiry concerns religious educational institutions, rather than state schools, religious educational institutions in Australia receive public funding, and religious schools in particular deliver compulsory education.<sup>104</sup>

8.131 Authoritative views expressed by UN treaty bodies also illustrate the trend away from tolerating discrimination against non-ecclesiastical employees on the basis of their personal beliefs or private life. For example, in 2022 in relation to Australia, the Committee on Economic, Social, and Cultural Rights identified discrimination in employment in the field of education as a matter of particular concern. The Committee asked Australia to

provide information on any steps taken to reform anti-discrimination legislation at the federal and the state levels with a view to addressing the protection gaps in the existing legislation. In particular, please also indicate any steps taken to address the discriminatory effect of section 38 of the Sex Discrimination Act against lesbian, gay, bisexual, transgender and intersex teachers and students in religious educational institutions.<sup>105</sup>

8.132 Further, in 2018 in relation to Germany, the same Committee expressed concern at reports of discrimination in employment in relation to non-ecclesiastical positions in church-run institutions (including schools). The Committee recommended that Germany ‘ensure that no discrimination is permitted against non-ecclesiastical employees on grounds of religious belief, sexual orientation or gender identity’.<sup>106</sup>

102 *Pavez Pavez v Chile* (Inter-American Court of Human Rights, Series C No 449, 4 February 2022) [128]. The case discussed the ‘ministerial exception’, a concept adapted from United States law, as being relevant to institutional autonomy. Relevant aspects of United States law are discussed in Australian Law Reform Commission, ‘International Comparisons’ (Background Paper ADL1, November 2023).

103 *Pavez Pavez v Chile* (Inter-American Court of Human Rights, Series C No 449, 4 February 2022) [144].

104 See further [Chapter 3](#).

105 Committee on Economic, Social and Cultural Rights, *List of Issues Prior to Submission of the Sixth Periodic Report of Australia*, 70th sess, UN Doc E/C.12/AUS/QPR/6 (7 April 2022) [9].

106 Committee on Economic, Social and Cultural Rights, *Concluding Observations on the Sixth Periodic Report of Germany*, 64th sess, UN Doc E/C.12/DEU/CO/6 (27 November 2018) [23].

8.133 Similarly, in 2023 in relation to Ireland, the Human Rights Committee reiterated its previous concerns that

institutions under the direction or control of a body established for religious purposes, including in the fields of education and health, can discriminate against employees or prospective employees to protect the religious ethos of the institution ...<sup>107</sup>

8.134 On this basis, the Committee recommended that Ireland amend the relevant legislation to bar all forms of discrimination in employment in the fields of education and health.<sup>108</sup>

8.135 This trend under international law away from tolerating discrimination against non-ecclesiastical employees on the basis of their personal beliefs or private life suggests that the approach under **Recommendation 7** is compatible with Australia's international legal obligations (including in relation to institutional autonomy).

8.136 **Common law mechanisms:** Most, if not all, employments require some level of coherence between the values and beliefs of the employing enterprise and the values and beliefs of its employees (including as manifested through the private lives of those employees). However, the degree of coherence required by religious educational institutions is often substantial. That is so because the very service provided by religious educational institutions through many of their employees is value laden — it is education which reflects (to varying degrees) the religious beliefs of the particular institution. However, while a reasonable degree of coherence between the values and beliefs of a religious educational institution and its employees can make an important contribution to the capacity of a religious educational institution to build a community of faith, it is but one of many ways in which religious educational institutions might build and maintain a community of faith.

8.137 Australian law recognises that an employer is entitled to require from its employees a degree of coherence with the values of the employing enterprise. The Australian Human Rights Commission emphasised this point in its submission.<sup>109</sup> As **Chapter 13** discusses, several common law duties are implied in all employment contracts. Every employee has a duty to obey lawful and reasonable directions given by the employer. Those directions could be ad hoc or could be set out in the contract or by way of a code of conduct. Whether the direction is reasonable will depend on the circumstances, including the particular employment and the prevailing standards at the time. Further, every employee has a duty of fidelity and loyalty, the extent of which will vary by reference to the nature of the employment and the particular position held by the employee.

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107 Human Rights Committee, *Concluding Observations on the Fifth Periodic Report of Ireland*, 135th sess, UN Doc CCPR/C/IRL/CO/5 (26 January 2023) [41].

108 Ibid [42].

109 Australian Human Rights Commission, *Submission 384*.



8.138 Through those contractual mechanisms, an employer is entitled to require a reasonable degree of coherence with its core values and the values espoused and manifested by its employee, including potentially in respect of the personal beliefs and private life of the employee. The extent of coherence that may be required is nuanced, to take into account the competing interests of the employer and the employee. The directions that the employer may give must be lawful and reasonable, and the extent of coherence that may be required through the duty of fidelity and loyalty will depend on the circumstances, including the extent to which non-coherence may be injurious to the proper performance of the duties of the particular position in which the employee is employed. There is no reason to think that in reconciling the competing interests, the case-specific approach of the common law will not give significant weight to protecting those core values of the employer that are inherent or important to the proper performance of the duties required of the employee in the employment in question.

8.139 The way in which duties such as the duty of loyalty and fidelity interact with various human rights (including the right to freedom of religion and belief, and the right to privacy) has been considered in several international cases.<sup>110</sup> For example, in *Siebenhaar v Germany*, a teacher at a kindergarten run by a Protestant parish was bound by her employment contract to a duty of loyalty to the Protestant Church and was not permitted to be a member of, or work for, an organisation whose views or activities were seen to contradict the Church's mandate.<sup>111</sup> On becoming aware of the applicant's membership of the Universal Church and her teaching within that community, she was dismissed without notice. The ECtHR found that the dismissal did not unacceptably interfere with the teacher's right to freedom of religion.

8.140 Similarly, in *Fernández Martínez v Spain*<sup>112</sup> and *Travaš v Croatia*,<sup>113</sup> two religion teachers in state-run schools were disendorsed by the Catholic Church: one for advocating about particular religious rules, and the other for re-marrying in a civil ceremony after divorce. The ECtHR held, in both instances, that the interference with private life was justified, given that religious education teachers can be expected to owe a heightened degree of loyalty to religious ethos because they can be regarded as representatives of a church or religious community.<sup>114</sup>

8.141 Ultimately, international jurisprudence suggests that, in considering whether restrictions are necessary in relation to employment decisions made by religious employers (including religious educational institutions), human rights bodies respect

110 See further [Appendix I](#).

111 *Siebenhaar v Germany* (European Court of Human Rights, Court (Fifth Section), Application No 18136/02, 3 February 2011) [21].

112 *Fernández Martínez v Spain* (European Court of Human Rights, Grand Chamber, Application No 56030/07, 12 June 2014) (noting that the decision of the Grand Chamber was split nine to eight).

113 *Travaš v Croatia* (European Court of Human Rights, Court (Second Section), Application No 75581/13, 30 January 2017).

114 *Fernández Martínez v Spain* (European Court of Human Rights, Grand Chamber, Application No 56030/07, 12 June 2014) [78]–[89]; *Travaš v Croatia* (European Court of Human Rights, Court (Second Section), Application No 75581/13, 30 January 2017) [97]–[107].



the religious purpose of institutions, while also looking to the nature of the particular role involved, and the proportionality of the institution's actions to promoting that purpose. This approach involves a fact-sensitive, case-specific process of identifying and reconciling the various rights and interests involved, while giving significant weight to the importance of protecting religious freedom.

**8.142 Inherent requirements exceptions:** [Recommendation 7](#) would have no impact on the scope or availability of the inherent requirements exceptions found in the *Fair Work Act* as they relate to the attribute of religion.<sup>115</sup> The inherent requirements exceptions are located in ss 153(2)(a), 195(2)(a), 351(2)(b), and 772(2)(a) of the Act. These exceptions apply to all employers, in relation to all aspects of employment, and in relation to all protected grounds under the *Fair Work Act*.

**8.143** While inherent requirements exceptions provide employers with some degree of autonomy to decide whether a particular requirement is 'inherent' to a particular role,<sup>116</sup> an inherent requirement must be one that is 'essential' to the role.<sup>117</sup> This is something that must be determined objectively within the particular context.<sup>118</sup> Views expressed by the ILO Committee, and commentary on similar exceptions in comparable overseas jurisdictions, provide an indication of how the inherent requirements exceptions under the *Fair Work Act* should be applied (including in the context of religious institution employers).

**8.144** The ILO Committee has suggested that

consideration of the 'inherent requirements of the job' may involve such questions as whether there would be a risk that the pursuit of the institution's objective would be frustrated, undermined or harmed by employing someone in a particular post who did not share the ideological views of the organisation.<sup>119</sup>

**8.145** The ILO Committee has emphasised that inherent requirements exceptions should apply only to a narrow range of jobs with special responsibilities, and 'must correspond in a concrete and objective way to the inherent requirements of the *particular job*'.<sup>120</sup> Notably, the ILO Committee has stated that provisions (under law in the Netherlands) allowing discrimination on the ground of religion based on the inherent requirements of the job should not lead to discrimination based on sexual

115 However, [Recommendation 5](#) would limit the scope of the inherent requirements exceptions to the extent that they provide for a broader exception than that provided for under the *Sex Discrimination Act*.

116 See, eg, Thorne Harbour Health, Brave Network and SOGICE Survivors, *Submission 213*; Equality Australia, *Submission 375*; Australian Education Union, *Submission 395*; Law Council of Australia, *Submission 428*.

117 *Qantas Airways Ltd v Christie* (1998) 193 CLR 280; *X v Commonwealth* (1999) 200 CLR 177. See further [Chapter 12](#).

118 Ibid.

119 Committee of Experts on the Application of Conventions and Recommendations, *Equality in Employment and Occupation* (Special Survey, Report III (Part 4B), 83rd ILC Session, 1996) [198].

120 Committee of Experts on the Application of Conventions and Recommendations, *Giving Globalization a Human Face* (General Survey, Report III (Part 1B), 101st ILC Session, 2012) [831].

orientation.<sup>121</sup> Similarly, the Equal Rights Trust and Office of the United Nations High Commissioner for Human Rights have stated that religious beliefs cannot be used to justify discrimination on the basis of sex, sexual orientation, or gender identity.<sup>122</sup> Special Rapporteur for freedom of religion or belief, Nazila Ghanea, has also affirmed:

International law rejects any attempt to use either religion or belief, or freedom of religion or belief, as justification for the destruction of either the rights and freedoms of others or of other rights and freedoms.<sup>123</sup>

8.146 General employment exceptions to prohibitions on discrimination (similar to inherent requirements exceptions) are found in various overseas jurisdictions that have taken an approach similar to the policy position set out in the Terms of Reference.<sup>124</sup> For example, the EU has a ‘genuine and determining occupational requirement’ exception, England and Wales have an ‘occupational requirement’ exception, and Canada has a ‘bona fide occupational requirement’ exception.

8.147 Professor Vickers has suggested that the exception under EU law is likely to apply only to ‘those employed in religious service, whose job involves teaching or promoting the religion, or being involved in religious observance’.<sup>125</sup> Similarly, Dr van den Brink has suggested that, in the context of religious educational institutions, the exception might ‘justify the expectation that religion teachers share their religious ethos, but they cannot invoke this provision to require that physics or maths teachers do so’.<sup>126</sup>

8.148 In relation to the exception in England and Wales, Richy Thompson has suggested that the exception would ‘certainly’ apply to the head of the religious education department in a religious educational institution, and ‘might’ apply to the headteacher and other senior teaching posts.<sup>127</sup>

8.149 Under Canadian law, application of the bona fide occupational requirement exception has been described as a ‘case by case consideration of the circumstances’.<sup>128</sup> Dr Pearson has suggested that factors relevant to determining whether being of

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121 Committee of Experts on the Application of Conventions and Recommendations, *Direct Request Comment on Convention No 111 – Netherlands* (101st ILC Session, 2012); Committee of Experts on the Application of Conventions and Recommendations, *Direct Request Comment on Convention No 111 – Netherlands* (107th ILC Session, 2018).

122 Equal Rights Trust and Office of the United Nations High Commissioner for Human Rights (n 35) 149; Office of the United Nations High Commissioner for Human Rights (n 81) 55.

123 Nazila Ghanea, Special Rapporteur, *Landscape of Freedom of Religion or Belief*, 52nd sess, UN Doc A/HRC/52/38 (30 January 2023) [7].

124 See Australian Law Reform Commission, ‘International Comparisons’ (Background Paper ADL1, November 2023).

125 Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart Publishing, 2016) 175.

126 Martijn van den Brink, ‘When Can Religious Employers Discriminate? The Scope of the Religious Ethos Exemption in EU Law’ (2022) 1(1) *European Law Open* 89, 98.

127 Richy Thompson, ‘Religion, Belief, Education and Discrimination’ (2015) 14 *Equal Rights Review* 71, 89.

128 Alvin J Esau, ‘Islands of Exclusivity: Religious Organizations and Employment Discrimination’ (2000) 33(3) *University of British Columbia Law Review* 719, 750.

a particular religion would be a 'bona fide occupational requirement' may involve consideration of, for example, the pervasive religiousness of the school, how strong the school's links are with the church, the religiousness of the post, whether the religious rule has been brought to the attention of teachers, and whether the rule has been applied consistently.<sup>129</sup> Canadian courts have upheld the imposition of religious requirements for a range of roles, including administrators and ancillary staff.<sup>130</sup>

**8.150 Conclusion regarding existing employees:** In the light of all of that context, the question that then arises is whether, in relation to the contribution to building a community of faith that can be required of existing employees, the available common law mechanisms for requiring coherence, coupled with the inherent requirements exceptions, suffice to enable religious educational institutions to reasonably build and maintain a community of faith. That is, a community of faith consonant with the institutional autonomy that, by reference to Australia's international obligations (including the freedom to manifest religion or belief), religious educational institutions are entitled to have.

**8.151 Recommendation 7** is based on the premise that, in relation to existing employees, the available common law mechanisms, together with the inherent requirements exception, are sufficient. The ALRC is of the view that the availability of those mechanisms for achieving a reasonable degree of coherence between the values and beliefs of a religious educational institution and those of an existing employee, have not been shown to be inadequate. As emphasised by the Australian Human Rights Commission, religious educational institutions would still have other mechanisms to manage staff behaviour to ensure respect for the religious character of the institution once the staff member has been employed.<sup>131</sup>

**8.152** As recognised above, the need for coherence is significant in the particular context of many religious educational institutions. However, the available common law mechanisms, and the inherent requirements exceptions, are each capable of being applied in a way that sufficiently recognises the need for coherence, where coherence is reasonably justified. That conclusion is made in the context that, under **Recommendation 7**, religious educational institutions will have capacity to give preference to those persons whose values cohere to those of the institution in selecting employees for employment.

**8.153 Conclusion regarding prospective employees:** In respect of prospective employees, **Recommendation 7** is facilitative of the need for religious educational institutions to build a community of faith. Appropriately, it does not provide a blanket exception but, instead, provides a nuanced exception directed to those circumstances where preference on the basis of religion is reasonably necessary to build or maintain a community of faith, and is proportionate to that aim. The further limitation that the preference afforded not amount to conduct which is unlawful under

129 Megan Pearson, *Proportionality, Equality Laws, and Religion: Conflicts in England, Canada, and the USA* (Routledge, 2017) 130–1.

130 Vickers (n 125) 256–7. See also Esau (n 128) 720.

131 Australian Human Rights Commission, *Submission 384*.

the *Sex Discrimination Act* is justified for essentially the same reasons as those which justify the repeal of the exceptions in s 38 of the *Sex Discrimination Act* (see **Chapter 4**). In addition, the inherent requirements exception will remain available to religious educational institutions.

8.154 The ALRC is of the view is that the measures outlined in **Recommendation 7** are sufficient to enable religious educational institutions to recruit employees whose values and beliefs sufficiently cohere with those of the institution so as to facilitate the building or maintenance of a community of faith.

8.155 Supporting this conclusion, several representatives of minority religious communities indicated in consultations that their educational institutions were often not able to hire staff exclusively of their own religion, but were nevertheless able to maintain a robust religious character by hiring staff who were respectful or supportive of the school's objectives. This experience appears to demonstrate that it is not necessary for a religious educational institution to fill all positions with only staff of the same religious conviction in order to build or maintain a community of faith.

8.156 While implementation of **Recommendation 7** would require staff, students, and families involved in religious educational institutions to tolerate inclusion and diversity, the ALRC does not consider such tolerance to constitute a restriction on the freedom to manifest religion or belief in community with others (or on the right to freedom of expression).

8.157 **Conclusions regarding any limitation on the right:** As the ALRC is of the view that **Recommendation 7** would reasonably facilitate religious educational institutions to build and maintain a community of faith, the ALRC also considers that, under **Recommendation 7**, the institutional autonomy that religious educational institutions are entitled to exercise under international law is likely not diminished and, therefore, that the freedom to manifest religion or belief in community with others is likely not materially prejudiced as a result.

8.158 However, insofar as **Recommendation 7** would limit the capacity of religious educational institutions to determine which employees participate in the activities of the institution, it may (for the reasons discussed in **Chapter 4**)<sup>132</sup> limit the freedom to manifest religion or belief in community with others. However, for the reasons set out in **Chapter 4**, any such limitation would be justified in accordance with the relevant criteria under international law.

8.159 Overall, the ALRC has reached the view that it is possible that **Recommendation 7** would limit the freedom to manifest religion or belief in community with others, but that any limitation would likely be small and permissible under international law.

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132 At [4.99]–[4.105].

8.160 By way of brief summary, in accordance with the limitation criteria under art 18(3) of the ICCPR, as elaborated upon in General Comment No 22 and the Siracusa Principles,<sup>133</sup> any limitation on the freedom to manifest religion or belief under **Recommendation 7** would be justified because it would:

- be prescribed by law — in the form of legislation passed to amend the *Fair Work Act* or to enact a Religious Discrimination Act;
- be necessary to protect the fundamental rights and freedoms of others — in particular, the right to non-discrimination and equality, the right to work, the right to privacy, the right to health and life, and the right to freedom of expression (as outlined above);
- respond to a pressing public or social need — the potential harm caused by discrimination, including against vulnerable and historically marginalised populations (such as people identifying as LGBTQ+);
- pursue a legitimate aim — to diminish discrimination against employees and prospective employees at religious educational institutions;<sup>134</sup> and
- be proportionate to the legitimate aim sought — by restricting the freedom to manifest religion or belief only to the extent necessary to reasonably protect employees from discrimination, while allowing religious educational institutions to reasonably build and maintain a community of faith.

### **Parental liberty**

8.161 Some parents, and other stakeholders, stated that parental liberty justifies giving institutions the ability to select staff on the basis that staff authentically live in accordance with the religious beliefs of a school and so act as a role model for students.<sup>135</sup>

8.162 As discussed in **Chapter 11**, the liberty of parents to ‘ensure the religious and moral education of their children in conformity with their own convictions’ is connected to the freedom to manifest religion or belief through the teaching of religion (and other rights). Accordingly, the discussion above of the impact of **Recommendation 7** on the freedom to manifest religion or belief applies equivalently to parental liberty. On that basis, in the ALRC’s view, in the event that **Recommendation 7** did limit parental liberty, the limitation would likely not be substantial, and would be justifiable under international law for the same reasons as set out in the discussion above on the freedom to manifest religion or belief.

133 ICCPR art 18(3); Human Rights Committee, *General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993, adopted 30 July 1993) [8]; Siracusa Principles. See **Chapter 11**.

134 For a discussion of the diminishment of discrimination under **Recommendation 7**, see above at [8.57]–[8.63].

135 For a discussion of the issue of authenticity within religious communities, see Australian Law Reform Commission, ‘What We Heard’ (Background Paper ADL2, December 2023) [31], [40].

### **Overall analysis under international law**

8.163 In light of the analysis above, the ALRC has concluded that the recommended new exception for religious educational institutions in **Recommendation 7** is within the range of approaches that are permissible under international law. This is because the exception:

- maximises the realisation of human rights overall; and
- where it does restrict the realisation of some rights to some extent, it does so in a way that is justifiable under international law.

8.164 The rights that would be enhanced to some extent under **Recommendation 7**, by comparison with the existing legal position, include the right to equality and non-discrimination, the right to work, the right to privacy, the right to freedom of expression, the right to health and life, children's rights, and the right to education. Some of these rights would remain limited to some extent for some people, as is the case under existing law, but these limitations are justified. It is possible that the freedom to manifest religion or belief in community with others, and the associated parental liberty to ensure the religious and moral education of one's children in conformity with one's own convictions, would be limited for some people but, if they were, the limitations would not likely be substantial and would be justified under international law.

### **Consistency with the Australian Constitution**

8.165 A small number of stakeholders submitted that the reforms proposed in the *Consultation Paper* may be invalid under s 116 of the *Australian Constitution*.<sup>136</sup> Section 116 states that the Australian Government shall not make any law 'prohibiting the free exercise of any religion' (amongst other things). However, as set out in **Chapter 4** and **Chapter 13**, s 116 has been interpreted narrowly by the High Court.

8.166 Arguably, **Recommendation 7** might in some ways limit the free exercise of religion, for example, by determining the circumstances in which it is lawful for a religious educational institution to give preference to persons of the same religion in the selection of staff. However, as discussed further in **Chapter 13**, the High Court has held that s 116 of the *Australian Constitution* is directed at laws that have an explicit aim that is prohibited, rather than laws that have an indirect effect in relation to a prohibited aim.<sup>137</sup> The explicit aim of legislation implementing **Recommendation 7** would be to prohibit unjustified differential treatment of staff on the basis of religion, and not to restrict the free exercise of religion.

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<sup>136</sup> See, eg, A Deagon, *Submission 4*; Anglican Church Diocese of Sydney, *Submission 189*.

<sup>137</sup> See *Kruger v Commonwealth* (1997) 190 CLR 1, 40 (Brennan CJ), 60 (Dawson J, McHugh J agreeing), 86 (Toohey J). See also the other authorities cited in **Chapter 13**.

8.167 Furthermore, the High Court has held that ‘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’ under s 116.<sup>138</sup> Moreover, ‘general laws to preserve and protect society are not defeated by a plea of religious obligation to breach them’.<sup>139</sup>

8.168 In addition, **Recommendation 7** may also promote the free exercise of religion, for example, by determining the circumstances in which a staff member (or prospective staff member) must not be subject to disadvantage because of their religion. Overall, the ALRC is of the view that such reforms would not limit the free exercise of religion in a way that would be in breach of the *Australian Constitution*.

### Coherence with state and territory laws

8.169 The legislative test adopted in the recommended new exception for religious educational institutions in **Recommendation 7** is different from the various existing exceptions for religious educational institutions in state and territory anti-discrimination laws.<sup>140</sup> In order to achieve full compliance when giving preference to staff of the same religion, religious educational institutions would need to comply with the exceptions contemplated under **Recommendation 7**, as well as with the exceptions in any applicable state or territory law. Accordingly, the approach adopted in **Recommendation 7** provides staff members in all states and territories with a level of protection under the *Fair Work Act* that is consistent with Australia’s international obligations.

8.170 In making **Recommendation 7**, the ALRC does not intend to suggest that exceptions for religious educational institutions under state and territory anti-discrimination laws that might be more restrictive for religious educational institutions are inconsistent with Australia’s international legal obligations. More restrictive exceptions in state and territory anti-discrimination legislation may also fall within the margin of appreciation permitted under international law (and may even more closely align with obligations under the ILO 111).

8.171 Although no two jurisdictions currently have identical legislative provisions in this regard, there has been a trend towards limiting the scope for institutions to give preference to staff of a particular religion. In summary:

- Laws in the NT and Victoria contain exceptions to the prohibition on discrimination on religious grounds that apply only where the discrimination relates to a ‘genuine occupational qualification’ or ‘inherent requirement’.<sup>141</sup> In Victoria, there is an additional qualification that the discrimination be

138 *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 136–7 (Mason ACJ and Brennan J).

139 *Ibid* 136 (Mason ACJ and Brennan J).

140 Relevant exceptions in state and territory laws are explained further in **Chapter 12** and **Appendix E**.

141 *Anti-Discrimination Act 1992* (NT) s 35; *Equal Opportunity Act 2010* (Vic) s 83A.

reasonable and proportionate in the circumstances.<sup>142</sup> In Queensland, broadly, a 'genuine occupational requirement' test applies,<sup>143</sup> and the Queensland Human Rights Commission has recommended that it be conditioned with an express requirement that the conduct be reasonable and proportionate.<sup>144</sup>

- In the ACT, religious educational institutions can give preference on religious grounds in relation to the selection and appointment of staff, where the duties of employment involve, or would involve, participation by the employee or worker in the teaching or practice of the relevant religion.<sup>145</sup>
- In the ACT and Tasmania, discrimination in employment on religious grounds is permitted where it is intended to enable, or better enable, the institution to be conducted in accordance with its doctrines, tenets, beliefs, or teachings.<sup>146</sup> In the ACT, such discrimination must be in accordance with a published policy that is readily accessible by prospective and current employees and contractors at the institution.<sup>147</sup>
- In WA, there is currently a broad provision allowing religious educational institutions to give preference to staff on religious grounds.<sup>148</sup> However, the WA Government is considering a recent recommendation to replace this provision with an inherent requirement exception, where reasonable and proportionate in the circumstances.<sup>149</sup>
- Laws in SA and NSW do not prohibit discrimination in employment on the ground of religion.<sup>150</sup>

8.172 In addition to various exceptions relevant to religious institutions, including religious educational institutions, each state and territory law (as well as other Commonwealth anti-discrimination legislation) includes inherent requirements or genuine occupational qualification exceptions that apply to all employers.<sup>151</sup>

142 *Equal Opportunity Act 2010* (Vic) s 83A(1)(c).

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

144 Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 29–30, rec 39.

145 *Discrimination Act 1991* (ACT) s 44. Note that amendments have recently been introduced to s 44 by the *Discrimination Amendment Act 2023* (ACT). These amendments will come into force in April 2024. Until then, the exception also applies to staff involved in the 'observance' of the particular religion.

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

147 *Discrimination Act 1991* (ACT) ss 46(2), (4).

148 *Equal Opportunity Act 1984* (WA) s 73(3).

149 Law Reform Commission of Western Australia, *Project 111: Review of the Equal Opportunity Act 1984* (WA) (Final Report, May 2022) 16–17, rec 79.

150 Although, in SA discrimination on the ground of religious appearance or dress is prohibited. Specifically, an exception applies 'if the discrimination is for the purposes of enforcing a standard of appearance or dress reasonably required for the employment or engagement': *Equal Opportunity Act 1984* (SA) s 85Z(5).

151 See further **Chapter 12** and **Chapter 13**. For example, the *Disability Discrimination Act*, *Age Discrimination Act*, and *Australian Human Rights Commission Act* all include inherent requirement exceptions, as does the *Anti-Discrimination Act 1992* (NT). Genuine occupational qualification exceptions are found in the *Sex Discrimination Act* as well as anti-discrimination legislation in all states and territories (although these exceptions tend to apply to a more limited number of grounds).



8.173 In light of the different approaches adopted in the various state and territory laws, it is difficult to assess the current level of coherence between them, and the overall level of coherence that would be achieved under **Recommendation 7**. The approaches in the various states and territories do have some commonalities. For example, the law in each jurisdiction contains an exception similar to an ‘inherent requirements’ exception. However, there are differences, and it is somewhat difficult to assess the effect. The summary in the following paragraph is intended to be broad, and not comprehensive or precise. The summary does not endeavour to compare the precise wording in the various Acts, but rather to compare the likely effect of each law on the capacity for religious educational institutions to give preference to staff on the basis of religion.

8.174 **Recommendation 7** would, in effect, bring Commonwealth law closer to the position in most states and territories. **Recommendation 7** would provide for greater coherence between Commonwealth law and the law in Victoria, the NT, and Queensland. The level of coherence with the current position in the ACT and Tasmania is difficult to discern due to the different tests applied, but the effect of **Recommendation 7** on the level of coherence would likely be neutral. **Recommendation 7** would make Commonwealth law less coherent with the current law in NSW, SA, and WA. However, in relation to WA, if a recent recommendation of the Law Reform Commission of WA is implemented,<sup>152</sup> the position in WA would be broadly similar to that under **Recommendation 7**.

8.175 The ALRC’s assessment of coherence in relation to state and territory laws provides some support for **Recommendation 7**, but is not a weighty consideration.

### Comparable overseas jurisdictions

8.176 In relation to giving preference to staff on the ground of religion, a range of different approaches have been taken in overseas jurisdictions.<sup>153</sup> The approach taken in some jurisdictions does not reflect the policy position set out in the Terms of Reference. For example, jurisdictions such as France, Sweden, India, and South Africa do not have specific exceptions that permit religious educational institutions to give preference to staff on the ground of religion.

8.177 In contrast, the approach taken in other jurisdictions more closely aligns with the Terms of Reference, by providing scope for religious educational institutions to give preference to staff on the ground of religion (in addition to ‘genuine occupational

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152 Law Reform Commission of Western Australia (n 149) 16–17, rec 79.

153 For a discussion of the approaches taken in the EU, England and Wales, Ireland, New Zealand, and Canada, see Australian Law Reform Commission, ‘International Comparisons’ (Background Paper ADL1, November 2023).

qualification' or 'inherent requirements' exceptions that apply to all employers).<sup>154</sup> For example:

- Laws in the EU, England and Wales, the Netherlands, New Zealand, British Columbia, and (for state-funded schools) Ireland permit differential treatment in the employment of staff on the ground of religion where it is a genuine occupational requirement to be of a particular religion. In some jurisdictions, this is qualified so that differential treatment is only allowed where it is a proportionate means of achieving a legitimate aim, or where no reasonable accommodation can be offered to staff of a different religion.<sup>155</sup>
- In Germany (where religious educational institutions generally receive government funding),<sup>156</sup> domestic laws ostensibly provide for strong institutional autonomy in hiring that could justify giving preference to particular staff on religious (and other) grounds. However, these laws have been read down as a result of the application of EU law so that the giving of preference must be subject to a proportionality analysis.<sup>157</sup>
- Certain state-funded schools in England and New Zealand also permit differential treatment in the employment of staff on the ground of religion in relation to a set percentage of staff or for designated roles.<sup>158</sup>
- Some countries permit differential treatment in the employment of staff on the ground of religion in respect of all teachers (certain state-funded schools in Wales and schools receiving no state funding in Wales and New Zealand) or all staff (schools receiving no state funding in England and Ireland, and certain state-funded schools in England, Ontario, and British Columbia).<sup>159</sup>

154 Legislation in the EU, England and Wales, Ireland, New Zealand, and Canada includes general employment exceptions to prohibitions on discrimination: see *ibid.* For example, the EU has a 'genuine and determining occupational requirement' exception; New Zealand, England, and Wales have a genuine occupational qualification exception; and Canada has a bona fide qualification exception.

155 See *ibid.*

156 'The Education System in the Federal Republic of Germany 2018/2019' <[www.kmk.org/fileadmin/Dateien/pdf/Eurydice/Bildungswesen-engl-pdfs/funding.pdf](http://www.kmk.org/fileadmin/Dateien/pdf/Eurydice/Bildungswesen-engl-pdfs/funding.pdf)>.

157 *IX v WABE eV; and MH Müller Handels GmbH v MJ* (Court of Justice of the European Union, C-804/18 and C-341/19, ECLI:EU:C:2021:594, 15 July 2021) [84]; *IR v JQ* (Court of Justice of the European Union, Grand Chamber, C-68/17, ECLI:EU:C:2018:696, 11 September 2018); *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* (Court of Justice of the European Union, Grand Chamber, C-414/16, ECLI:EU:C:2018:257, 17 April 2018). See also Bundesarbeitsgericht [German Federal Labor Court], 8 AZR 501/14, ECLI:DE:BAG:2018:251018.U.8AZR501.14.0, 25 October 2018 and Bundesarbeitsgericht [German Federal Labor Court], 2 AZR 746/14, ECLI:DE:BAG:2019:200219.U.2AZR746.14.0, 20 February 2019, cited in Committee of Experts on the Application of Conventions and Recommendations, *Direct Request Comment on Convention No 111 – Germany* (109th ILC Session, 2021); Bundesverfassungsgericht [German Constitutional Court], 2 BVR 577/01, ECLI:DE:BVerfG:2004:rk20040310.2bvr057701, 10 March 2004, cited in *TC and UB v Komisija za zashtita ot diskriminatsia and VA (Opinion of Advocate General Saugmandsgaard Øe)* (Court of Justice of the European Union, C-824/19, ECLI:EU:C:2021:324, 22 April 2021).

158 See Australian Law Reform Commission, 'International Comparisons' (Background Paper ADL1, November 2023).

159 *Ibid.*

- In the United States of America, where religious educational institutions have traditionally not received any funding from the state, such institutions are afforded strong institutional autonomy over hiring decisions for those considered ‘ministers’ (which could apply to employees not holding a recognised title or those who have little formal training as religious leaders, but does not necessarily extend to all teaching or other staff).<sup>160</sup>

8.178 The more restrictive approaches taken in England, Wales, Ireland, and Germany (where laws broadly reflect the policy position set out in the Terms of Reference) do not appear to have been challenged in the ECtHR as violating art 9 of the ECHR (freedom of thought, conscience, and religion). This suggests that such regimes may be compatible with those states’ human rights obligations under the ECHR, or that these approaches may not have caused significant practical concerns for religious educational institutions.

8.179 The recommended new exception for religious educational institutions in **Recommendation 7** does not reflect exactly any of the approaches taken in the comparable jurisdictions listed above. However, the exception does fall within the spectrum of approaches taken in relation to giving preference to staff on the ground of religion. Notably, like many of the comparable jurisdictions, the specific exception for religious educational institutions in **Recommendation 7** includes a proportionality test.

## A future Religious Discrimination Act

8.180 As discussed above, there is currently no generally applicable Commonwealth Act dedicated to prohibiting (or permitting for certain purposes) discrimination on the ground of religion, although the Terms of Reference refer to the Australian Government’s express commitment to introduce such legislation. Implementing **Recommendation 7** would require amendments to the *Fair Work Act*. Those amendments could be made either prior to, or at the same time as, any enactment of a Religious Discrimination Act. When a Religious Discrimination Act is enacted, the Religious Discrimination Act should complement the necessary amendments to the *Fair Work Act*. This would ensure that religious educational institutions could continue to give preference to members of the same religion in the selection of staff in the circumstances contemplated by the Terms of Reference, and in light of Australia’s international legal obligations.

8.181 The scope of the term ‘staff’ may be broader under a Religious Discrimination Act than under the *Fair Work Act*. The protections against discrimination in the *Fair Work Act* apply to employees and prospective employees. Accordingly, the recommended exception in the *Fair Work Act* regarding selection of ‘staff’

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160 *McClure v Salvation Army*, 460 F2d 553 (5th Cir, 1972); *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission*, 565 US 171 (2012); *Our Lady of Guadalupe School v Morrissey-Berru*, 591 US 140 S Ct 2049 (2020). See further Australian Law Reform Commission, ‘International Comparisons’ (Background Paper ADL1, November 2023).

would apply in relation to prospective employees. Depending on the Australian Government's policy position in this regard, a future Religious Discrimination Act may provide protection against religious discrimination more broadly for other workers who are not employees or prospective employees (for example, to include contract workers or volunteers). In that case, an exception that is equivalent to the recommended exception for religious educational institutions in **Recommendation 7** should also apply in relation to those other workers under the Religious Discrimination Act.

## Exception in the Australian Human Rights Commission Act

**Recommendation 8** Further to Recommendation 7, the definition of 'discrimination' in s 3 of the *Australian Human Rights Commission Act 1986* (Cth) should be amended such that, in the context of employment as a member of the staff of a religious educational institution, and in relation to discrimination on the basis of religion, the exception in paragraph (d) of the definition in s 3 aligns with the exception set out in paragraph B of Recommendation 7.

8.182 **Recommendation 8** seeks to maintain a level of consistency between related provisions in the *Fair Work Act* and the *Australian Human Rights Commission Act*, in light of **Recommendation 7**.

8.183 As set out in **Chapter 13**, there are multiple 'complaint pathways' under the *Australian Human Rights Commission Act*, including the 'discrimination' and 'unlawful discrimination' pathways.

8.184 The scope of the 'discrimination' pathway is set out in the definition of 'discrimination' in s 3 of the *Australian Human Rights Commission Act*. The 'discrimination' pathway covers a wide range of protected attributes, including religion, and relates only to discrimination 'in employment or occupation'. Two exceptions apply: one relating to the 'inherent requirements' of the job, and another relating to employment in religious institutions. The second exception provides that 'in connection with employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed', a 'distinction, exclusion or preference' does not constitute 'discrimination' if the distinction, exclusion or preference is 'made in good faith in order to avoid injury to the religious susceptibilities' of adherents of the relevant religion or creed.<sup>161</sup>

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161 *Australian Human Rights Commission Act 1986* (Cth) s 3 (definition of 'discrimination').

8.185 As set out earlier in this chapter,<sup>162</sup> equivalent exceptions are currently contained in various provisions of the *Fair Work Act*. Under **Recommendation 7**, exceptions relating to 'religious susceptibilities of adherents' would no longer apply to discrimination on the basis of religion in relation to employment at a religious educational institution. Instead, a new exception would provide for the circumstances in which it is permissible to give preference to a person of the same religion in the selection of staff. Accordingly, to maintain a level of consistency with the *Fair Work Act*, the exception in the *Australian Human Rights Commission Act* should be amended to have an equivalent effect.

8.186 The immediate practical effect of **Recommendation 8** is not anticipated to be significant. This is because the concept of 'discrimination' in the *Australian Human Rights Commission Act* is not often relied upon, as it does not give rise to judicial remedies.<sup>163</sup> In relation to 'discrimination', the Australian Human Rights Commission's functions consist of inquiring into any act or practice (including any systemic practice) that may constitute 'discrimination', and endeavouring to effect a settlement of those matters by way of conciliation.<sup>164</sup> If the conciliation is unsuccessful, the Act does not provide for any court application to be made regarding those matters.

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162 See above at **[8.18]**.

163 Australian Human Rights Commission, *Submission 384*.

164 *Australian Human Rights Commission Act 1986* (Cth) s 31(b).



## 9. Further Reforms

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### Introduction

9.1 This chapter discusses three recommendations for further reform relevant to this Inquiry. The further reforms recommended in this chapter would strengthen the effectiveness of Australia's anti-discrimination laws generally and would assist religious educational institutions and their community members in understanding their rights and responsibilities.

9.2 This chapter proceeds in three parts. Each part relates to one of the recommendations for further reform.

9.3 **Recommendation 9** addresses the need for a review of the Australian Human Right Commission guidelines on temporary exemptions in light of recommendations made in this Inquiry. Specifically, if **Recommendation 1** were implemented and the exceptions in the *Sex Discrimination Act* were narrowed accordingly, some religious educational institutions may then apply for temporary exemptions for the first time. Relevant guidelines on temporary exemptions would assist those institutions to transition to their new obligations under the *Sex Discrimination Act*.

9.4 **Recommendation 10** comprises further development of guidance material concerning obligations under the *Sex Discrimination Act* and *Fair Work Act*, to assist administrators of religious educational institutions to better understand and comply with the law. This material would also be accessible to the broader school community for the public to understand relevant protections.

9.5 **Recommendation 11** relates to recommended further reviews on issues beyond the scope of this Inquiry that would facilitate greater alignment between anti-discrimination laws (including a future Religious Discrimination Act) and the *Fair Work Act*.

## Review of guidelines for temporary exemptions

**Recommendation 9** The Australian Human Rights Commission should review its 'Commission Guidelines' for 'Temporary exemptions under the *Sex Discrimination Act 1984* (Cth)' in light of any legislative amendments to be made in response to this Inquiry.

9.6 Under s 44 of the *Sex Discrimination Act*, the Australian Human Rights Commission may grant exemptions, of up to five years, for individuals and organisations from their obligations under the Act. The effect of operating under an exemption is that no complaints can be made against the individual or organisation insofar as that exemption applies.

9.7 The Australian Human Rights Commission currently provides Commission Guidelines regarding temporary exemptions from the *Sex Discrimination Act* ('Commission Guidelines').<sup>1</sup> The Commission Guidelines include the criteria the Commission considers when determining an application for temporary exemption. These criteria include:

- whether an exemption is necessary;
- whether granting of the exemption is consistent with the objectives of the *Sex Discrimination Act*;
- whether it is appropriate to grant an exemption subject to terms and conditions; and
- the views of persons or organisations who are interested in or who may be affected by the outcome of the exemption application.<sup>2</sup>

9.8 Under **Recommendation 1**, existing exceptions in the *Sex Discrimination Act* relevant to religious educational institutions would be narrowed and those institutions would be subject to new legal obligations. Following a general implementation period, some religious educational institutions may apply for a temporary exemption to allow further time to adjust to these new obligations. Not only would religious educational institutions base such an application on distinctive considerations that may not have previously been taken into account, but they may also be making such an application for the first time. A review of the Commission Guidelines to provide information relevant to religious educational institutions would support these institutions to transition to their new legislative obligations.

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1 Australian Human Rights Commission, *Commission Guidelines: Temporary Exemptions under the Sex Discrimination Act* (2009).

2 Ibid.



9.9 **Recommendation 9** closely reflects Proposal 12 in the *Consultation Paper*. In its submission, the Australian Human Rights Commission noted that it regularly reviews all guidelines and will consider possible changes to the Commission Guidelines in light of the recommendations of this Report.<sup>3</sup> All other submissions that addressed Proposal 12 expressed a degree of support for a review of the Commission Guidelines by the Australian Human Rights Commission.<sup>4</sup>

9.10 The Queensland Human Rights Commission emphasised that temporary exemptions must be granted for the shortest time necessary.<sup>5</sup> The Australian Human Rights Commission also stated that it has power to grant temporary exemptions, which it usually only exercises for applicants who require time to become fully compliant under the *Sex Discrimination Act*.<sup>6</sup> However, this consideration is not currently made explicit as a criterion in the Commission Guidelines. The Australian Human Rights Commission could examine whether including this consideration as an explicit criterion may effectively communicate to religious educational institutions (and others) the primary importance of exemptions being temporary in nature.

## Development of guidance

**Recommendation 10** The Australian Human Rights Commission, in consultation with the Attorney-General's Department (Cth), the Fair Work Commission, the Fair Work Ombudsman, and non-government stakeholders, should develop detailed guidance to assist:

- educational institution administrators to understand and comply with the *Sex Discrimination Act 1984* (Cth) and anti-discrimination provisions in the *Fair Work Act 2009* (Cth); and
- the public to understand relevant protections from discrimination under those Acts.

9.11 During consultations, a number of stakeholders noted that they had difficulties navigating between the overlapping but distinct obligations and protections in the *Sex Discrimination Act* and the *Fair Work Act*. The development of dedicated and detailed guidance material would assist religious educational institutions, their communities, and others to better understand how these two Acts intersect, and the various obligations they impose. Such guidance material should be developed by

<sup>3</sup> Australian Human Rights Commission, *Submission 384*.

<sup>4</sup> See, eg, Australian Discrimination Law Experts Group, *Submission 75*; Anglican Social Responsibilities Commission, Diocese of Perth, *Submission 98*; Australian Lawyers Alliance, *Submission 162*; Victorian Equal Opportunity and Human Rights Commission, *Submission 255*; Not published, *Submission 297*; Equality Australia, *Submission 375*; Independent Education Union, *Submission 387*; Public Interest Advocacy Centre, *Submission 405*; NSW Council for Civil Liberties, *Submission 407*; Law Council of Australia, *Submission 428*.

<sup>5</sup> Queensland Human Rights Commission, *Submission 125*.

<sup>6</sup> Australian Human Rights Commission, *Submission 384*.

the Australian Human Rights Commission, in consultation with the Attorney-General's Department (Cth), the Fair Work Commission, the Fair Work Ombudsman, and non-government stakeholders.

9.12 In particular, consideration should be given to the extent to which guidance material could provide examples or other appropriate guidance on when a condition, requirement, or practice might be considered 'reasonable in the circumstances' for the purposes of the test in s 7B of the *Sex Discrimination Act* that deals with indirect discrimination. For example, the Association of Heads of Independent Schools Australia expressed concern that broadly phrased legal tests such as 'reasonableness' and 'proportionality' — without further elaboration — may lead to costly and burdensome litigation to determine the lawful parameters of institutional conduct on a case-by-case basis.<sup>7</sup> Furthermore, Professor Vickers has observed that a high degree of uncertainty in legislation can have a chilling effect on human rights.<sup>8</sup> Guidance materials, which could include concrete examples as sought by stakeholders, may assist to reduce such concerns.

9.13 However, as discussed in **Chapter 4** and **Chapter 12**, an assessment of reasonableness (incorporating a test of proportionality) requires nuanced consideration in each case. Accordingly, any guidance material would need to respond to the tension between stakeholders' requests for certainty and the importance of flexibility in the application of anti-discrimination laws.

9.14 Guidance material could set out how indirect discrimination provisions have operated in a variety of contexts. As noted in **Chapter 8**, courts have increasingly used and explained the legal concept of 'proportionality'. Accordingly, case law may be useful in providing relevant considerations in certain contexts.<sup>9</sup>

9.15 Other jurisdictions have developed guidance that may provide a helpful starting point for developing these materials.<sup>10</sup> In addition, the Australian Human Rights Commission has recently developed comprehensive guidance material for the

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7 Association of Heads of Independent Schools of Australia, *Submission 196*.

8 Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart Publishing, 2016) 9.

9 See, eg, *Arora v Melton Christian College* [2017] VCAT 1507; *Australian Christian College Moreton Ltd v Taniela* [2022] QCATA 118.

10 Department for Education (UK), *The Equality Act 2010 and Schools: Departmental Advice for School Leaders, School Staff, Governing Bodies and Local Authorities* (May 2014); Department of Education (Qld), *Diversity in Queensland Schools: Information for Principals*. See further **Appendix G** and **Chapter 5**.

Respect@Work reforms in the form of online resources<sup>11</sup> and guideline documents,<sup>12</sup> while explanatory materials also provide guidance.<sup>13</sup> These guideline documents provide illustrative examples of what it may mean to take 'reasonable and proportionate' measures to eliminate, as far as possible, unlawful conduct.<sup>14</sup>

9.16 As a further step, Australian Government agencies could consider liaising with relevant state and territory bodies, including anti-discrimination bodies and work health and safety bodies, to produce guidance materials explaining how relevant Commonwealth, state, and territory laws and complaint processes work alongside each other.

## Submissions

9.17 **Recommendation 10** closely reflects Proposal 13 in the *Consultation Paper*. Proposal 13 was largely supported in submissions that addressed it, including by the Australian Human Rights Commission.<sup>15</sup>

9.18 In its submission, the Australian Human Rights Commission noted that development of guidance material is consistent with its functions under ss 48(1)(ga) and (gaa) of the *Sex Discrimination Act*.<sup>16</sup> The Australian Human Rights Commission further submitted that the Fair Work Commission should be involved in the publication of any guidelines regarding the *Fair Work Act*. Accordingly, **Recommendation 10** includes reference to the Fair Work Commission and the Fair Work Ombudsman.

11 'Respect@Work' <[www.respectatwork.gov.au/](http://www.respectatwork.gov.au/)>.

12 Australian Human Rights Commission, *Guidelines for Complying with the Positive Duty under the Sex Discrimination Act 1984 (Cth)* (August 2023). See also Australian Human Rights Commission, *Information Guide on the Positive Duty under the Sex Discrimination Act 1984 (Cth): Relevant Unlawful Conduct, Drivers, Risk Factors and Impacts* (August 2023); Australian Human Rights Commission, *Causes and Risk Factors of Sex Discrimination, Sexual Harassment and Other Unlawful Behaviours* (Factsheet, August 2023); Australian Human Rights Commission, *Effective Education and Training* (Factsheet, August 2023); Australian Human Rights Commission, *Person-Centred and Trauma-Informed Approaches to Safe and Respectful Workplaces* (Factsheet, August 2023); Australian Human Rights Commission, *Seeking Support - Counselling and Support Services* (Factsheet, August 2023); Australian Human Rights Commission, *What Is the Positive Duty?* (Factsheet, September 2023); Australian Human Rights Commission, *Steps to Meet the Positive Duty* (Factsheet, October 2023).

13 Explanatory Memorandum, Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022.

14 See, eg, Australian Human Rights Commission, 'Guidelines for Complying with the Positive Duty under the Sex Discrimination Act 1984 (Cth)' (n 12) 17–19, pt 6.

15 See, eg, Australian Discrimination Law Experts Group, *Submission 75*; Anglican Social Responsibilities Commission, Diocese of Perth, *Submission 98*; Australian Lawyers Alliance, *Submission 162*; Victorian Equal Opportunity and Human Rights Commission, *Submission 255*; Not published, *Submission 297*; Commissioner for Children and Young People WA, *Submission 373*; Equality Australia, *Submission 375*; Australian Human Rights Commission, *Submission 384*; Independent Education Union, *Submission 387*; Australian Education Union, *Submission 395*; Public Interest Advocacy Centre, *Submission 405*; NSW Council for Civil Liberties, *Submission 407*; Australian Council of Trade Unions, *Submission 411*; Law Council of Australia, *Submission 428*.

16 Australian Human Rights Commission, *Submission 384*.

9.19 Some submissions urged that relevant stakeholder groups be consulted when developing guidance material, in order to test whether the proposed guidelines are meaningful and relevant to users, such as children, educational institutions, LGBTQ+ organisations, and unions.<sup>17</sup> Some submissions emphasised that published guidelines (and any examples they contain) should be written, presented, and published in ways that are accessible to children and their families.<sup>18</sup>

9.20 The Australian Christian Lobby expressed a concern that the development of guidance material would not be subject to parliamentary oversight, but nevertheless would in effect impose requirements on religious educational institutions. It characterised such guidance as an example of inappropriate state intrusion into the affairs of faith communities.<sup>19</sup> It is relevant to note, however, that it is standard government practice to issue guidance material in relation to legislative requirements across a broad range of subject areas.<sup>20</sup> Guidance material seeks to explain the practical implications of enacted law, rather than to impose new requirements.

## Further reviews

**Recommendation 11** The Australian Government should conduct further reviews to consider and consult on reforms to simplify, consolidate, and strengthen Commonwealth anti-discrimination law.

9.21 As this Inquiry has demonstrated, there are a number of complexities in the interactions between Commonwealth anti-discrimination laws, employment laws, and implementation of Australia's human rights commitments. It is beyond this Inquiry's Terms of Reference for the ALRC to consider those issues comprehensively and systematically and to make recommendations for broader reform. However, it is apparent that further reviews would be beneficial to address a number of technical difficulties and areas of uncertainty in the law. In addition, although a number of recommendations in this Report relate specifically to religious educational institutions only (in light of the Terms of Reference), the Australian Government should consider broader reform in order to address the underlying issues identified.

17 Anglican Social Responsibilities Commission, Diocese of Perth, *Submission 98*; Commissioner for Children and Young People WA, *Submission 373*; Equality Australia, *Submission 375*; Australian Education Union, *Submission 395*; Australian Council of Trade Unions, *Submission 411*; Law Council of Australia, *Submission 428*.

18 Commissioner for Children and Young People WA, *Submission 373*; Law Council of Australia, *Submission 428*.

19 Australian Christian Lobby, *Submission 299*.

20 See, eg, Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) 144.

9.22 Some reviews contemplated under **Recommendation 11** relate to areas that have previously been considered by the Australian Human Rights Commission.<sup>21</sup> In addition, some reviews reflect the focus of the Parliamentary Joint Committee on Human Rights' inquiry into Australia's Human Rights Framework.<sup>22</sup> Further reviews should build on that existing work.

9.23 The ALRC recommends that the Australian Government should undertake reviews to consider reform in the following areas, each of which is discussed in more detail below:

- the enactment of a Religious Discrimination Act;
- a wider review (beyond the context of religious educational institutions) of the protections and exceptions in the *Sex Discrimination Act* and related anti-discrimination provisions in the *Fair Work Act*;
- a review of the *Age Discrimination Act*, *Disability Discrimination Act*, *Racial Discrimination Act*, *Sex Discrimination Act*, and any Religious Discrimination Act ('Commonwealth anti-discrimination Acts') to consider harmonising their respective application, terminology, burdens of proof, and scope, and consider their potential consolidation in a single Act;
- a review of the interactions between the *Fair Work Act* and the Commonwealth anti-discrimination Acts; and
- the enactment of human rights legislation.

9.24 **Recommendation 11** closely reflects Proposal 14 in the *Consultation Paper*. Proposal 14 was largely supported in submissions.<sup>23</sup> Some supportive submissions added further commentary and suggestions, and these are discussed below. In the *Consultation Paper*, the ALRC suggested a staged process of further reviews and reforms. Some submissions sought a change to the proposed order of the various reforms. The ALRC considers the timing of any further reviews or reforms to be a matter for government.

21 Australian Human Rights Commission, *Free & Equal: A Reform Agenda for Federal Discrimination Laws* (Position Paper, December 2021); Australian Human Rights Commission, *Free & Equal: A Human Rights Act for Australia* (Position Paper, 2022).

22 Hon Mark Dreyfus KC MP, 'Review into Australia's Human Rights Framework' (Media Release, 22 March 2023).

23 Queensland Human Rights Commission, *Submission 125*; NSW Advocate for Children and Young People, *Submission 209*; Victorian Equal Opportunity and Human Rights Commission, *Submission 255*; Not published, *Submission 297*; Kingsford Legal Centre, *Submission 339*; Independent Education Union, *Submission 387*; Minister for Human Rights (ACT), *Submission 390*; Australian Education Union, *Submission 395*; Not published, *Submission 410*; Australian Council of Trade Unions, *Submission 411*; Law Council of Australia, *Submission 428*.

## A Religious Discrimination Act

9.25 The Terms of Reference refer to a commitment by the Australian Government to enact a Religious Discrimination Act. The Terms of Reference do not ask the ALRC to consider whether a Religious Discrimination Act would be desirable, but rather to consider whether some of the reforms contemplated in this Inquiry could be included in such an Act. **Recommendation 7**, and the accompanying discussion, relate to aspects of a Religious Discrimination Act.<sup>24</sup>

9.26 There are a number of important considerations for the Australian Government when formulating a Religious Discrimination Act, well beyond the Terms of Reference. However, some of the issues that have arisen in this Inquiry highlight relevant considerations for the Government. For example, some submissions emphasised the importance of coherence between related domestic laws, including anti-discrimination legislation of the Commonwealth, states, and territories.<sup>25</sup> In addition, several consultees sought greater clarity about the relationship between the various pieces of anti-discrimination legislation and how they operate together.

9.27 As set out in **Chapter 13**, complaints to the Australian Human Rights Commission regarding discrimination on the ground of religion can currently be dealt with only under the ‘discrimination’ pathway. This pathway does not provide access to court remedies in the event that conciliation fails.<sup>26</sup> If a Religious Discrimination Act were passed, and contraventions of that Act were added to the definition of ‘unlawful discrimination’ in the *Australian Human Rights Commission Act*, then persons alleging discrimination on the ground of religion would gain access to court remedies in the event that conciliation fails.

9.28 Several stakeholders expressed concerns about religious discrimination, intolerance, and coercion.<sup>27</sup> In addition, some submissions urged that a Religious Discrimination Act should be enacted concurrently with the reforms recommended in this Inquiry, rather than as a subsequent reform. For example, the Human Rights Law Alliance and the National Catholic Education Commission submitted that anti-discrimination and religious protection issues are ‘inextricably linked’ and must be considered in tandem.<sup>28</sup> The ALRC accepts that some stakeholders have concerns regarding religious discrimination. However, there is no reason why the reforms recommended in this Report should not be implemented prior to the enactment of a Religious Discrimination Act, if the Australian Government were so minded.<sup>29</sup>

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24 See **Chapter 8**.

25 See, eg, Australian Human Rights Commission, *Submission 384*; Law Council of Australia, *Submission 428*.

26 See **Chapter 13**.

27 See, eg, Australian Law Reform Commission, ‘What We Heard’ (Background Paper ADL2, December 2023) [109]–[110]; Hindu Council of Australia, *Submission 2 to Australian Law Reform Commission, Review into the Framework of Religious Exemptions in Anti-Discrimination Legislation* (2019).

28 Human Rights Law Alliance, *Submission 96*; National Catholic Education Commission, *Submission 409*.

29 See, eg, **Chapter 5**.

## The Sex Discrimination Act and Fair Work Act

9.29 A number of stakeholders in this Inquiry commented on the complex interactions between the *Sex Discrimination Act* and the *Fair Work Act*.<sup>30</sup> In addition, because of the specific scope of the Terms of Reference, some of the legislative amendments recommended in this Inquiry have the potential to introduce additional inconsistencies and complexities. Consequently, a review of the interaction between these two Acts more generally should be undertaken, with the aim of promoting greater coherence.

9.30 **Chapter 7** outlines some of the existing inconsistencies between the *Fair Work Act* and the *Sex Discrimination Act*, and contains recommendations to make the two Acts more consistent in relation to religious educational institutions specifically. However, it is beyond the Terms of Reference to recommend reforms regarding the application of those Acts in relation to religious institutions more generally, or in relation to all employers.

9.31 For example, the Australian Discrimination Law Experts Group submitted that the Australian Government should consider whether s 40(1)(g) of the *Sex Discrimination Act* (regarding the effect of direct compliance with various instruments under the *Fair Work Act*) should, subject to a wider review, be repealed.<sup>31</sup> By way of further example, attributes protected under the *Sex Discrimination Act* include ‘relationship status’ and ‘potential pregnancy’, however, provisions in the *Fair Work Act* refer to ‘marital status’ and ‘pregnancy’. Any reform in relation to these aspects of the Acts would affect all employers, not just religious educational institutions, and so should be the subject of further consideration by government.

9.32 Further, each of the *Sex Discrimination Act* and the *Fair Work Act* includes several provisions relating to religious institutions more generally.<sup>32</sup> Any legislative amendments that would narrow existing exceptions for religious educational institutions only, and not for other religious institutions, may in some cases give rise to artificial distinctions.<sup>33</sup> Consequently, a wider review of each Act as it relates to religious institutions would be beneficial.<sup>34</sup>

9.33 In addition, **Chapter 6** contains recommendations regarding ‘associates’ and ‘workers’ under the *Sex Discrimination Act* in relation to religious educational institutions specifically. The principles underpinning those recommendations are

30 See, eg, Australian Discrimination Law Experts Group, *Submission 75*; Australian Lawyers Alliance, *Submission 162*; Australian Human Rights Commission, *Submission 384*; Independent Education Union, *Submission 387*; Australian Education Union, *Submission 395*; Australian Council of Trade Unions, *Submission 411*; Law Council of Australia, *Submission 428*.

31 Australian Discrimination Law Experts Group, *Submission 75*.

32 See, eg, *Sex Discrimination Act 1984* (Cth) ss 23, 37. See also *Fair Work Act 2009* (Cth) ss 153(2)(b), 195(2)(b), 351(2)(c), 772(2)(b).

33 See, eg, Victorian Pride Lobby, *Submission 123*; National Catholic Education Commission, *Submission 409*; Law Council of Australia, *Submission 428*.

34 See **Chapter 7**. See also **Chapter 4** and **Chapter 8**.



likely to apply in other contexts as well, and a further review should consider other contexts in which similar reforms should be adopted.

## Commonwealth anti-discrimination laws

9.34 As demonstrated by this Inquiry — and considered in detail in a recent report by the Australian Human Rights Commission<sup>35</sup> — there are significant inconsistencies between the various Commonwealth anti-discrimination Acts. A review of Commonwealth anti-discrimination laws (alongside a future Religious Discrimination Act) could seek to address and minimise inconsistencies across the Acts and, if found appropriate, could lead to their consolidation into a single Act relating to all relevant grounds of discrimination.

9.35 A review of legislation overseas, and in Australian states and territories, indicates that Australian Commonwealth law is unusual in separating different protected characteristics between different Acts, rather than enacting a single anti-discrimination law for all protected characteristics. Incoherence and practical difficulties can arise from such separation, including uncertainty or confusion as to the meaning of slightly different terminology in relation to similar concepts across a number of Acts. In addition, separate pieces of anti-discrimination legislation for specific protected attributes may not appropriately address intersectional experiences of discrimination when a person may be the subject of discrimination on more than one ground.<sup>36</sup>

9.36 Support for addressing inconsistencies and harmonising Commonwealth anti-discrimination laws (including through introducing human rights legislation) was reflected in submissions to this Inquiry,<sup>37</sup> and in recent submissions to the Parliamentary Joint Committee on Human Rights.<sup>38</sup>

35 Australian Human Rights Commission, 'Free & Equal: A Reform Agenda for Federal Discrimination Laws' (n 21) 251–310.

36 Australian Human Rights Commission, 'Free & Equal: A Human Rights Act for Australia' (n 21) 46. See also NSW Advocate for Children and Young People, *Submission 209*; Transgender Victoria, *Submission 211*; Intersex Human Rights, *Submission 239*; LGBTIQ+ Health Australia, *Submission 372*; Diversity Council Australia, *Submission 398*; Public Health Association of Australia, *Submission 421*.

37 See, eg, Diversity Council Australia, *Submission 398*; Public Interest Advocacy Centre, *Submission 405*; Australian Council of Trade Unions, *Submission 411*; Law Council of Australia, *Submission 428*.

38 For example, the Australian Human Rights Commission proposed a new National Human Rights Framework built on five pillars, one of which proposes modernising Commonwealth anti-discrimination laws by reviewing long-standing problems, introducing a co-regulatory approach, and introducing a preventative model: Australian Human Rights Commission, *Submission No 1 to Parliamentary Joint Committee on Human Rights, Parliament of Australia, Inquiry into Australia's Human Rights Framework* (30 June 2023) 11. See also Elder Abuse Action Australia, *Submission No 33 to Parliamentary Joint Committee on Human Rights, Parliament of Australia, Inquiry into Australia's Human Rights Framework* (30 June 2023); Economic Justice Australia, *Submission No 34 to Parliamentary Joint Committee on Human Rights, Parliament of Australia, Inquiry into Australia's Human Rights Framework* (30 June 2023); Refugee Advocacy Network, *Submission No 38 to Parliamentary Joint Committee on Human Rights, Parliament of Australia, Inquiry into Australia's Human Rights Framework* (30 June 2023).



9.37 The Australian Discrimination Law Experts Group submitted that any review to better harmonise provisions between Commonwealth anti-discrimination laws should seek to ‘level up’ or provide the greatest protection from discrimination, as opposed to ‘levelling down’ to an identified lowest common denominator.<sup>39</sup>

9.38 Various stakeholders supported further reviews to consider:

- updating how protected attributes are described, in line with contemporary best practice;<sup>40</sup>
- whether to change the burden of proof for indirect discrimination to a *prima facie* evidentiary standard as recommended by the Queensland Human Rights Commission;<sup>41</sup>
- the extent to which discrimination on the basis of a person’s assumed characteristics should be prohibited (‘attribute extensions’);<sup>42</sup>
- the extent to which harassment on the basis of protected attributes should be prohibited;<sup>43</sup>
- removing the comparator test in direct discrimination tests;<sup>44</sup> and
- consolidating Commonwealth anti-discrimination laws into a single Act.<sup>45</sup>

9.39 In addition, it may be beneficial to assess whether protection under all anti-discrimination legislation should be extended to prohibit discrimination against all ‘workers’, broadly defined, and against people who associate with others believed to have protected attributes.<sup>46</sup>

9.40 A review of Commonwealth anti-discrimination laws could also consider whether to introduce further positive duties to eliminate discrimination, with the aim of preventing, rather than simply responding to, discrimination.<sup>47</sup> For example, the *Sex Discrimination Act* was recently amended to introduce positive duties relating to the elimination of discrimination.<sup>48</sup> Preventative models have been discussed by the Australian Human Rights Commission in relation to human rights legislation<sup>49</sup>

39 Australian Discrimination Law Experts Group, *Submission* 75.

40 Equality Australia, *Submission* 375.

41 Ibid. See also Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (Report, July 2022) 200–3.

42 Department of Employment and Workplace Relations (Cth), *Updating the Fair Work Act 2009 to Provide Stronger Protections for Workers against Discrimination* (Consultation Paper, April 2023) 7; Equality Australia, *Submission* 375.

43 Equality Australia, *Submission* 375.

44 Australian Discrimination Law Experts Group, *Submission* 75; Equality Australia, *Submission* 375.

45 Anglican Social Responsibilities Commission, Diocese of Perth, *Submission* 98; Australian Human Rights Commission, *Submission* 384; Australian Council of Trade Unions, *Submission* 411; Law Council of Australia, *Submission* 428.

46 See [Chapter 6](#).

47 Positive duties are discussed in [Chapter 12](#).

48 Such as the positive duty on employers to take reasonable and proportionate measures to eliminate workplace sexual harassment, victimisation, and sex discrimination as far as possible: *Sex Discrimination Act 1984* (Cth) s 47C. See further [Chapter 12](#).

49 Australian Human Rights Commission, ‘Free & Equal: A Human Rights Act for Australia’ (n 21) 79.

and anti-discrimination laws.<sup>50</sup> In addition, New Zealand legislation imposes positive duties on state schools to take ‘all reasonable steps to eliminate racism, stigma, bullying, and any other forms of discrimination within the school’.<sup>51</sup> The Australian Human Rights Commission has advocated that a positive duty would shift the reactive nature of anti-discrimination law and the burden it places on complainants.<sup>52</sup>

9.41 Further, the Australian Government should consider whether to prohibit vilification on all grounds protected under Commonwealth anti-discrimination laws. Vilification is sometimes considered a form of discrimination. While some Commonwealth anti-discrimination legislation does expressly prohibit vilification,<sup>53</sup> the *Sex Discrimination Act* does not currently expressly prohibit vilification on the grounds protected under that Act. Queensland legislation prohibits vilification in order to ‘promote equality of opportunity’, but does not expressly categorise vilification as a form of discrimination (instead, it is categorised as ‘associated objectionable conduct’).<sup>54</sup> In Victoria, vilification is addressed in separate legislation, rather than in dedicated anti-discrimination legislation.<sup>55</sup>

9.42 A further initiative would be to review the interaction between Commonwealth, state, and territory anti-discrimination legislation. Different views were expressed by stakeholders during this Inquiry on the nature of the existing relationship between relevant Commonwealth, state, and territory laws, particularly in light of the provisions of the *Australian Constitution*.<sup>56</sup> In addition, some consultees discussed the complexity and potential confusion for complainants in determining whether they should take action under an applicable Commonwealth, state, or territory law. These issues could be considered by the Standing Council of Attorneys-General.

## The Fair Work Act and Commonwealth anti-discrimination laws

9.43 The Australian Government should review the level of consistency between, and the interactions between, Commonwealth anti-discrimination laws and the *Fair Work Act*.

9.44 In relation to the issue of consistency, a key question is the extent to which the various provisions of the *Fair Work Act* prohibit indirect discrimination.<sup>57</sup> The Australian Discrimination Law Experts Group expressed concern regarding persisting uncertainty on this question.<sup>58</sup> The Australian Government should review the extent to which existing prohibitions in Commonwealth anti-discrimination Acts and the

50 Australian Human Rights Commission, ‘Free & Equal: A Reform Agenda for Federal Discrimination Laws’ (n 21) 70.

51 *Education and Training Act 2020* (NZ) s 127(1)(b)(iii).

52 Australian Human Rights Commission, ‘Free & Equal: A Reform Agenda for Federal Discrimination Laws’ (n 21) 58.

53 See, eg, *Racial Discrimination Act 1975* (Cth) s 18C.

54 *Anti-Discrimination Act 1991* (Qld) ss 121, 124A.

55 *Racial and Religious Tolerance Act 2001* (Vic).

56 See [Chapter 13](#).

57 See [Chapter 7](#).

58 Australian Discrimination Law Experts Group, *Submission 75*.

*Fair Work Act* differ in their scope, and investigate whether it would be desirable to apply more consistent direct and indirect discrimination tests across those laws.

9.45 The review should also consider whether existing exceptions should be framed more consistently in the *Fair Work Act* and Commonwealth anti-discrimination laws.<sup>59</sup> In addition, the review should also consider the Australian Human Rights Commission's recommendation to replace the 'reasonableness' test for indirect discrimination with a 'legitimate and proportionate' test.<sup>60</sup>

9.46 In relation to the interaction between Commonwealth anti-discrimination laws and the *Fair Work Act*, most Commonwealth anti-discrimination laws contain an exception for acts done in direct compliance with an industrial instrument under the *Fair Work Act*.<sup>61</sup> Government should review the operation and effect of these exceptions and consider the extent to which they should continue to apply.

9.47 Finally, the prohibition on adverse action in the *Fair Work Act* is subject to an exception in s 351(2)(a) of that Act which applies when the action is not unlawful under any applicable Commonwealth, state, or territory anti-discrimination law. This exception creates complexity in at least two ways: first, to establish liability under s 351, an employee may in effect be required to establish liability under, potentially, three separate Acts;<sup>62</sup> and, second, concerns have been expressed that s 351(2)(a) inhibits the development of a 'consistent and predictable' body of case law regarding adverse action.<sup>63</sup> In light of these complexities, government should review the operation and impact of s 351(2)(a).

## Human rights legislation

9.48 In accordance with the Terms of the Reference for this Inquiry, the ALRC has developed recommendations in light of Australia's international human rights obligations. International human rights law has provided the ALRC with a framework to analyse suggested reforms with the aim of maximising the enjoyment of all human rights. Enactment of Commonwealth human rights legislation would potentially provide helpful assistance when considering the appropriate intersection of human rights in the Australian context. For example, some stakeholders submitted that existing human rights legislation in some states has provided helpful guidance in this regard.<sup>64</sup>

59 Ibid; Equality Australia, *Submission 375*.

60 Australian Human Rights Commission, 'Free & Equal: A Reform Agenda for Federal Discrimination Laws' (n 21) 295.

61 *Age Discrimination Act 2004* (Cth) s 39(8)(b); *Disability Discrimination Act 1992* (Cth) s 47(1)(c); *Sex Discrimination Act 1984* (Cth) s 40(1)(g).

62 See **Chapter 7**.

63 Simon Rice and Cameron Roles, "'It's a Discrimination Law Julia, but Not as We Know It': Part 3-1 of the Fair Work Act' (2010) 21 *The Economic and Labour Relations Review* 13, 29.

64 Human Rights Law Centre, *Submission 188*; Minister for Human Rights (ACT), *Submission 390*.

9.49 A number of submissions suggested that the operation of Commonwealth anti-discrimination law would be enhanced by the enactment of Commonwealth human rights legislation.<sup>65</sup> For example, the Australian Lawyers Alliance submitted that existing human rights protections in Australia are piecemeal and inadequate.<sup>66</sup> Some stakeholders emphasised the urgency of such reform and suggested it should be prioritised above other potential reforms.<sup>67</sup>

9.50 Commonwealth human rights legislation has been recommended by the Australian Human Rights Commission,<sup>68</sup> and is currently under consideration by the Parliamentary Joint Committee on Human Rights.<sup>69</sup>

9.51 Some submissions emphasised that the functions of Commonwealth anti-discrimination laws should be distinguished from the role of human rights legislation. As the Human Rights Law Centre noted, anti-discrimination laws and a Human Rights Act would serve ‘complementary, but not identical purposes’.<sup>70</sup> Equality Australia submitted that:

Anti-discrimination laws prohibit discrimination by both public and private organisations and individuals, while a Human Rights Act generally regulates the conduct of public authorities to better conform with human rights. They both have different, yet important work, to do.<sup>71</sup>

9.52 In contrast, Dr Deagon submitted that the introduction of human rights legislation was not necessary.<sup>72</sup> His concern was that secular interpretations of human rights (including by courts) in effect subordinate religious freedoms to equality rights. As a result, he submitted that a Human Rights Act in Australia would not achieve a ‘peaceful coexistence’ of rights. Instead, he submitted that parliamentary processes are a ‘more appropriate forum for resolving competing moral claims between religious freedom and equality’.<sup>73</sup>

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65 Queensland Human Rights Commission, *Submission 125*; Australian Lawyers Alliance, *Submission 162*; Human Rights Law Centre, *Submission 188*; Queer Department of the National Union of Students and Queer Office of University of Technology Sydney Students’ Association, *Submission 252*; Pride in Protest, *Submission 260*; Kingsford Legal Centre, *Submission 339*; Equality Australia, *Submission 375*; Minister for Human Rights (ACT), *Submission 390*; Public Interest Advocacy Centre, *Submission 405*; NSW Council for Civil Liberties, *Submission 407*; Not published, *Submission 410*; Australian Council of Trade Unions, *Submission 411*; Law Council of Australia, *Submission 428*.

66 Australian Lawyers Alliance, *Submission 162*.

67 Ibid; NSW Council for Civil Liberties, *Submission 407*.

68 Australian Human Rights Commission, ‘Free & Equal: A Human Rights Act for Australia’ (n 21).

69 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Inquiry into Australia’s Human Rights Framework* (30 June 2023).

70 Human Rights Law Centre, *Submission 188*.

71 Equality Australia, *Submission 375*.

72 A Deagon, *Submission 4*.

73 Ibid.

# **PART THREE: INTERNATIONAL AND DOMESTIC LAW**



# 10. Australia's International Law Obligations

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## Introduction

10.1 In formulating its recommendations, the ALRC has considered how the policy objectives set out in the Terms of Reference can be achieved, to the extent practicable, in a way that is consistent with Australia's legal obligations under international law.<sup>1</sup>

10.2 This chapter provides an overview of Australia's legal obligations under international law that are relevant to this Inquiry. It then sets out the basis upon which rights may be limited under international law, and how the intersection of rights should be managed. **Chapter 11** sets out in more detail specific treaty provisions and accompanying jurisprudence that are relevant to this Inquiry.

## Treaty obligations

10.3 Australia is subject to a wide range of obligations under international law.<sup>2</sup> In the context of this Inquiry, the most relevant obligations are found in international treaties to which Australia is a state party or member state, including the:

- *International Covenant on Civil and Political Rights* ('ICCPR');<sup>3</sup>
- *International Covenant on Economic, Social and Cultural Rights* ('ICESCR');<sup>4</sup>
- *Convention on the Elimination of All Forms of Discrimination Against Women* ('CEDAW');<sup>5</sup>

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1 See the **Terms of Reference** and *Australian Law Reform Commission Act 1996* (Cth) s 24(1)(b).

2 The sources of international law are set out in art 38(1) of the *Statute of the International Court of Justice*. These sources include international treaties, customary international law, general principles of law, and, as a subsidiary means for determining the rules of law, judicial decisions and the writings of eminent jurists.

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

4 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('ICESCR').

5 *Convention on the Elimination of all Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) ('CEDAW').

- *Convention on the Rights of the Child* ('CRC');<sup>6</sup>
- *Convention against Discrimination in Education* ('CADE');<sup>7</sup>
- *Discrimination (Employment and Occupation) Convention* ('ILO 111');<sup>8</sup>
- *Occupational Safety and Health Convention* ('ILO 155');<sup>9</sup>
- *Convention on the Rights of Persons with Disabilities* ('CRPD');<sup>10</sup> and
- *International Convention on the Elimination of All Forms of Racial Discrimination* ('CERD').<sup>11</sup>

10.4 Australia's treaty practice is governed by the 1969 *Vienna Convention on the Law of Treaties* ('Vienna Convention'),<sup>12</sup> which sets out binding principles for the interpretation of treaties. Article 31 of the Vienna Convention states the general rule of interpretation, which provides that:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

10.5 Article 32 of the Vienna Convention provides that regard may be had to supplementary means of interpretation, including the preparatory work leading up to agreement of the treaty (*travaux préparatoires*), to confirm or clarify the meaning of the treaty in light of art 31.

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6 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('CRC').

7 *Convention against Discrimination in Education*, opened for signature 14 December 1960, 429 UNTS 93 (entered into force 22 May 1962) ('CADE').

8 *Discrimination (Employment and Occupation) Convention*, opened for signature 25 June 1958, ILO No 111 (entered into force 15 June 1960) ('ILO 111').

9 *Occupational Safety and Health Convention*, opened for signature 22 June 1981, ILO No 155 (entered into force 11 August 1983) ('ILO 155').

10 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) ('CRPD').

11 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) ('CERD').

12 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, 8 ILM 679 (entered into force 27 January 1980).



### In focus: Understanding human rights treaty obligations

The Vienna Convention provides the basic rules for treaty interpretation. However, the general terms of human rights treaties may be open to differing interpretations, especially where rights intersect and as societies change.

Each human rights treaty generally has a Committee or other body tasked with monitoring the treaty's implementation. This Committee will commonly issue both general statements regarding its interpretation of the treaty (often known as 'General Comments' or 'General Recommendations'), as well as particular views on individual communications and recommendations to states during periodic reviews. These are 'not authoritative in themselves', but are given significant weight in understanding the scope, applicability, and content of these treaties.<sup>13</sup> Reports published by UN Special Procedures, who are experts on issues appointed by the UN Human Rights Council, also offer guidance for interpreting treaty provisions and for identifying human rights issues that intersect multiple rights.<sup>14</sup>

Decisions of international and regional courts also help to 'elucidate and develop international law' in this area.<sup>15</sup> Cases decided by regional human rights courts under their own treaties (such as the ECHR, *American Convention on Human Rights*, and *African Convention on Human and Peoples' Rights*) may provide important insights into the interpretation of similarly worded rights under international treaties. Differences in text and context, however, may mean that these interpretations cannot be automatically transposed. Decisions of domestic courts applying international law 'may also be influential in developing international human rights law', feeding into, and informing, the development of international law.<sup>16</sup>

Other 'soft law', including non-binding resolutions of international institutions such as the UN General Assembly and UN Human Rights Council, can also provide evidence of states' understanding of the law, 'goals and aspirations', and accepted interpretations of particular treaties. Over time, accumulation of soft law on a particular issue can also contribute to the development of international norms.<sup>17</sup>

13 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [1996] ICJ Rep 595, 654 (Separate Opinion of Weeramantry J). With respect to the Human Rights Committee, see *CRI026 v Republic of Nauru* (2018) 355 ALR 21 [22]; *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* [2010] ICJ Rep 639 [66]. As to the status of General Comments as evidence of the state of international law, see further Christine Chinkin, 'Sources' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 4th ed, 2022) 65, 71–2, 81.

14 Chinkin (n 13) 80.

15 Ibid 77.

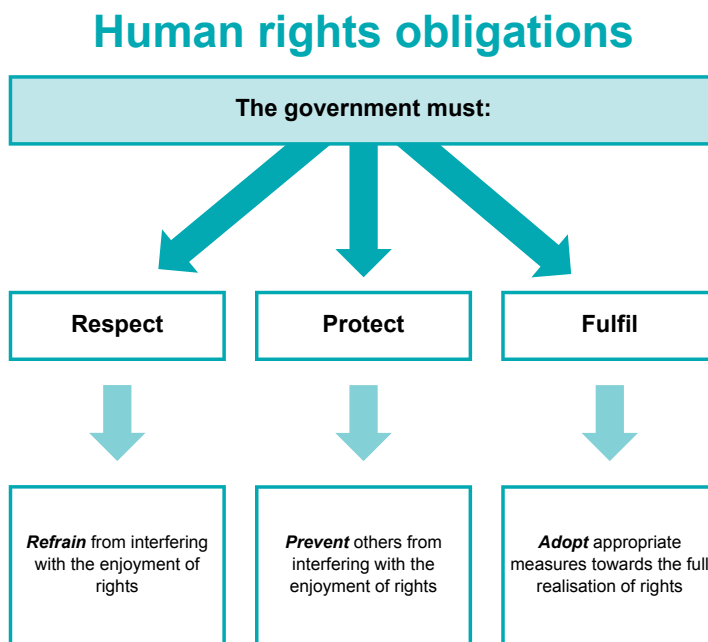
16 Ibid.

17 See further ibid 82–4.

10.6 Under international human rights treaties, state parties have the obligation to ensure that all persons enjoy all human rights. Australia's obligations under international human rights law are threefold (see **Figure 10.1** below):

- **to respect human rights** — requiring government not to unduly interfere with or limit human rights;
- **to protect human rights** — requiring government to take measures to prevent others from interfering with human rights; and
- **to fulfil human rights** — requiring government to take positive measures to fully realise human rights.<sup>18</sup>

**Figure 10.1: The nature of human rights obligations**



18 See, eg, Human Rights Committee, *General Comment No 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant: International Covenant on Civil and Political Rights*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2014, adopted 29 March 2004) [5]–[9]; Committee on Economic, Social and Cultural Rights, *General Comment No 13: The Right to Education (Article 13 of the Covenant)*, 21st sess, UN Doc E/C.12/1999/10 (8 December 1999) [46]. See further Katharine G Young, 'Rights and Obligations' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 4th ed, 2022) 129, 134; Parliamentary Joint Committee on Human Rights (Cth), *Guidance Note 1: Drafting Statements of Compatibility* (December 2014) 1; Olivier De Schutter, 'Introduction' in Olivier De Schutter (ed), *Economic, Social and Cultural Rights as Human Rights* (Edward Elgar, 2013) xiii.

10.7 Where a person's rights have been breached, states have an obligation to ensure accessible and effective remedies are available to that person.<sup>19</sup>

10.8 Australia is required to comply with these obligations under international law. However, it has discretion as to how it implements these obligations within its domestic legal system. Unlike some other countries, international law does not automatically become part of domestic law in Australia.<sup>20</sup> Instead, international law becomes part of Australia's domestic law when adopted by statute. Additionally, common law requires

that statutes should be interpreted and applied, so far as their language permits, so as not to be inconsistent with international law or conventions to which Australia is a party.<sup>21</sup>

10.9 Despite ratifying the human rights treaties referred to above, Australia has not fully adopted the rights they enumerate into domestic legislation. Accordingly, some, but not all, of the rights embodied in these treaties are directly justiciable in Australian courts.

10.10 On the other hand, as recognised in the Religious Freedom Review,

international law generally provides States with a broad discretion as to how they give effect to their obligations. While legally binding, these instruments do not necessarily require the use of legislation specifically to implement them. Other measures may also be appropriate and effective. However, some aspects of those rights might lend themselves readily to implementation through the law.<sup>22</sup>

10.11 While some advocates focus on a narrow set of human rights, it is the responsibility of the state to realise all rights.

## Limitation of human rights

10.12 The 1993 *UN Vienna Declaration and Program of Action* stated that 'all human rights are universal, indivisible and interdependent and interrelated'.<sup>23</sup> This framework has been said to conceptualise human rights as coexisting and reinforcing and, on this basis, that human rights should be considered in parallel and in a mutually

19 See, eg, ICCPR art 2. See also Parliamentary Joint Committee on Human Rights (Cth), *Guidance Note 1: Drafting Statements of Compatibility* (December 2014) 1.

20 See *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 224; *Dietrich v R* (1992) 177 CLR 292, 305. See also Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws* (Report No 129, December 2015) [2.38] 39.

21 *Momcilovic v The Queen* (2011) 245 CLR 1 [18]. Statutes enacted after the ratification of an international treaty can also be interpreted in line with the treaty: *Coleman v Power* (2004) 220 CLR 1 [19].

22 *Religious Freedom Review: Report of the Expert Panel* (Report, 18 May 2018) 14.

23 *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23 (12 July 1993, adopted 25 June 1993 by the World Conference on Human Rights), endorsed by UN General Assembly, *World Conference on Human Rights*, GA Res 48/121, UN GAOR, UN Doc A/48/49 (20 December 1993) [5].

enriching manner.<sup>24</sup> This means that no one right can be used to extinguish or violate another right, and that the specific purpose of each right must be respected.

10.13 Only a small number of human rights are absolute. Most rights can be limited to a certain extent to protect other legitimate objectives. Depending on the right, legitimate objectives might include the protection of public health, public order, or the rights and freedoms of others.

10.14 Because human rights are fundamental to human dignity and personhood, the rights themselves are to be interpreted generously and any limitations require a strict and 'compelling justification'.<sup>25</sup> Any restrictive measures imposed on the enjoyment of a right must be proportionate and appropriate to achieve their protective function.<sup>26</sup> Additionally, such measures 'must be the least intrusive instrument amongst those which might achieve their protective function ... [and be] proportionate to the interest to be protected'.<sup>27</sup>

10.15 A state relying on restrictions retains the burden of proving the legal basis of those restrictions.<sup>28</sup> For instance, with respect to freedom of expression, the Human Rights Committee has commented that state parties must

demonstrate in specific and individualised fashion the precise nature of the threat [which warrants limiting the right], and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression [made by an individual] and the threat.<sup>29</sup>

10.16 The criteria governing the permissible limitation of rights are set out, variously, in treaties and jurisprudence. While some rights-specific limitation clauses exist,<sup>30</sup> other limitations are implied,<sup>31</sup> and some treaties contain general limitation clauses.<sup>32</sup>

24 Dominic McGoldrick, 'Thought, Expression, Association, and Assembly' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 4th ed, 2022) 209, 232.

25 Heiner Bielefeldt, 'Limiting Permissible Limitations: How to Preserve the Substance of Religious Freedom' (2020) 15 *Religion and Human Rights* 3, 6–7, 9, 18. See also Parliamentary Joint Committee on Human Rights (Cth), *Guidance Note 1: Drafting Statements of Compatibility* (December 2014) 2.

26 Human Rights Committee, *General Comment No 34: Article 19 (Freedoms of Opinion and Expression)*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011) [34].

27 Ibid, quoting Human Rights Committee, *General Comment No 27: Article 12 (Freedom of Movement)*, 67th sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) [14].

28 Human Rights Committee, *General Comment No 34: Article 19 (Freedoms of Opinion and Expression)*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011) [27].

29 Ibid [35].

30 See, eg, ICCPR art 18(3); CRC art 14(3).

31 See, for example, art 17 of the ICCPR which refers to 'arbitrary or unlawful' interferences with privacy.

32 See, eg, ICESCR art 4. See also Committee on Economic, Social, and Cultural Rights, *General Comment No 14: The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 22nd sess, UN Doc E/C.12/2000/4 (11 August 2000) [28].

In addition, the criteria for permissible limitations have been developed through jurisprudence and state practice.<sup>33</sup>

10.17 Criteria for the permissible limitation of rights are further elaborated on in the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* ('Siracusa Principles'). The Siracusa Principles are not binding, but are authoritative and have been endorsed by the Attorney-General's Department (Cth), the Australian Human Rights Commission, and the Parliamentary Joint Committee on Human Rights (Cth).<sup>34</sup> The Siracusa Principles are largely reflected in General Comment No 22 (concerning freedom of thought, conscience, and religion), in which the Human Rights Committee stated that, in general, a limitation on a right recognised in the ICCPR must:

- be provided for by law;
- pursue a legitimate goal, as set out in the relevant article;
- be necessary — that is, respond to a pressing social need; and
- be proportionate to the specific need it is aimed at addressing.<sup>35</sup>

10.18 The Siracusa Principles are also reflected, to varying degrees, in the criteria applied to the permissible limitation of rights in the ICESCR.<sup>36</sup>

10.19 In relation to assessing proportionality, guidance from the Parliamentary Joint Committee on Human Rights (Cth) describes the types of factors that are often taken into account, including:

- whether there are other less restrictive ways to achieve the same aim;
- whether there are effective safeguards or controls over the measures, including the possibility of monitoring and access to review;

33 For instance, in relation to 'arbitrary' interferences with the right to privacy.

34 See *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 41st sess, UN Doc E/CN.4/1985/4 (28 September 1984); Attorney-General's Department (Cth), 'Permissible Limitations' <[www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/](http://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/)>; Australian Human Rights Commission, 'Human Rights Brief No. 4: Lawful Limits on Fundamental Freedoms' (2006) 4 <<https://humanrights.gov.au/our-work/publications/human-rights-brief-no-4>>; Parliamentary Joint Committee on Human Rights (Cth), *Guidance Note 1: Drafting Statements of Compatibility* (December 2014) 2. The Religious Freedom Review recommended (Recommendation 2) that Commonwealth, state, and territory governments should have regard to the Siracusa Principles when drafting laws that would limit the right to freedom of religion.

35 See also Human Rights Committee, *General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993, adopted 30 July 1993) [8].

36 See Committee on Economic, Social, and Cultural Rights, *General Comment No 14: The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 22nd sess, UN Doc E/C.12/2000/4 (11 August 2000) [28]. The principles embodied in the Siracusa Principles have passed, generally, into human rights law. For example, particular principles embodied in *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* are derived from the Siracusa Principles: United Nations, *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, 43rd sess, UN Doc E/CN.4/1987/17 (8 January 1987).

- the extent of any interference with human rights — the greater the interference, the less likely it is to be considered proportionate;
- whether affected groups are particularly vulnerable; and
- whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case.<sup>37</sup>

## Managing the intersection of rights

10.20 Applying limitation criteria is more complicated when multiple rights intersect — that is, where limitations on rights are necessary to protect the rights of others — because limitations must be considered in relation to each of those rights.<sup>38</sup> The aim is to

preserve the substance of human rights ... of all the legitimate human rights concerns at issue in a particular case — to the maximum degree possible.<sup>39</sup>

10.21 Maximising the realisation of all rights to the maximum extent possible is preferable to the language of ‘balancing’ rights, which inherently invites ‘trade-offs’.<sup>40</sup> A former UN Special Rapporteur on freedom of religion or belief has stated that

every effort must be made, through a careful case-by-case analysis, to ensure that all rights are brought in practical concordance or protected through reasonable accommodation.<sup>41</sup>

10.22 Acknowledging compatibility and identifying synergies between rights can direct focus away from conflicts and towards maximal realisation.<sup>42</sup> In the context of considering rights relevant to this Inquiry, a former UN Special Rapporteur on freedom of religion or belief has explained:

37 Parliamentary Joint Committee on Human Rights (Cth), *Guidance Note 1: Drafting Statements of Compatibility* (December 2014) 2–3. These factors for assessing proportionality were also identified by the Islamic Society of South Australia, *Submission 389*.

38 Bielefeldt (n 25) 13.

39 Ibid 13 (emphasis in original). See further Ahmed Shaheed, Special Rapporteur, *Gender-Based Violence and Discrimination in the Name of Religion or Belief*, 43rd sess, UN Doc A/HRC/43/48 (24 August 2020) [52].

40 Heiner Bielefeldt and Michael Wiener, *Religious Freedom Under Scrutiny* (University of Pennsylvania Press, 2019) 34.

41 Ahmed Shaheed, *Report of the Special Rapporteur on Freedom of Religion or Belief*, 37th sess, UN Doc A/HRC/37/49 (28 February 2018) [47].

42 For example, a recent UN Independent Expert report emphasised that freedom of religion or belief and freedom from discrimination based on sexual orientation and gender identity ‘are fully compatible under international human rights law’: Human Rights Council, *Freedom of Religion or Belief, and Freedom from Violence and Discrimination Based on Sexual Orientation and Gender Identity*, 53rd sess, UN Doc A/HRC/53/37 (7 June 2023) [8]. Also, in May 2021, 41 UN Experts issued a joint statement highlighting the synergy between the right to freedom of religion or belief, and the right to non-discrimination, identifying that ‘LGBT and gender diverse persons are and have always been part of all faith traditions around the world and, as all human beings, must be recognised as worthy of love and belonging’: see UN Experts, ‘Statement by Human Rights Experts on the International Day against Homophobia, Transphobia and Biphobia’ (Media Release, 14 May 2021).

The legally instituted limits on manifesting freedom of religion or belief reflect the fact that an essential part of the right to freedom of religion or belief is that freedom of religion or belief must not be used for ends that are inconsistent with the Charter of the United Nations or relevant human rights instruments. Both article 30 of the Universal Declaration of Human Rights and article 5 of the International Covenant on Civil and Political Rights further clarify that no human right may be invoked to destroy another human right.<sup>43</sup>

10.23 Several submissions stated that Commonwealth human rights legislation should be enacted to more comprehensively implement the seven core human rights treaties to which Australia is a state party, and to more effectively manage the intersection between individual rights.<sup>44</sup>

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43 Ahmed Shaheed, Special Rapporteur, *Gender-Based Violence and Discrimination in the Name of Religion or Belief*, 43rd sess, UN Doc A/HRC/43/48 (24 August 2020) [61].

44 See, eg, Australian Lawyers Alliance, *Submission 162*; Human Rights Law Centre, *Submission 188*; Kingsford Legal Centre, *Submission 339*; Minister for Human Rights (ACT), *Submission 390*; Public Interest Advocacy Centre, *Submission 405*; NSW Council for Civil Liberties, *Submission 407*; Law Council of Australia, *Submission 428*. See [Chapter 9](#).





# 11. Relevant Human Rights

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## Introduction

11.1 The issues dealt with in this Inquiry engage several human rights, many of which are overlapping. These rights are enshrined in nine treaties to which Australia is a state party,<sup>1</sup> and include:

- the right to equality and non-discrimination on the grounds of sex, sexual orientation, gender identity, marital or relationship status, pregnancy, race, or religion;<sup>2</sup>
- the right to freedom of thought, conscience, and religion (including freedom to manifest religion or belief);<sup>3</sup>
- children's rights,<sup>4</sup> parents' rights,<sup>5</sup> cultural rights,<sup>6</sup> minority rights,<sup>7</sup> and indigenous rights;<sup>8</sup>

1 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR'); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976) ('ICESCR'); *Convention on the Elimination of all Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) ('CEDAW'); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('CRC'); *Convention against Discrimination in Education*, opened for signature 14 December 1960, 429 UNTS 93 (entered into force 22 May 1962) ('CADE'); *Discrimination (Employment and Occupation) Convention*, opened for signature 25 June 1958, ILO No 111 (entered into force 15 June 1960) ('ILO 111'); *Occupational Safety and Health Convention*, opened for signature 22 June 1981, ILO No 155 (entered into force 11 August 1983) ('ILO 155'); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) ('CRPD'); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) ('CERD').

2 See *Universal Declaration of Human Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 2 ('UDHR'); ICCPR arts 2(1), 26; ICESCR art 2(2); CEDAW arts 3, 5(a), 10, 11(2)(a); CRC arts 2, 13, 14, 19, 24(1), 29(1), 30; ILO 111 arts 1, 2 (which cover equality of opportunity and discrimination in the context of employment and occupation).

3 See ICCPR art 18; CERD art 5(d)(vii); CRC art 14; CADE art 2(b); *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) art 12 ('UNDRIP'); *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, GA Res 36/55, 36th sess, UN Doc A/RES/36/55 (16 December 1976, adopted 25 November 1981) ('Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief').

4 See CRC arts 1–4, 12–16, 28–29(1); ICCPR art 24(1).

5 See ICCPR art 18(4); ICESCR arts 13(3)–(4); CRC arts 3(2), 5, 14(2), 18; CADE art 5(1)(b).

6 See ICESCR arts 1, 3, 15(1)(a); ICCPR arts 1, 27; CRC art 30; CEDAW arts 1, 3, 13(c); CERD arts 5(e)(v)–(vi).

7 See ICCPR art 27; CRC art 30; CADE art 5(1)(c); *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, GA Res 47/135, 47th sess, UN Doc A/RES/47/135 (3 February 1993, adopted 18 December 1992) ('Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities').

8 See UNDRIP arts 5, 12, 14(1); ICCPR art 27; CRC art 30; Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

- rights to privacy,<sup>9</sup> education,<sup>10</sup> employment,<sup>11</sup> health,<sup>12</sup> and life,<sup>13</sup> and
- freedom of expression,<sup>14</sup> and freedom of association.<sup>15</sup>

11.2 Some treaties also impose specific duties on Australia to take positive measures, in the context of children and education, to address discrimination in society.<sup>16</sup> For example, under the CRC, Australia is required to take proactive measures to ‘ensure effective equal opportunities for all children to enjoy the rights under the Convention’.<sup>17</sup> Under CEDAW, Australia must take appropriate measures to eliminate ‘any stereotyped concept of the roles of men and women at all levels and in all forms of education’, including by the revision of textbooks and school programmes and the adaptation of teaching methods.<sup>18</sup> CADE obliges Australia to take all necessary measures to ensure that education is directed to the full development of the human personality and the strengthening of respect for human rights and fundamental freedoms, in addition to the promotion of understanding, tolerance, and friendship.<sup>19</sup>

11.3 This chapter provides an overview of provisions enshrining key rights, alongside interpretive guidance from relevant international monitoring bodies (especially treaty body committees and human rights courts) and, where relevant, insights from the *travaux préparatoires*. It also considers issues raised by the interactions of particular rights in the context of religious educational institutions. The chapter proceeds in ten parts, each of which examines a particular right or group of rights.

9 See ICCPR art 17; CRC art 16.

10 See ICESCR art 13; CERD art 5(e)(v); CEDAW arts 10, 14(2)(d); CRC art 28(1); CRPD art 24(1); UNDRIP art 14(1); CADE arts 3(b), 5(1)(a).

11 See ICESCR arts 6, 7; CERD art 5(e)(i); CEDAW art 11(1).

12 See ICESCR art 12(1); CEDAW art 10(h); CRC art 24; CERD art 5(e)(iv); ILO 155 art 4.

13 See ICCPR art 6; CRC art 6.

14 See ICCPR art 19; CERD arts 4–5; CRC arts 12–13.

15 See ICCPR arts 21–22; CERD art 5(d)(ix); CRC art 15. See also Australian Human Rights Commission, *Submission 384*.

16 See, eg, ICESCR art 13(1); CERD art 7. See also Human Rights Committee, *General Comment No 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant: International Covenant on Civil and Political Rights*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004, adopted 29 March 2004) [7].

17 Committee on the Rights of the Child, *General Comment No 14: The Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art 3, Para 1)*, 62nd sess, UN Doc CRC/C/GC/14 (29 May 2013) [41].

18 CEDAW art 10(c).

19 CADE art 5(2).

## Right to equality and non-discrimination

11.4 Australia's human rights obligations with respect to equality and non-discrimination arise under the UN human rights treaty framework and the ILO, a specialised agency of the UN. Although international human rights and international labour standards have developed along somewhat separate tracks, they are very closely connected.<sup>20</sup>

11.5 The preambles to the UDHR, ICCPR, ICESCR, and CRC state that

recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

11.6 Woven throughout other international instruments, the principles of dignity and equality are recognised as being at the heart of the international human rights framework.<sup>21</sup> Professor Nowak has described non-discrimination, in particular, as a thread running throughout international human rights law.<sup>22</sup>

## Dual status of the right

11.7 The principle of non-discrimination is both a guarantee associated with other rights (subordinate), and a standalone or 'free-standing' right (autonomous).<sup>23</sup> Although some consultees questioned the idea of a free-standing right in submissions,<sup>24</sup> international human rights law on this is clear:

20 A joint statement of the UN Human Rights Treaty Body Chairpersons and the ILO Committee in February 2023 emphasised that international labour standards are an 'integral part' of human rights, and that the mandates of supervisory bodies in both areas are 'complementary and mutually reinforcing': ILO Committee of Experts on the Application of Conventions and Recommendations and UN Human Rights Treaty Bodies Chairpersons, *Application of International Labour Standards* 2023, 111th sess, ILO Report III(A)/Addendum (28 February 2023).

21 See CEDAW and CERD which were adopted with the aim of eliminating discrimination on particular grounds. See also the CRPD, CADE, and ILO 111 which are premised on the principles of dignity and equality. In 2007, the UNDRIP was adopted, by resolution, by the UN General Assembly and expressly states that the Declaration shall be interpreted in accordance with the principles of equality and non-discrimination (art 46(3)). See further Human Rights Committee, *General Comment No 18: Non-discrimination*, 37th sess, UN Doc HRI/GEN/1/Rev.9 (Vol I) (10 November 1989) [1].

22 Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, 2nd revised ed, 2005) 600.

23 Human Rights Committee, *General Comment No 28: Article 3 (The Equality of Rights Between Men and Women)*, 68th sess, UN Doc CCPR/C/21/Rev.1/Add.10 (29 March 2000) [31]. See the following treaty provisions: UDHR art 2; ICCPR arts 2(1), 3, 26; ICESCR art 2(2); CEDAW arts 3, 5(a), 10, 11(2)(a); CRC arts 2, 13, 14, 19, 24(1), 29(1), 30; ILO 111 arts 1, 2.

24 See, eg, K Conolly MP, *Submission 24: Freedom for Faith*, *Submission 203*.

individuals have both a right to be free from discrimination in the enjoyment of all other human rights and a 'free-standing' right to non-discrimination in areas that are regulated by law but not the subject of another human right.<sup>25</sup>

11.8 Under the ICCPR, for example, art 2 provides an accessory right,<sup>26</sup> while art 26 provides a standalone right.<sup>27</sup> In General Comment No 18, adopted in 1989, the Human Rights Committee explained that, while

article 2 limits the scope of the rights to be protected against discrimination to those provided for in the Covenant, article 26 does not specify such limitations. That is to say, article 26 provides that all persons are equal before the law and are entitled to equal protection of the law without discrimination, and that the law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds. In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. ... In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.<sup>28</sup>

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- 25 Equal Rights Trust and Office of the United Nations High Commissioner for Human Rights, *Protecting Minority Rights: A Practice Guide to Developing Comprehensive Anti-Discrimination Legislation* (2022) 1. The scope of this autonomous right was also elaborated on by the Human Rights Committee in Human Rights Committee, *Views: Communication No 172/1984*, 29th sess, UN Doc CCPR/C/29/D/172/1984 (9 April 1987) ('*Broeks v The Netherlands*') and confirmed in Human Rights Committee, *General Comment No 18: Non-discrimination*, 37th sess, UN Doc HRI/GEN/1/Rev.9 (Vol I) (10 November 1989) [12]. On the other hand, the ECHR only contains a subordinate non-discrimination guarantee, not a free-standing right: Daniel Moeckli, 'Equality and Non-Discrimination' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 4th ed, 2022) 151, 151, 156.
- 26 Article 2 provides that states must respect and ensure 'the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.
- 27 Article 26 provides that: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.
- 28 Human Rights Committee, *General Comment No 18: Non-discrimination*, 39th sess, UN Doc HRI/GEN/1/Rev.9 (Vol I) (10 November 1989) [12]. See also Human Rights Committee, *Views: Communication No 172/1984*, 29th sess, UN Doc CCPR/C/29/D/172/1984 (9 April 1987) ('*Broeks v The Netherlands*'); Human Rights Committee, *Views: Communication 182/1984*, 29th sess, UN Doc Supp No 40 A/42/40 (9 April 1987) ('*Zwaan-de Vries v The Netherlands*'). Other cases where the Human Rights Committee has considered cases of discrimination regarding economic, social, and cultural rights include Human Rights Committee, *Views: Communication No 2348/2014*, 123rd sess, UN Doc CCPR/C/123/D/2348/2014 (30 August 2018, adopted 7 August 2018) ('*Touissant v Canada*') [11.8] (in which the Committee found that a denial of health care coverage on the basis of 'immigration status' constituted a violation of art 26); Human Rights Committee, *Views: Communication No 694/1996*, 67th sess, UN Doc CCPR/C/67/D/694/1996 (5 November 1999) ('*Waldman v Canada*') (in which the Committee found that the provision of public funding for Catholic schools, but not Jewish schools, constituted unlawful discrimination contrary to art 26).

11.9 The ILO 111 also provides a standalone right and prohibits discrimination on the basis of race, colour, sex, religion, political opinion, national extraction, or social origin in the context of employment and occupation.<sup>29</sup>

## What is discrimination?

11.10 The Human Rights Committee has explained that under the ICCPR, discrimination is understood to mean

any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.<sup>30</sup>

11.11 Article 1(1)(a) of the ILO 111 similarly defines discrimination as

any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

11.12 Discrimination under international human rights law encompasses both measures that have a discriminatory purpose (direct discrimination) and measures that have a discriminatory effect on the enjoyment of rights (indirect discrimination). Indirect discrimination results from ‘a rule or measure that is neutral on its face or without intent to discriminate’, which exclusively or disproportionately affects people with a particular personal attribute.<sup>31</sup>

11.13 In relation to art 1 of the ILO 111, the ILO has clarified in its Labour Legislation Guidelines that the definition of discrimination includes both direct and indirect discrimination:

The use of the expression *has the effect of nullifying or impairing* is a drafting technique that addresses the issue of direct and indirect discrimination. ... Direct discrimination exists when unequal treatment stems directly from laws, rules or practices making an explicit difference on one particular ground, such as laws which do not allow women to sign contracts, which amount to direct sex discrimination. Indirect discrimination refers to situations, rules and practices which appear neutral, but which in practice lead to disadvantages

29 See ILO 111 arts 1, 2. Article 1(3) of the ILO 111 states that ‘the terms **employment** and **occupation** include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment’.

30 Human Rights Committee, *General Comment No 18: Non-discrimination*, 37th sess, UN Doc HRI/GEN/1/Rev.9 (Vol I) (10 November 1989) [7].

31 Human Rights Committee, *Views: Communication No 998/2001*, 78th sess, UN Doc CCPR/C/78/D/998/2001 (22 September 2003) (*Althammer v Austria*) [10.2].

primarily suffered by a specific category of persons. ... In short, the intention to discriminate is not required.<sup>32</sup>

11.14 UN treaty bodies have generally adopted a 'pragmatic' approach to the concept of discrimination that recognises its limits by reference to how and why people are being treated differently.<sup>33</sup> With respect to the ICCPR, the Human Rights Committee explained in General Comment No 18, adopted in 1989, that

not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.<sup>34</sup>

11.15 The ILO 111 takes a different approach to differential treatment. It sets out three circumstances in which differential treatment may be justified in relation to employment — specifically:

- a distinction, exclusion or preference based on the inherent requirements of a particular job;<sup>35</sup>
- measures to protect the security of the state;<sup>36</sup> and
- special measures of protection or assistance.<sup>37</sup>

11.16 The first category, differential treatment based on inherent job requirements, is particularly relevant to this Inquiry. The ILO Committee has emphasised that the exception must be interpreted restrictively: very few instances justify different treatment based on the grounds listed in the ILO 111 (including religion), and any criteria used by an employer to justify different treatment 'must correspond in a concrete and objective way to the inherent requirements of a particular job'.<sup>38</sup>

11.17 Regarding discrimination on the basis of religion, the ILO Committee has explained that restrictions on a 'narrow range' of jobs associated with particular religious institutions may be acceptable.<sup>39</sup> The Committee has suggested that

32 International Labour Organisation, 'Substantive provisions of labour legislation: The Elimination of Discrimination in Respect of Employment and Occupation', Chapter VII, *Labour Legislation Guidelines* (emphasis in original).

33 Sándor Gurbai, 'Beyond the Pragmatic Definition? The Right to Non-Discrimination of Persons with Disabilities in the Context of Coercive Interventions' (2020) 22(1) *Health and Human Rights* 279, 279, quoting Wouter Vandenhoe, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Intersentia, 2005) 71.

34 Human Rights Committee, *General Comment No 18: Non-discrimination*, 37th sess, UN Doc HRI/GEN/1/Rev.9 (Vol I) (10 November 1989) [13].

35 ILO 111 art 1(2).

36 Ibid art 4.

37 Ibid art 5.

38 Committee of Experts on the Application of Conventions and Recommendations, *Giving Globalization a Human Face* (General Survey, Report III (Part 1B), 101st ILC Session, 2012) [831]. This paragraph was referred to in Committee of Experts on the Application of Conventions and Recommendations, *Direct Request Comment on Convention No 111 – Tajikistan* (111st ILC Session, 2023); Committee of Experts on the Application of Conventions and Recommendations, *Direct Request Comment on Convention No 111 – Barbados* (111st ILC Session, 2023).

39 Committee of Experts on the Application of Conventions and Recommendations, 'Giving Globalization a Human Face' (n 38) [831] and citations.

a consideration of the 'inherent requirements of the job' may involve such questions as whether there would be a risk that the pursuit of the institution's objective would be frustrated, undermined or harmed by employing someone in a particular post who did not share the ideological views of the organization. ... It is clear from the views expressed by the Committee of Experts, however, that distinctions made in these circumstances could only be justified under the Convention where the job itself carried special responsibilities.<sup>40</sup>

11.18 Notably, the ILO Committee has stated that provisions (under the law in the Netherlands) allowing discrimination on the ground of religion based on the inherent requirements of the job should not lead to discrimination based on sexual orientation.<sup>41</sup>

11.19 In 2019, the ILO Committee suggested that exceptions previously found in the *Equal Opportunity Act 2010* (Vic) allowing religious bodies and religious educational institutions to discriminate in accordance with the doctrines, beliefs or principles of a religion, or when it is reasonable to avoid injury to the religious sensitivities of adherents to the religion, were not in accordance with Australia's obligations under the ILO 111.<sup>42</sup> The ILO Committee asked the Australian Government

to continue to provide information on any amendments envisaged to the *Equal Opportunity Act 2010* with a view to bringing the provisions regarding religious exemptions into conformity with the Convention by establishing an 'inherent requirement' test.<sup>43</sup>

11.20 Difficult issues arise in relation to measures which seek to give preference to marginalised groups, one being that not all instances of giving preference are considered legitimate. As the Committee on the Elimination of Racial Discrimination has explained, in the context of CERD:

Discrimination is constituted not simply by an unjustifiable 'distinction, exclusion or restriction' but also by an unjustifiable 'preference', making it especially important that States parties distinguish 'special measures' from unjustifiable preferences.<sup>44</sup>

11.21 Treaty bodies have developed further guidance as to when giving 'preference to' (for example, giving an advantage) will not amount to 'discrimination' (against a person with a protected attribute): it must be reasonable and objective, its aim

40 Committee of Experts on the Application of Conventions and Recommendations, *Equality in Employment and Occupation* (Special Survey, Report III (Part 4B), 83rd ILC Session, 1996) [198].

41 Committee of Experts on the Application of Conventions and Recommendations, *Direct Request Comment on Convention No 111 – Netherlands* (101st ILC Session, 2012); Committee of Experts on the Application of Conventions and Recommendations, *Direct Request Comment on Convention No 111 – Netherlands* (107th ILC Session, 2018).

42 Committee of Experts on the Application of Conventions and Recommendations, *Observation Comment on Convention No 111 – Australia* (109th ILC Session, 2021).

43 Ibid.

44 Committee on the Elimination of Racial Discrimination, *General Recommendation No 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms Racial Discrimination*, 75th sess, UN Doc CERD/C/GC/32 (24 September 2009) [7].



and effects must be legitimate and compatible with the nature of rights protected under the treaty, and there must be proportionality between the aim sought and the effects.<sup>45</sup> This understanding is also reflected in the jurisprudence of the primary regional human rights mechanisms.<sup>46</sup> Essentially, to be justified as ‘objective and reasonable’:

- the measures must serve a legitimate aim that is compatible with the nature of the rights protected under the treaty (and, under the ICESCR, for the purpose of promoting the general welfare in a democratic society); and
- there must be a ‘clear and reasonable relationship of proportionality’ between the aim sought and the measures adopted and their effects.<sup>47</sup>

11.22 Some submissions suggested that the ability to prefer particular staff on religious grounds necessarily means that institutions should be able to exclude staff on grounds protected under the *Sex Discrimination Act* where particular identities or behaviours are deemed by the institution not to align with its beliefs.<sup>48</sup> Relevantly for this Inquiry, the Equal Rights Trust and the OHCHR have stated that the state cannot legitimately use religious beliefs to justify discrimination on the basis of sex, sexual orientation, or gender identity.<sup>49</sup> Most recently, current Special Rapporteur, Nazila Ghanea, has underlined that:

International law rejects any attempt to use either religion or belief, or freedom of religion or belief, as justification for the destruction of either the rights and freedoms of others or of other rights and freedoms.<sup>50</sup>

45 See, eg, Committee on Economic, Social and Cultural Rights, *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)*, 42nd sess, UN Doc E/C.12/GC/20 (2 July 2009) [13].

46 See, eg, African Commission on Human and Peoples’ Rights, *Decision: Communication No 313/05 (12–26 May) (‘Good v Republic of Botswana’)* [219]; Inter-American Commission on Human Rights, *Decision: Case 11.625, Report No. 4/01 (19 January 2001) (‘Morales de Sierra v Guatemala’)* [31]; *Biao v Denmark* (European Court of Human Rights, Grand Chamber, Application No 38590/10, 24 May 2016) [90] (‘*Biao v Denmark*’). See further Moeckli (n 25) 161.

47 Committee on Economic, Social and Cultural Rights, *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)*, 42nd sess, UN Doc E/C.12/GC/20 (2 July 2009) [13]. As to the Human Rights Committee’s adoption of this approach see, eg, Human Rights Committee, *Views: Communication No 932/2000*, 75th sess, UN Doc A/57/40 (Vol II) (15 July 2002) (‘*Gillot v France*’) [13.2]; Human Rights Committee, *Views: Communication No 2747/2016*, 123rd sess, UN Doc CCPR/C/123/D/2747/2016 (7 December 2018) (‘*Yaker v France*’) [8.17]. In relation to CERD, see Committee on the Elimination of Racial Discrimination, *Concluding Observations: Australia*, 66th sess, UN Doc CERD/C/AUS/CO/14 (14 April 2005) [24]. See further *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica (Advisory Opinion OC-4/84)* (Inter-American Court of Human Rights, Series A No 4, 19 January 1984) [56]–[57]; *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium (Belgian Linguistics Case) (No 2)* (1968) 1 EHRR 252 [10].

48 See, eg, A Deagon, *Submission 4*.

49 Equal Rights Trust and Office of the United Nations High Commissioner for Human Rights (n 25) 55.

50 Nazila Ghanea, Special Rapporteur, *Landscape of Freedom of Religion or Belief*, 52nd sess, UN Doc A/HRC/52/38 (30 January 2023) [7].

## Prohibited grounds of discrimination

11.23 While the ICCPR and ICESCR set out a number of prohibited grounds of discrimination (including race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status), the list of prohibited grounds has significantly increased since these conventions were adopted.<sup>51</sup> For example, marital status, sexual orientation, gender identity, sex characteristics, and disability, as well as intersectional forms of discrimination, are now recognised.<sup>52</sup> The open criteria of 'other status' has facilitated interpretive expansion of prohibited grounds.<sup>53</sup>

11.24 In the context of employment, the ILO 111 prohibits discrimination on the basis of race, colour, sex, religion, political opinion, national extraction, or social origin.<sup>54</sup> Since ratification of the ILO 111 in 1960, the ILO Committee has recognised that sexual orientation should be included as a ground of discrimination in national legislation.<sup>55</sup> The ILO Committee has expressed encouragement at the growing number of member states that have incorporated equality and non-discrimination protections for gender diverse people into legislative provisions and constitutional guarantees.<sup>56</sup> Importantly, the ILO 111 allows member states to expand the list of grounds on which discrimination is prohibited.<sup>57</sup> Since 1989, Australia has incorporated sexual orientation, gender identity, and marital status to the list of prohibited grounds of discrimination.<sup>58</sup>

51 See Moeckli (n 25) 157.

52 Ibid. CEDAW offers specific protection on the ground of sex and encompasses marital status as a protected attribute. For a comprehensive list of protected attributes, see Office of the United Nations High Commissioner for Human Rights, 'Comprehensive Anti-Discrimination Legislation Must Be a Priority, Say UN Experts Ahead of Universal Declaration Anniversary' <[www.ohchr.org/en/press-releases/2022/12/comprehensive-anti-discrimination-legislation-must-be-priority-say-un](http://www.ohchr.org/en/press-releases/2022/12/comprehensive-anti-discrimination-legislation-must-be-priority-say-un)>.

53 Moeckli (n 25) 157.

54 See ILO 111 arts 1, 2. Article 1(3) of the ILO 111 clarifies that 'employment and occupation' include 'access to vocational training, access to employment and to particular occupations, and terms and conditions of employment'.

55 International Labour Conference, *Equality in Employment and Occupation, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 4B)* (83rd Session, 1996) [111], [121], [277], [297].

56 International Labour Conference, *Giving Globalisation a Human Face, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1B)* (101st Session, 2012) [334], [824].

57 Article 1(b) of the ILO 111 expressly allows member states to determine 'such other distinction' (grounds) that may form the basis of discrimination.

58 *Human Rights and Equal Opportunity Commission Regulations 1989* (Cth) reg 4; *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) ss 426, 429, 432–433, 436; *Sex Discrimination Amendment (Sexual Orientation, Gender Identity, and Intersex Status) Act 2013* (Cth) ss 1, 25–27, 28–44. The ILO's Gender, Equality and Diversity Branch has highlighted the special importance of art 1(b) of the ILO 111 in allowing for the addition of new grounds of discrimination, including sexual orientation: International Labour Conference (n 55) [19], [51]–[52].

11.25 Relevantly for this Inquiry, multiple UN treaty bodies and special procedures recognise that gender-based discrimination amounts to sex-based discrimination.<sup>59</sup> The Committee on Economic, Social, and Cultural Rights has clarified that gender identity is a prohibited ground of discrimination and that 'other status' in art 2(2) of the ICESCR includes sexual orientation.<sup>60</sup> This latter view was also adopted by the Committee on the Rights of the Child.<sup>61</sup> In *Toonen v Australia*, the Human Rights Committee held that the right to privacy (under art 17 of the ICCPR) applies to a person's sexual orientation.<sup>62</sup> The Committee also accepted, in *Young v Australia*<sup>63</sup> and *X v Colombia*,<sup>64</sup> that 'sexual orientation' is covered separately from 'sex'. Most recently, in *G v Australia*, the Human Rights Committee found that refusal to change the sex on a transgender person's birth certificate if they were married constituted discrimination on the basis of marital status and transgender identity (under art 26 of the ICCPR), and arbitrary interference with the person's privacy and family (under art 17 of the ICCPR).<sup>65</sup> Acceptance of the norm of non-discrimination on these grounds is indicated by state practice, including through resolutions of the General Assembly and Human Rights Council,<sup>66</sup> and voluntary acceptance

59 See Human Rights Committee, *Views: Communication No 2324/2013*, 119th sess, UN Doc CCPR/C/116/D/2324/2013 (17 November 2016, adopted 31 March 2016) ('*Mellet v Ireland*'); Human Rights Committee, *Views: Communication No 2452/2014*, 119th sess, UN Doc CCPR/C/119/D/2425/2014 (11 July 2017) ('*Whelan v Ireland*'); Committee on the Elimination of Discrimination Against Women, *General Comment No 28: Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 47th sess, UN Doc CEDAW/C/GC/28 (16 December 2010); Human Rights Council, *Report of the Working Group on the Issue of Discrimination against Women in Law and in Practice*, 38th sess, UN Doc A/HRC/38/46 (14 May 2018) [14]; Agnes Callamard, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on a Gender-Sensitive Approach to Arbitrary Killings*, 38th sess, UN Doc A/HRC/35/23 (6 June 2017) [16].

60 See Committee on Economic, Social and Cultural Rights, *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)*, 42nd sess, UN Doc E/C.12/GC/20 (2 July 2009) [32].

61 See Committee on the Rights of the Child, *General Comment No 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, 33rd sess, UN Doc CRC/GC/2003/4 (1 July 2003) [6].

62 Human Rights Committee, *Views: Communication No 488/1992*, 50th sess, UN Doc CCPR/C/50/D/488/1992 (31 March 1994) ('*Toonen v Australia*') [8.6].

63 In Human Rights Committee, *Views: Communication No 941/2000*, 78th sess, UN Doc CCPR/C/78/D/941/2000 (18 September 2003) ('*Young v Australia*') [10.4], the Committee found that distinctions made between same-sex couples and opposite-sex couples in relation to veterans' entitlements were discriminatory and in breach of the right to equality (under art 26 of the ICCPR).

64 Human Rights Committee, *Views: Communication No 1361/2005*, 89th sess, UN Doc CCPR/C/89/D/1361/2005 (14 May 2007) ('*X v Colombia*') [7.2].

65 Human Rights Committee, *Views: Communication No 2172/2012*, 119th sess, UN Doc CCPR/C/119/D/2172/2012 (28 June 2017) ('*G v Australia*').

66 See Human Rights Council, *Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity*, GA Res 32/2, 32nd sess, UN Doc A/HRC/RES/32/2 (15th July 2016, adopted 30 June 2016), recalling General Assembly resolution 60/251 of 15 March 2006, in which the Assembly stated that the Human Rights Council 'should be responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner': *Resolution Adopted by the General Assembly*, GA Res 60/251, 60th sess, UN Doc A/RES/60/251 (3 April 2006, adopted 15 March 2006) [2].

of recommendations to address violence and discrimination based on sexual orientation and gender identity through the Universal Periodic Review process by more than 100 states.<sup>67</sup>

11.26 In June 2023, the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity stated:

That all persons should live free from violence and discrimination based on their sexual orientation and/or gender identity is not an idea from a particular part of the world: it is an international standard.<sup>68</sup>

## Obligations to enact anti-discrimination legislation

11.27 Australia has ratified all three international law instruments which specifically aim to eliminate discrimination on particular grounds: CEDAW, CERD, and the CRPD. Each of these instruments places obligations on Australia to operationalise the right to non-discrimination through legislation, policy, and practical actions, and are reflected in Commonwealth anti-discrimination laws (see [Chapter 12](#)). Specifically, art 3 of CEDAW requires Australia to take

all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

11.28 Article 2(2) of the ICESCR and art 26 of the ICCPR are also understood by their relevant committees to require state parties to legislate to prohibit discrimination by both state and private actors.<sup>69</sup> In General Comment No 28, the Committee on the Elimination of Discrimination Against Women explained that art 26 of the ICCPR requires states to prohibit sex-based discrimination by private actors ‘in areas such as employment, education, political activities and the provision of accommodation,

67 Vitit Muntarhorn, Independent Expert, *Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity*, 72nd sess, UN Doc A/72/172 (19 July 2017) [16]. In its 2021 Universal Periodic Review of Australia, the UN Human Rights Council noted Australia's implementation of previous recommendations made by the Council (recommendations 220–224) in its Second Cycle Universal Periodic Review of Australia. These recommendations related to legislation for same-sex marriage and open legal partnership models to all, regardless of a person's sexual orientation or gender identity, and a need to protect people from discrimination on the basis of sexual orientation, gender identity, and intersex status: Human Rights Council, *National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21: Australia*, 37th sess, UN Doc A/HRC/WG.6/37/AUS/1 (28 December 2020) [129]–[130].

68 Human Rights Council, *Freedom of Religion or Belief, and Freedom from Violence and Discrimination Based on Sexual Orientation and Gender Identity*, 53rd sess, UN Doc A/HRC/53/37 (7 June 2023) [9].

69 See Equal Rights Trust and Office of the United Nations High Commissioner for Human Rights (n 25) 4; Committee on Economic, Social and Cultural Rights, *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)*, 42nd sess, UN Doc E/C.12/GC/20 (2 July 2009) [37].

goods and services'.<sup>70</sup> This was followed by further recognition, in General Comment No 31, that the state must take positive measures to protect individuals from discrimination by private actors in 'fields affecting basic aspects of ordinary life such as work or housing'.<sup>71</sup>

11.29 Article 2 of the ILO 111 also requires member states to

declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

11.30 Treaty bodies are increasingly recognising the obligation of state parties to prohibit intersectional discrimination,<sup>72</sup> which the Equal Rights Trust and the OHCHR maintain 'can only be achieved through comprehensive anti-discrimination laws'.<sup>73</sup>

### **In focus: Guide to comprehensive anti-discrimination legislation**

The Equal Rights Trust and the OHCHR have recently provided guidance for states on the laws they should enact to meet their obligations to respect, protect, and fulfil the right to equality and non-discrimination. On release of the guidance in December 2022, 43 independent UN experts across 34 special procedures mandates provided their endorsement, and urged states 'to use the Guide and relevant human rights standards as practical tools for the development and reform of their legal frameworks on equality and non-discrimination'.<sup>74</sup>

70 Human Rights Committee, *General Comment No 28: Article 3 (The Equality of Rights Between Men and Women)*, 68th sess, UN Doc CCPR/C/21/Rev.1/Add.10 (29 March 2000) [31]. See also Committee on the Elimination of Discrimination Against Women, *General Comment No 28: Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 47th sess, UN Doc CEDAW/C/GC/28 (16 December 2010) [13].

71 Human Rights Committee, *General Comment No 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant: International Covenant on Civil and Political Rights*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004, adopted 29 March 2004) [8].

72 See Committee on the Elimination of Racial Discrimination, *General Recommendation No 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms Racial Discrimination*, 75th sess, UN Doc CERD/C/GC/32 (24 September 2009) [7]; Committee on the Elimination of Discrimination Against Women, *General Comment No 28: Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 47th sess, UN Doc CEDAW/C/GC/28 (16 December 2010) [18]; Committee on the Rights of Persons with Disabilities, *General Comment No 6: Equality and Non-Discrimination*, 19th sess, UN Doc CRPD/C/GC/6 (26 April 2018, adopted 9 March 2018) [19], [21]–[22].

73 Equal Rights Trust and Office of the United Nations High Commissioner for Human Rights (n 25) xxii.

74 Office of the United Nations High Commissioner for Human Rights (n 52).

According to these UN experts, the Guide details ‘the necessary elements of anti-discrimination legislation which is comprehensive, effective and consistent with the requirements of international human rights law’.<sup>75</sup> This includes that such legislation should:

- **Prohibit discrimination:** this involves the repeal or amendment of laws, policies, and practices that discriminate, and ensuring comprehensive and effective protection from discrimination.<sup>76</sup> This obligation also inheres a ‘duty to refrain from discrimination in all areas of life regulated by law and [covers] the conduct of all persons, including public and private actors’.<sup>77</sup>
- **Permit (and require) affirmative action:** such measures are temporary and aim to advance and achieve equality, and redress disadvantage.<sup>78</sup>
- **Establish equality duties:** this includes accessibility as a proactive, systemic duty, and statutory equality duties that operationalise the right to equality and non-discrimination. Ensuring the integration of institutional duties — which seek to advance equality in the work and operations of public and private sector organisations — is incorporated into this latter set of duties.<sup>79</sup>
- **Provide for an effective remedy:** remedies for discrimination can include sanctions, reparations, and institutional or societal measures that aim to address the social causes and consequences of discrimination.<sup>80</sup>
- **Provide access to justice and enforcement:** ensure effective access to justice for people who experience discrimination, and independent and impartial enforcement bodies.<sup>81</sup>
- **Establish equality bodies:** such bodies should be independent, effective, and accessible, with a mandate to promote equality, prevent discrimination, consider complaints of discrimination, ensure effective access to justice, and provide both remedy and sanction.<sup>82</sup>
- **Provide an implementation framework:** this framework should not only support the implementation of equality and non-discrimination policies, but also support the integration of these considerations into all other policies and programs.<sup>83</sup>

75 Ibid.

76 Equal Rights Trust and Office of the United Nations High Commissioner for Human Rights (n 25) 115.

77 Ibid xiv.

78 Ibid.

79 Ibid xv.

80 Ibid.

81 Ibid.

82 Ibid xvi.

83 Ibid.

## Right to freedom of thought, conscience, and religion

11.31 The right to freedom of thought, conscience, and religion is also central to the issues raised by the Terms of Reference. Several submissions addressed this right exclusively, including the associated right of parents 'to ensure the religious and moral education of their children in conformity with their own convictions'.<sup>84</sup>

11.32 The right to freedom of thought, conscience and religion is recognised in art 18 of the UDHR, and guaranteed under a number of international treaties, including art 18 of the ICCPR and art 14 of the CRC.<sup>85</sup> Those provisions place obligations on Australia to take measures to protect and ensure the right to freedom of religion or belief.

11.33 Protection against discrimination on the basis of religion is additionally guaranteed under arts 2 and 26 of the ICCPR and other treaty provisions.<sup>86</sup> Article 27 of the ICCPR affords protection to people belonging to religious minorities so that they 'shall not be denied the right, in community with other members of their group, to ... profess and practice their own religion ...'. Article 20(2) of the ICCPR further provides that '[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'.

11.34 The Human Rights Committee, in General Comment No 22, has described the right to freedom of thought, conscience, and religion as 'far reaching and profound'.<sup>87</sup> The Committee has also affirmed the non-derogable status of the right, as per art 4(2) of the ICCPR, in both General Comment No 29 and General Comment No 22, stating that the 'fundamental character of these freedoms is ... reflected in the fact that this provision cannot be derogated from, even in time of public emergency'.<sup>88</sup>

84 ICCPR art 18(4); CRC art 14; Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief art 5; ECHR art 9; ICESCR art 13(3). See A Deagon, *Submission 4*; Human Rights Law Alliance, *Submission 96*; Freedom for Faith, *Submission 203*.

85 Joint Standing Committee on Foreign Affairs, Defence, and Trade, *Interim Report: Legal Foundations of Religious Freedom in Australia* (2017) 8–10 lists a number of other potentially relevant instruments. See also the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief art 1.

86 For example, the ILO 111 and ILO 158. See A Deagon, *Submission 4*; Law Council of Australia, *Submission 428*.

87 Human Rights Committee, *General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993, adopted 30 July 1993) [1].

88 Human Rights Committee, *General Comment No 29: States of Emergency (Article 4)*, 72nd sess, UN Doc CCPR/C/21/Rev.1/Add.11 (31 August 2001) [7], [11]; Human Rights Committee, *General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993, adopted 30 July 1993) [1]; Sarah Joseph, 'Human Rights Committee: General Comment 29' (2002) 2(1) *Human Rights Law Review* 81. Former Special Rapporteur on freedom of religion or belief, Ahmed Shaheed, has stated that the 'normative essence of the right includes non-coercion in the exercise of freedom of thought, conscience and religion or belief; the right to manifest one's religion or belief; non-discrimination; and rule of law': Ahmed Shaheed, *Interim Report of the Special Rapporteur on Freedom of Religion or Belief*, 75th sess, UN Doc A/75/385 (12 October 2020) [64].

11.35 In discussing the normative scope of the right, former Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt, has presented an inclusive conceptualisation, stating:

Freedom of religion or belief does not — and indeed cannot — protect religions or belief systems themselves, that is, their various truth claims, teachings, rituals or practices. Instead, it empowers human beings — as individuals, as well as in community with others — who profess religions or beliefs and may wish to shape their lives in conformity with their own convictions. The reason for this focus on ‘believers rather than beliefs’ ... is not that human rights reflect a certain ‘anthropocentric world view’, as some observers have wrongly inferred. Instead, a main reason is that religions and beliefs are very different, often even irreconcilably so, in their messages and normative requirements. Religions and beliefs reflect an abundance of diverse teachings, doctrines, ideas of salvation, norms of conduct, liturgies, holidays, fasting periods, dietary customs, dress codes and other practices. Moreover, interpretations of what matters religiously may differ widely, not only between but also within religious communities. Hence, the only common denominator identifiable within such vast diversity seems to be the human being, who is the one professing and practising his or her religion or belief, as an individual and/or in community with others. Accordingly, human rights can only do justice to the existing and emerging diversity by empowering human beings, who indeed are the right-holders of freedom of religion or belief. This consistent focus on human beings as right-holders is also fully in line with the human rights-based approach in general.<sup>89</sup>

## Forum internum and forum externum

11.36 The right to freedom of thought, conscience, and religion, enshrined in art 18(1) of the ICCPR, is held by human beings as rights holders, and has relational and institutional aspects that are significant in its manifestation.

11.37 The first aspect is the freedom to have or adopt a religion or belief of one’s choice (the ‘*forum internum*’). This includes the right to not profess any religion or belief.<sup>90</sup> This is buttressed by art 18(2) of the ICCPR, which prohibits coercion that would impair a person’s freedom to have or to adopt a religion or belief of one’s choice. The Human Rights Committee has explained that such coercion would include the use or threat of physical force or penal sanctions to compel adherence, recantation, or conversion, and ‘policies or practices having the same intention or effect’.<sup>91</sup>

89 Heiner Bielefeldt, Special Rapporteur, *Elimination of all Forms of Religious Intolerance*, 71st sess, UN Doc A/70/286 (2 August 2015) [11].

90 Human Rights Committee, *General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993, adopted 30 July 1993) [2].

91 Ibid [5]. Bielefeldt, Ghanea, and Wiener have explained that ‘the term coercion should be interpreted in a strict manner’: Heiner Bielefeldt, Nazila Ghanea and Michael Wiener, *Freedom of Religion or Belief: An International Law Commentary* (Oxford University Press, 2016) 88.



11.38 The second aspect is the freedom to manifest one's religion or belief — either individually or with others, and in public or private — in worship, observance, practice and teaching (the '*forum externum*'). This aspect is considered in further detail below.

11.39 The *forum internum* aspect of this right — the freedom to hold or adopt a religion or belief, including the right not to be subject to coercion — is absolute and protected unconditionally.<sup>92</sup> This is distinguished from the *forum externum* aspect — the freedom to manifest religion or belief — which is not absolute, as art 18(3) of the ICCPR makes clear.<sup>93</sup> In other words, the right to manifest religion or belief 'does not always guarantee the right to behave in public in a manner governed by that belief'.<sup>94</sup> Rather, once a belief is 'manifested (that is, implemented) in action, it leaves the sphere of absolute protection, because the manifestation of a religious belief may have an impact on others'.<sup>95</sup> Hence, despite its non-derogable status, this freedom can be limited, in limited circumstances and in strict accordance with the terms of art 18(3), which is discussed below.

## Manifestation of religion or belief

11.40 In General Comment No 22, the Human Rights Committee elaborated on the 'broad range of acts' that may amount to manifestation of religion or belief protected in art 18(1), including:

- **worship:** which 'extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest';
- **observance and practice:** which 'may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or headcoverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group'; and
- **practice and teaching:** which 'includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries

92 Human Rights Committee, *General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993, adopted 30 July 1993) [3].

93 Ibid. See below at [11.44]–[11.52]. The right to hold opinions 'without interference' is also absolute in this sense, while the right to express those opinions may be 'subject to certain restrictions': see ICCPR arts 19(1), (3).

94 *Pichon and Sajous v France* (European Court of Human Rights, Chamber, Application No 49853/99, 2 October 2001) 5. This case concerned art 9 of the ECHR (the right to freedom of thought, conscience and religion) which is expressed in similar terms to art 18 of the ICCPR.

95 Australian Human Rights Commission, 'Freedom to Believe and the Freedom to Manifest That Belief' <[www.humanrights.gov.au/our-work/rights-and-freedoms/freedom-believe-and-freedom-manifest-belief](http://www.humanrights.gov.au/our-work/rights-and-freedoms/freedom-believe-and-freedom-manifest-belief)>.

or religious schools, and the freedom to prepare and distribute religious texts or publications'.<sup>96</sup>

11.41 The 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (although not binding), also elaborates on the types of acts protected by right to the freedom of religion or belief. These include the right:

- (a) To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes;
- (b) To establish and maintain appropriate charitable or humanitarian institutions;
- (c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;
- (d) To write, issue and disseminate relevant publications in these areas;
- (e) To teach a religion or belief in places suitable for these purposes;
- (f) To solicit and receive voluntary financial and other contributions from individuals and institutions;
- (g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;
- (h) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief; and
- (i) To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.<sup>97</sup>

11.42 Accordingly, establishing and operating an educational institution that is conducted in accordance with the beliefs of a particular religion is part of the exercise of the freedom to manifest a religion. It is just one of many different ways that a person or group might manifest their beliefs, but it is an important one. Some groups might conceive of education as a way of 'passing on' religion to the next generation (potentially alongside culture, language, and other group attributes). Religious educational institutions also play a role in training emerging religious leaders.

11.43 Article 18 of the ICCPR guarantees the freedom to manifest a religion or belief 'either individually or in community with others and in public or private'. As the report of the Religious Freedom Review explained:

In this respect, the human right to freedom of religion or belief has a communal or 'associational' dimension. However, the Special Rapporteur has observed that it is a right held by individuals and not by religions or religious organisations. The right is not designed to protect particular convictions, truth claims or belief

96 Human Rights Committee, *General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993, adopted 30 July 1993) [4]. See further Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief art 6.

97 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief art 6.

systems (religious or otherwise). Rather, the purpose of the right is to protect individual believers and their freedom to possess and express their beliefs, either individually or in community with others. This is an important distinction when assessing whether a particular measure involves a burden on the human right to freedom of religion or belief.<sup>98</sup>

## Limitations on manifestation of religion or belief

11.44 Article 18(3) of the ICCPR expressly contemplates that the freedom to manifest religion or belief can be limited in some circumstances. Article 18(3) stipulates that limitations on art 18(1) are only permissible as prescribed by law ‘where this is necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others’. In General Comment No 22, the Human Rights Committee stated, in relation to art 18(3):

Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18. The Committee observes that paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant ... Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.<sup>99</sup>

11.45 Professor Bielefeldt highlights that the main function of limitation clauses, such as art 18(3), is to establish criteria that ‘limit the scope of permissible limitations’.<sup>100</sup> The scope of this limitation is reflected in art 14(3) of the CRC. Submissions broadly acknowledged that the criteria set out in art 18(3) of the ICCPR, read in conjunction with General Comment No 22 by the Human Rights Committee, are the authoritative standard in limiting the right afforded in art 18(1).<sup>101</sup>

11.46 The Siracusa Principles state that the criterion of ‘necessity’ implies that a limitation be ‘based on one of the grounds justifying limitations’,<sup>102</sup> which under art 18(3) of the ICCPR includes the fundamental rights and freedoms of others.

98 *Religious Freedom Review: Report of the Expert Panel* (Report, 18 May 2018) 26–7 (citations omitted). The *travaux préparatoires* of the ICESCR and ICCPR reveal that discussions between delegations ‘stressed that the paramount issue was the protection of the individual’s freedom of choice in matters of thought, conscience and religion’: General Assembly, *Draft International Covenants on Human Rights: Report of the Third Committee*, 12th sess, UN Doc A/4625 (8 December 1960) 17 [49]. In contrast, some submissions considered that the right to freedom of religion or belief included a collective or an associational right (as distinct from a collective dimension): see, eg, A Deagon, *Submission 4*.

99 Human Rights Committee, *General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993, adopted 30 July 1993) [8].

100 Heiner Bielefeldt, ‘Limiting Permissible Limitations: How to Preserve the Substance of Religious Freedom’ (2020) 15 *Religion and Human Rights* 3, 4.

101 Human Rights Law Alliance, *Submission 96*; M Fowler, *Submission 201*; Australian Human Rights Commission, *Submission 384*; P Taylor, *Submission 386*.

102 *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 41st sess, UN Doc E/CN.4/1985/4 (28 September 1984) [10] (‘Siracusa Principles’).

The Siracusa Principles also state that any limitation must ‘respond to a pressing public or social need’, pursue ‘a legitimate aim’, and be ‘proportionate to that aim’.<sup>103</sup> Professor Gunn emphasises the strength of the term ‘necessity’, in that it suggests that ‘no other option is possible or that consequences will be dire if the restriction is not imposed’.<sup>104</sup>

11.47 Professor Bielefeldt, Associate Professor Ghanea, and Dr Wiener opine that limitation of the right to manifest freedom of religion or belief on the ground of the fundamental rights and freedom of others

is the most cross-cutting and intelligible of the limitation grounds, because it originates from the inherent logic of the human rights approach itself, which aims at protecting everyone’s human rights on the basis of equality.<sup>105</sup>

11.48 Notwithstanding this, there was concern in some submissions that the *Consultation Paper* did not define what constitutes a ‘fundamental right or freedom’ capable of falling within the scope of art 18(3).<sup>106</sup> Other submissions contended that despite human rights law insisting that all rights are equal, the existence of non-derogable rights in the ICCPR implied a hierarchy whereby only non-derogable rights were ‘fundamental’ while other rights were not.<sup>107</sup> This interpretation does not accord with the UDHR which sets out all of the human rights to be universally protected and refers collectively to these rights as ‘fundamental’.

11.49 In delineating the scope of art 18(3), and permissible limitation clauses more broadly, the Human Rights Committee has identified, specifically, equality and non-discrimination as one possible fundamental right that may warrant the limitation of the manifestation of freedom of religion or belief:

In interpreting the scope of permissible limitation clauses, States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26 [of the ICCPR].<sup>108</sup>

11.50 The Australian Human Rights Commission affirmed this scope in its submission.<sup>109</sup>

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103 Ibid.

104 Jeremy Gunn, ‘Permissible Limitations on the Freedom of Religion or Belief’ in John Witte Jr and Green (eds), *Religion and Human Rights: An Introduction* (Oxford University Press, 2012) 254, 254, 261.

105 Bielefeldt, Ghanea and Wiener (n 91) 557.

106 K Conolly MP, *Submission 24*.

107 P Parkinson, *Submission 95*.

108 Human Rights Committee, *General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993, adopted 30 July 1993) [8].

109 Australian Human Rights Commission, *Submission 384*.

11.51 The Siracusa Principles clarify that ‘the scope of the rights and freedoms of others that may act as a limitation upon rights in the [ICCPR] extends beyond the rights and freedoms recognised in the [ICCPR]’.<sup>110</sup> This means, for example, that the right to education, children’s rights, and employment rights, which are recognised under other treaties,<sup>111</sup> are capable of falling within the scope of art 18(3) of the ICCPR.

11.52 Article 18(4) of the ICCPR enshrines ‘respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions’. This right flows from the ‘guarantees of the freedom to teach a religion or belief’ protected under art 18(1).<sup>112</sup> This right, which highlights the relational dimension of the right to freedom of religion or belief, is discussed in detail below.

## Children’s rights

11.53 As rights holders, children are afforded human rights protection under general provisions in international instruments applicable to all people, and are afforded specific protection under the CRC.<sup>113</sup> Article 24(1) of the ICCPR also affords specific protection to every child of their right, without discrimination, to ‘such measures of protection as are required by [their] status as a minor, on the part of [their] family, society and the State’.

11.54 Article 3(1) of the CRC states that ‘in all actions concerning children ... the best interests of the child shall be a primary consideration’.<sup>114</sup> In General Comment No 14, the Committee on the Rights of the Child clarified that the best interests of the child is a threefold concept: it is a substantive right, a fundamental legal principle, and a rule of procedure.<sup>115</sup> The Committee has stated that ‘if a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child’s best interests should be chosen’.<sup>116</sup>

110 Siracusa Principles [35].

111 For example, rights enshrined under the ICESCR, ILO 111, CADE, and CEDAW.

112 Human Rights Committee, *General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993, adopted 30 July 1993) [6].

113 Renae Barker, ‘The Place of the Child in Recent Australian Debate about Freedom of Religion and Belief’ (2022) 11(6) *Laws* 83, 83.

114 The Committee on the Rights of the Child has interpreted ‘in all actions’ to mean in all decisions, acts, conduct, proposals, services, procedures and other measures: Committee on the Rights of the Child, *General Comment No 14: The Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art 3, Para 1)*, 62nd sess, UN Doc CRC/C/GC/14 (29 May 2013) [17].

115 *Ibid* [6].

116 *Ibid*.

11.55 As a state party to the CRC, Australia is obliged to ‘ensure that the interests of the child have been assessed and taken as a primary consideration in decisions and actions taken by the private sector’.<sup>117</sup> This includes individual decisions that concern or impact a child made by ‘administrative authorities’ with respect to education.<sup>118</sup> Australia is also obliged to ‘clarify the best interests of all children, including those in vulnerable situations, when adopting implementation measures’.<sup>119</sup> Reflecting the special situation of children, “primary consideration” means that the child’s best interests may not be considered on the same level as all other considerations’.<sup>120</sup>

11.56 The CRC recognises children as rights holders, holding the rights to:

- non-discrimination;<sup>121</sup>
- life;<sup>122</sup>
- education;<sup>123</sup>
- health;<sup>124</sup>
- express one’s views freely in all matters affecting the child where the child is capable of forming their own views, with due weight given in accordance with the age and maturity of the child;<sup>125</sup>
- freedom of expression;<sup>126</sup>
- freedom of thought, conscience and religion;<sup>127</sup>

117 Ibid [14].

118 Ibid [30].

119 Ibid [33].

120 Ibid [37].

121 CRC art 2. This provision includes a prohibition on discrimination on the basis of characteristics held by the child and of the child’s parents or legal guardians. These characteristics are race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth, or other status. The right to equality and non-discrimination is enshrined, more broadly, in: ICCPR arts 2(1), 3, 26; CEDAW arts 3, 5(a), 10, 11(2)(a).

122 CRC art 6(1). The Committee on the Rights of the Child has stated that ‘States must create an environment that respects human dignity and ensures the holistic development of every child. In the assessment and determination of the child’s best interests, the State must ensure full respect for his or her inherent right to life’: Committee on the Rights of the Child, *General Comment No 14: The Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration* (Art 3, Para 1), 62nd sess, UN Doc CRC/C/GC/14 (29 May 2013) [42].

123 CRC arts 28, 29(1). See also ICESCR art 13.

124 CRC art 24(1). See also ICESCR art 12(1); CERD art 5(e)(iv).

125 CRC art 12(1). This right is reinforced by art 3(1) of the CRC, ‘by facilitating the essential role of children in all decisions affecting their lives’, and must take into consideration the evolving capacities of the child (art 5): Committee on the Rights of the Child, *General Comment No 14: The Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration* (Art 3, Para 1), 62nd sess, UN Doc CRC/C/GC/14 (29 May 2013) [43]–[44]. This right was acknowledged by Australian Human Rights Commission, *Submission 384*.

126 CRC art 13(1). This right was acknowledged by Uniting Network Australia, *Submission 408*.

127 CRC art 14(1). As discussed elsewhere in this chapter, it is asserted that art 14(1) should be interpreted consistently with art 18 of the ICCPR, art 18 of the UDHR and the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief: see above at [11.31]–[11.52]. Further, art 14(1) should be interpreted in light of the principles of equality and non-discrimination: see Bielefeldt, Ghanea and Wiener (n 91) 421.

- profess and practise one's religion in community with other members of one's group (expressly for children from religious minorities or indigenous origin);<sup>128</sup>
- freedom of association and peaceful assembly;<sup>129</sup> and
- privacy and family, without arbitrary or unlawful interference.<sup>130</sup>

11.57 A key distinguishing factor of the CRC is its respect for 'the evolving capacities of the child'.<sup>131</sup> This recognition underpins 'the dynamic interrelatedness of parental rights and the rights of the child',<sup>132</sup> including through the expression of art 14 of the CRC, which enshrines a child's right to freedom of thought, conscience, and religion.<sup>133</sup>

11.58 In its submission, the Commissioner for Children and Young People (WA) drew attention to the intersection of freedom of thought, conscience, and religion, and other rights held by the child, stating:

Children and young people have the right to be supported in their own or their family's faith or community whether or not their personal attributes are consistent with religious teachings on sex, gender or sexuality.<sup>134</sup>

11.59 The rights of the child, including the best interests of the child, were recognised as central to the Inquiry by Dr van Leent, Dr Jeffries, Dr Barnes, and Dr Jowett from the Queensland University of Technology, who submitted that these rights should be prioritised to a greater extent under Australian law.<sup>135</sup> This latter sentiment was reflected in the submission by the Public Health Association of Australia.<sup>136</sup> Other submissions acknowledged rights afforded to children in relation to freedom of religion or belief.<sup>137</sup>

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128 CRC art 30. Bielefeldt, Ghanaia and Wiener recognise that while art 30 clearly acknowledges a community dimension, 'the immediate rights holder remains the individual child belonging to a religious minority': *ibid*. The authors maintain that art 30 should be interpreted and implemented in accordance with art 27 of the ICCPR. See also Heiner Bielefeldt, Special Rapporteur, *Elimination of all Forms of Religious Intolerance*, 70th sess, UN Doc A/70/286 (5 August 2015) [19].

129 CRC art 15(1).

130 *Ibid* art 16(1).

131 *Ibid* arts 5, 14. See also Gerison Lansdown, *The Evolving Capacities of the Child* (Study Paper, UNICEF Innocenti Research Centre, 2005).

132 Bielefeldt, Ghanaia and Wiener (n 91) 423.

133 *Ibid*.

134 Commissioner for Children and Young People WA, *Submission 373*.

135 L van Leent, M Jeffries, N Barnes and S Jowett, *Submission 158*. See also LGBTIQ+ Health Australia, *Submission 372* which stated that the best interests of the child are a primary consideration.

136 Public Health Association of Australia, *Submission 421*.

137 R Barker, *Submission 166*; Catholic Women's League of Victoria and Wagga Wagga, *Submission 187*; M Fowler, *Submission 201*; Australian Human Rights Commission, *Submission 384*; Uniting Network Australia, *Submission 408*.

## Right to education

11.60 Australia has specific treaty obligations in relation to the right to education under the ICESCR, CRC, CEDAW, and CADE.

11.61 The right to education is guaranteed in art 13(1) of the ICESCR which states:

The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

11.62 The Committee on Economic, Social, and Cultural Rights, in General Comment No 13, has emphasised that 'education is both a human right in itself and an indispensable means of realizing other human rights'.<sup>138</sup> As an 'empowerment right', the right to education acts as a vehicle to promote human dignity, rights, and democracy.<sup>139</sup> The Committee also noted that since the General Assembly's adoption of the ICESCR, several international instruments have elaborated on the objectives to which education should be directed.<sup>140</sup>

11.63 In the CRC, a child's right to education is recognised in art 28. In relation to the aims of education for children, art 29(1) of the CRC states:

States Parties agree that the education of the child shall be directed to:

...

(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

...

11.64 The educational aim embodied in art 29(1)(d) seeks to support children to develop respect for diversity and pluralism,<sup>141</sup> which underpins the preservation of a

138 Committee on Economic, Social and Cultural Rights, *General Comment No 13: The Right to Education (Article 13 of the Covenant)*, 21st sess, UN Doc E/C.12/1999/10 (8 December 1999) [1].

139 Ibid.

140 Ibid [5].

141 Oduntan Jawoniyi, 'Fulfilling Article 29:1 of the United Nations Convention on the Rights of the Child—the Aims of Education—through Religious Education' (2014) 9(1) *Religion and Human Rights* 31, 35.



democratic society.<sup>142</sup> The school environment is identified by the Committee on the Rights of the Child as needing to reflect the principles in art 29(1)(d), which requires schools to take measures to prevent exclusion and bullying to meet the aims of this provision.<sup>143</sup> This intent was encapsulated by the Committee in General Comment No 1, when it emphasised:

Children do not lose their human rights by virtue of passing through the school gates ... education must be provided in a way that respects the inherent dignity of the child and enables the child to express his or her views freely in accordance with article 12(1) and to participate in school life.<sup>144</sup>

11.65 In its submission, Kingsford Legal Centre similarly drew attention to the right of the child to education free from discrimination of any kind,<sup>145</sup> which is protected under arts 28 and 2(1) of the CRC. This view was strongly supported by the submission from the Commissioner for Young People (SA).<sup>146</sup>

11.66 Adopted by the General Conference of UNESCO in 1960, CADE affirms the UDHR's assertion of the principle of non-discrimination and the proclamation that every person has the right to education. It considers that discrimination in education is a violation of rights enunciated in the UDHR.

11.67 Article 2 of CADE establishes that the establishment or maintenance of religious educational institutions in accordance with the wishes of the student's parents is not discriminatory if the education provided conforms to such standards as may be laid down or approved by the competent authorities.<sup>147</sup> It states that the object of private educational institutions cannot be to secure the exclusion of any group.<sup>148</sup>

11.68 Under art 3 of CADE, states must 'ensure, by legislation where necessary, that there is no discrimination in the admission of students to educational institutions'.<sup>149</sup>

11.69 In addition to its treaty obligations, Australia has committed to meeting the UN Sustainable Development Goals, including Goal 4 which seeks to ensure inclusive

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142 The principle that 'pluralism in education is essential for the preservation of democratic society' in the context of freedom of religion and education was recognised by the ECtHR in *Kjeldsen, Busk Madsen and Pedersen v Denmark* (European Court of Human Rights, Chamber, Application No 5095/71, 5920/72, 5926/72, 7 December 1976) [50]. See also Eugenia Relaño, 'Educational Pluralism and Freedom of Religion: Recent Decisions of the European Court of Human Rights' (2010) 32(1) *British Journal of Religious Education* 19, 23. The contribution of freedom of religion to a democratic society is also recognised more broadly: see Lotta Lerwall, 'Ban on Faith-Based Schools?' in Hedvig Bernitz and Victoria Enkvist (eds), *Freedom of Religion: An Ambiguous Right in the Contemporary European Legal Order* (Hart Publishing, 2020) 151–2.

143 Committee on the Rights of the Child, *General Comment No 1: The Aims of Education* (Article 29), 26th sess, UN Doc CRC/GC/2001/1 (17 April 2001) [19].

144 Ibid [8].

145 Kingsford Legal Centre, *Submission* 339.

146 Commissioner for Children and Young People SA, *Submission* 360, who also cited art 29 of the CRC as relevant right. See also Law Council of Australia, *Submission* 428.

147 CADE art 2(b).

148 Ibid art 2(c).

149 Ibid art 3(b).

and equitable education for all.<sup>150</sup> Citing Goal 4, UNESCO recently considered the exclusion of LGBTI students in education:

Schools should be safe, inclusive and supportive of all learners. Yet, LGBTI learners endure hostile conditions at school, experiencing or risking physical violence, bullying and discrimination. Such experiences negatively affect students' health and well-being but also lead to worse education outcomes, showing in higher absenteeism and lower educational attainment and aspirations, as observed with all students who suffer violence ... A range of interventions are needed to promote a safe and inclusive environment, protect the right to education, health and physical integrity for all learners and lead efforts to shift societal attitudes, within the framework of the broader social inclusion objective.<sup>151</sup>

11.70 The *Abidjan Principles on the Human Rights Obligations of States to Provide Public Education and to Regulate Private Involvement in Education* ('Abidjan Principles') act as guiding (soft law) principles on the human rights obligations of states to provide public education and to regulate private involvement in education.<sup>152</sup> Recognised by the Human Rights Committee and Special Rapporteur on the right to education,<sup>153</sup> these principles promote equality and non-discrimination in education, recognising the intersectionality of different grounds of discrimination.<sup>154</sup> The Abidjan Principles attribute shared responsibility, owed by both the state and private actors, to ensure that education delivered in private educational institutions is consistent with applicable human rights law.<sup>155</sup>

## Parents' rights and liberties

11.71 Parents are expressly afforded rights and attributed responsibilities across several international human rights instruments.<sup>156</sup>

11.72 Article 26(3) of the UDHR recognises that: 'Parents have a prior right to choose the kind of education that shall be given to their children'. This is reflected in the ICCPR, ICESCR, CRC, and CADE which guarantee a parental liberty to ensure

150 Department of Foreign Affairs and Trade (Cth), *2017 Foreign Policy White Paper* (Report, 2017) 18. The Sustainable Development Goals emerge from the 2030 Agenda for Sustainable Development which are a globally agreed, long-term map for development.

151 United Nations Educational, Scientific and Cultural Organisation, *Don't Look Away: No Place for Exclusion of LGBTI Students* (Policy Paper 45, May 2021) 1.

152 *The Abidjan Principles on the Human Rights Obligations of States to Provide Public Education and to Regulate Private Involvement in Education* (13 February 2019) ('Abidjan Principles').

153 See Human Rights Council, *The Right to Education: Follow-Up to Human Rights Council Resolution 8/4*, 41st sess, UN Doc A/HRC/41/L.26 (9 July 2019); Koumba Boly Barry, Special Rapporteur, *Right to Education: Impact of the Coronavirus Disease Crisis on the Right to Education – Concerns, Challenges and Opportunities*, 44th sess, UN Doc A/HRC/44/39 (30 June 2020).

154 Abidjan Principles 13, [13]–[24].

155 Ibid 18–19, [49], [52].

156 See ICCPR arts 17, 18(4), 23; CRC arts 3(2), 5, 18; CEDAW art 16(1)(d); CADE art 5(1)(b).

the moral and religious education of one's children in accordance with one's own convictions. This liberty is also associated with a liberty to establish private schools.<sup>157</sup>

11.73 Over the past 10 years, treaty body jurisprudence and commentary have highlighted an evolving and increasingly nuanced understanding of the intersection between parental rights, children's rights, and the right to education. This jurisprudence and commentary are discussed alongside relevant treaty provisions to set out the scope of the parental liberty, in light of these other rights in particular.

## Convention against Discrimination in Education

11.74 The liberty of parents to choose an education for their children was first guaranteed by treaty in the European context in 1954, within the First Protocol to the ECHR, which guarantees the right to education.<sup>158</sup> It was then reflected in CADE (to which Australia is a party), adopted in 1960. Article 5(1)(a) of CADE sets out the aims of education (as discussed above). Article 5(1)(b) of CADE then provides that it

is essential to respect the liberty of parents and, where applicable, of legal guardians, firstly to choose for their children institutions other than those maintained by the public authorities but conforming to such minimum educational standards as may be laid down or approved by the competent authorities and, secondly, to ensure in a manner consistent with the procedures followed in the State for the application of its legislation, the religious and moral education of the children in conformity with their own convictions; and no person or group of persons should be compelled to receive religious instruction inconsistent with his or their conviction ...<sup>159</sup>

## ICCPR

11.75 Parental liberty was then recognised in both the ICCPR and ICESCR, adopted on the same day in 1966. In the ICCPR, the liberty is recognised alongside the right to freedom of religion or belief (see below **In focus: Insights from the travaux préparatoires for the ICESCR and ICCPR**). Article 18(4) of the ICCPR states that the

States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

157 See ICCPR art 18(4); ICESCR art 13(3); CRC art 14(2); CADE art 5(1)(b). A parental liberty to choose for their children an educational institution other than a public educational institution is also recognised under overarching principle 3 of the Abidjan Principles: at 13 [23]–[24].

158 *Convention for Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol No 1 to the Convention for Protection of Human Rights and Fundamental Freedoms*, opened for signature 20 March 1952, ETS No 009 (entered into force 18 May 1954).

159 CADE art 5(c) guarantees the right of members of national minorities to carry on their own educational activities, including the maintenance of schools, subject to certain conditions.

11.76 The right enshrined in art 18(4) was cited as highly relevant to the Inquiry in many submissions.<sup>160</sup>

11.77 In General Comment No 22, issued in 1993, the Human Rights Committee stated that the liberty afforded to parents under art 18(4) cannot be restricted.<sup>161</sup> However, former Special Rapporteur Bielefeldt subsequently clarified that art 18(4) of the ICCPR should be 'interpreted in the light of the [CRC]', while art 14(2) of the CRC should be 'seen in continuity with art 18(4)' of the ICCPR.<sup>162</sup> The *travaux préparatoires* also clarify the scope of this right (see below [In focus: Insights from the travaux préparatoires for the ICESCR and ICCPR](#)).

11.78 In explaining the scope of parental rights, former Special Rapporteur Bielefeldt has stated that art 18(4) of the ICCPR does not prevent the state from imposing educational standards.<sup>163</sup> This position is principally stated in the ICESCR (adopted in 1966), whereby the liberty of parents to choose schools other than public schools for their children is qualified by a condition that such schools conform to 'such minimum educational standards as may be laid down or approved by the State'.<sup>164</sup>

160 P Nolan, *Submission 1*; Christian Churches, *Submission 80*; P Parkinson, *Submission 95*; Anglican Church Diocese of Sydney, *Submission 189*; Presbyterian Church of Victoria, *Submission 195*; M Fowler, *Submission 201*; University of Southern Queensland Law, Religion, and Heritage Research Program Team, *Submission 202*; Freedom for Faith, *Submission 203*; Association of Independent Schools of South Australia, *Submission 212*; K Donnelly, *Submission 227*; Catholic School Parents Australia, *Submission 247*; Institute of Public Affairs, *Submission 250*; Council of Catholic School Parents NSW and the ACT, *Submission 288*; Australian Christian Lobby, *Submission 299*; Islamic Council of Victoria, *Submission 301*; I Waller, *Submission 311*; J Alvaro, *Submission 349*; Executive Council of Australian Jewry, *Submission 377*; P Taylor, *Submission 386*; Bishops of Australasian-Middle East Christian Apostolic Churches, *Submission 388*; Catholic Education Tasmania, *Submission 397*; Australian Lutheran Education Australia, *Submission 402*; National Catholic Education Commission, *Submission 409*; Muslim Legal Network (NSW), *Submission 419*.

161 Human Rights Committee, *General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993, adopted 30 July 1993) [8]. See Human Rights Law Alliance, *Submission 96*, which draws attention to this statement as a justification for the position that the ALRC's proposals in the *Consultation Paper* would result in unwarranted restrictions.

162 Heiner Bielefeldt, Special Rapporteur, *Elimination of all Forms of Religious Intolerance*, 70th sess, UN Doc A/70/286 (5 August 2015) [33]. In the United Kingdom House of Lords, debates over the degree to which the state can override parental decisions in relation to their children's religious education have highlighted the child's right to education as playing 'a more prominent role in determining the scope of parental choice': Ryan Hill, 'Open Options Education and Children's Religious Upbringing: A Critical Review of Current Discussions Taking Place in the UK Parliament' (2019) 8(3) *Oxford Journal of Law and Religion* 567, 568.

163 Heiner Bielefeldt, Special Rapporteur, *Elimination of all Forms of Religious Intolerance*, 70th sess, UN Doc A/70/286 (5 August 2015) [50].

164 See ICESCR art 13(3).

## ICESCR

11.79 In the ICESCR, a parental liberty is found alongside the right to education. Article 13(3) provides that the

States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

11.80 Adjunct to this parental right is the liberty of individuals and bodies to establish and direct educational institutions subject to the principles in art 13(1) of the ICESCR, and in conformity with minimum standards set by the state under art 13(4). As stated in art 13(1), these principles include that education be

directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms ... [and] enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

11.81 In General Comment No 13, the Committee for Economic, Social, and Cultural Rights clarified that art 13(3) is to be read alongside art 13(4), which:

29. ... affirms 'the liberty of individuals and bodies to establish and direct educational institutions', provided the institutions conform to the educational objectives set out in article 13(1) and certain minimum standards. These minimum standards [under art 13(4)] may relate to issues such as admission, curricula and the recognition of certificates. In their turn, these standards must be consistent with the educational objectives set out in article 13(1).

30. ... Given the principles of non-discrimination, equal opportunity and effective participation in society for all, the State has an obligation to ensure that the liberty set out in article 13(4) does not lead to extreme disparities of educational opportunity for some groups in society.

...

54. States parties are obliged to establish 'minimum educational standards' to which all educational institutions established in accordance with article 13(3) and (4) are required to conform. They must also maintain a transparent and effective system to monitor such standards.<sup>165</sup>

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165 Committee on Economic, Social and Cultural Rights, *General Comment No 13: The Right to Education (Article 13 of the Covenant)*, 21st sess, UN Doc E/C.12/1999/10 (8 December 1999) [29]–[30], [54].

### In focus: Insights from the *travaux préparatoires* for the ICESCR and ICCPR

The *travaux préparatoires* for the ICESCR and ICCPR offer insight into the origins of the liberty rights afforded to parents in art 13(3) of the ICESCR and art 18(4) of the ICCPR.

Although the ICESCR and ICCPR were negotiated in tandem, the incorporation of a parental right to 'choose the kind of education that shall be given to their children' (as stated in art 26(3) of the UDHR) into a human rights treaty was first proposed by the delegation from the Netherlands in the context of the right to education (under art 13 of the ICESCR). This proposal responded to 'the lessons of Nazi experience' which demonstrated how freedom of conscience could be infringed when 'children were taken from their parents and indoctrinated by the State'.<sup>166</sup>

Regarding the scope of this parental right, delegates felt that it was impossible to provide parents with the right to determine the curriculum of their child's education as complete freedom in this respect might result in teaching contrary to the aims of education set out in art 13(1) of the ICESCR.<sup>167</sup>

The subsequent proposal of art 18(4) of the ICCPR by the delegate from Greece was met with mixed response, given this provision would duplicate art 13(3) of the ICESCR.<sup>168</sup> Parties to the negotiation deemed that duplication was warranted to ensure that States that were party to the ICCPR, but not the ICESCR, would be bound.<sup>169</sup>

The right afforded to parents is unique in that it confers a right on a third party, rather than the individual (the child). This characteristic was raised as an issue by some delegates given that the ICCPR and ICESCR attach rights to the individual.<sup>170</sup>

166 General Assembly, *Draft First International Covenant on Human Rights and Measures of Implementation*, 5th sess, A/C.3/SR.290 (20 October 1950) [18]. Professor Evans has identified, in the context of negotiations for the ECHR, that the parental right to choose private religious schooling for their children was underpinned by an aim to avoid the influence of totalitarian governments over education, whereby parents were excluded from decisions about the moral and religious education of their children: Carolyn Evans, *Freedom of Religion Under the European Convention on Human Rights* (Oxford University Press, 2001) 46.

167 General Assembly, *Draft International Covenants on Human Rights: Annotations Prepared by the Secretary-General*, 10th sess, UN Doc A/2929 (1 July 1955) 324 [45], [47].

168 General Assembly, *Draft International Covenants on Human Rights: Report of the Third Committee*, 12th sess, UN Doc A/4625 (8 December 1960) [45], [54]; UN GAOR, 15th sess, 1027th mtg, Agenda Item 34, UN Doc A/C.3/SR.1027 (18 November 1960) [16], [31]; UN GAOR, 15th sess, 1028th mtg, Agenda Item 34, UN Doc A/C.3/SR.1028 (21 November 1960) [1].

169 General Assembly, *Draft International Covenants on Human Rights: Report of the Third Committee*, 12th sess, UN Doc A/4625 (8 December 1960) [54].

170 UN GAOR, 15th sess, 1023rd mtg, Agenda Item 34, UN Doc A/C.3/SR.1028 (15 November 1960) [19]; UN GAOR, 15th sess, 1025th mtg, Agenda Item 34, UN Doc A/C.3/SR.1025 (17 November 1960) [57].

## Convention on the Rights of the Child

11.82 Article 14(2) of the CRC is the most recent articulation of the parental liberty, which is associated with the right of the child to freedom of thought, conscience, and religion (under art 14(1)):

States Parties shall respect 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.

11.83 Since 1989, the widespread adoption of the CRC has shifted thinking in relation to children's rights towards a focus on the interests of the child, centring the child in the interpretation of the right to freedom of religion or belief, the right to education, and parents' rights.

11.84 The Committee on the Rights of the Child, in General Comment No 20, clarified that under art 14(2) of the CRC, parental rights and duties to provide direction to the child with respect to freedom of religion or belief are to be in a manner consistent with the child's evolving capacities:

In other words, it is the child who exercises the right to freedom of religion, not the parent, and the parental role necessarily diminishes as the child acquires an increasingly active role in exercising choice throughout adolescence.<sup>171</sup>

11.85 In addition to the agency afforded to the child in art 14 of the CRC, art 12(1) of the CRC also provides that 'children have the right to express their own views in all matters affecting them, and that their views should be given due weight in accordance with their age and maturity'.<sup>172</sup>

11.86 Former Special Rapporteur Bielefeldt has identified art 5 of the CRC as playing a key role in defining the 'complex and dynamic relationship between the rights of the child and parental rights and duties' which are expressly interrelated in art 14(2).<sup>173</sup> Article 5 states:

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable ... other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the [CRC].

11.87 Article 29(1) of the CRC sets out the aims of education. In General Comment No 1, the Committee on the Rights of the Child recognised that art 29(1) also 'draws

171 Committee on the Rights of the Child, *General Comment No 20: Implementation of the Rights of the Child during Adolescence*, UN Doc CRC/C/GC/20 (6 December 2016) [43]. See also Heiner Bielefeldt, *Report of the Special Rapporteur on Freedom of Religion or Belief*, 16th sess, UN Doc A/HRC/16/53 (15 December 2010) [50]–[51]. See also *Perovy v Russia* (European Court of Human Rights, Court (Third Section), Application No 47429/09, 19 April 2021) [49]–[50].

172 See Australian Human Rights Commission, *Submission 384*.

173 Heiner Bielefeldt, Special Rapporteur, *Elimination of all Forms of Religious Intolerance*, 70th sess, UN Doc A/70/286 (5 August 2015) [24].

upon, reinforces, integrates and complements' provisions that cannot be fully understood in isolation.<sup>174</sup> For example, this includes underlining

the importance of respect for parents, of the need to view [children's] rights within their broader ethical, moral, spiritual, cultural or social framework, and of the fact that most children's rights, far from being externally imposed, are embedded within the values of local communities.<sup>175</sup>

11.88 In this context, the Committee recognised the impact that discrimination can have on a child's right to education,<sup>176</sup> stating:

Discrimination on the basis of any of the grounds listed in article 2 of the [CRC], whether it is overt or hidden, offends the human dignity of the child and is capable of undermining or even destroying the capacity of the child to benefit from educational opportunities.<sup>177</sup>

11.89 The Committee also recognised that practices that are inconsistent or incompatible with the rights enshrined in the CRC are not in the child's best interests.<sup>178</sup> This may include, in certain instances, practices that seek to preserve the religious and cultural values and traditions that form a child's identity.<sup>179</sup>

11.90 The Committee elaborated upon the best interests of the child in General Comment No 14, and considered how to reconcile potential conflicts between rights. It stipulated that the best interests of the child, as an established human rights norm, be a primary consideration:

If harmonization [between rights] is not possible, authorities and decision-makers will have to analyse and weigh the rights of all those concerned, bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child's interests have high priority and not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best.<sup>180</sup>

11.91 Bielefeldt, Ghanea, and Wiener have stated that, fundamentally, even when taking the best interests of the child as a primary consideration, a child's human rights 'can never be conceptualized in a spirit of narrow "individualism"'. They clearly

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174 Committee on the Rights of the Child, *General Comment No 1: The Aims of Education (Article 29)*, 26th sess, UN Doc CRC/GC/2001/1 (17 April 2001) [6].

175 Ibid [7].

176 See *ibid* [10]. This is also reflected, applying to all people, in the UDHR.

177 Ibid. This includes discrimination on the basis of religion, sex, race, colour, language, political or other opinion, national, ethnic or social origin, property, disability, birth, or other status.

178 Committee on the Rights of the Child, *General Comment No 14: The Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art 3, Para 1)*, 62nd sess, UN Doc CRC/C/GC/14 (29 May 2013) [57].

179 Ibid.

180 Ibid [39]. Relevant here and more broadly, the Committee has specified a non-exhaustive list of elements to be considered when assessing and determining a child's best interests: at [52]–[84]. For recent jurisprudence on the consideration and weighting of elements in an assessment by the Committee, see Committee on the Rights of the Child, *Views: Communication No 51/2018*, 86th sess, UN Doc CRC/C/86/D/51/2021 (12 March 2021) ('*A.B. v Finland*') [12.4].



presuppose community ties, and above all, family ties without which the rights of the child cannot be realized'.<sup>181</sup>

11.92 Former Special Rapporteur Bielefeldt has noted that the context of religious instruction in private schools warrants specific assessment, because

private schools, depending on their particular rationale and curriculum, might accommodate the more specific educational interests or needs of parents and children, including in questions of religion or belief. Indeed, many private schools have a specific denominational profile which can make them particularly attractive to adherents of the respective denomination, but frequently also for parents and children of other religious or belief orientation. In this sense, private schools constitute a part of the institutionalized diversity within a modern pluralistic society.<sup>182</sup>

### Legitimate interference with the right

11.93 On the basis that the parental liberty to ensure the religious and moral education of one's children in conformity with one's own convictions (under art 18(4) of the ICCPR) is related to the guarantee of the freedom to teach religion protected under art 18(1), this right may only be limited in strict accordance with the criteria in art 18(3) of the ICCPR.

11.94 There is limited jurisprudence from the Human Rights Committee on art 18(4) of the ICCPR.<sup>183</sup> To date, communications considered by the Committee have centred on the provision of religious education in public schools, public funding of religious educational institutions, and ensuring that state-provided education is delivered to students in a way that is not inconsistent with the convictions of their parents.<sup>184</sup> The Committee has not considered an asserted breach of art 18(4) in situations where religious educational institutions were restricted from discriminating against students or staff on grounds such as those in the *Sex Discrimination Act*.

11.95 While not directly applicable, jurisprudence from the ECtHR offers some guidance as to the scope of parents' rights, and legitimate grounds for interference.<sup>185</sup> In a number of cases brought under the ECHR, a child's right to education has

181 Bielefeldt, Ghanea and Wiener (n 91) 221.

182 Heiner Bielefeldt, *Report of the Special Rapporteur on Freedom of Religion or Belief*, 16th sess, UN Doc A/HRC/16/53 (15 December 2010) [54].

183 For allegations of breach of art 18(4) of the ICCPR see, eg, Human Rights Committee, *Views: Communication No 40/1978*, 82nd sess, UN Doc CCPR/C/12/D/40/1978 (9 April 1981) ('*Hartikainen et al v Finland*'); Human Rights Committee, *Views: Communication No 694/1996*, 67th sess, UN Doc CCPR/C/67/D/694/1996 (5 November 1999) ('*Waldman v Canada*'); Human Rights Committee, *Views: Communication No 1155/2003*, 82nd sess, UN Doc CCPR/C/82/D/1155/2003 (23 November 2004, adopted 3 November 2004) ('*Leirvåg v Norway*').

184 See Paul Taylor, *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights* (Cambridge University Press, 2020) 530–3.

185 See *Osmanoğlu and Kocabaş v Switzerland* (European Court of Human Rights, Court (Third Section), Application No 29086/12, 10 January 2017); *Konrad v Germany* (European Court of Human Rights, Court (Fifth Section), Application No 35504/03, 11 September 2006).

been prioritised over a parental right to have their religious beliefs respected.<sup>186</sup> For example, in *Osmanoğlu and Kocabaş v Switzerland*,<sup>187</sup> the Court considered whether compulsory mixed-gender swimming classes for girls against the will of their Muslim parents, who objected on religious grounds, violated the parents' right to freedom of religion (under art 9 of the ECHR). The Court concluded that, for an interference with the right to freedom of religion or belief to be justified, it must be prescribed by law, intended to achieve a legitimate aim, proportionate to that aim, and necessary in a democratic society.<sup>188</sup> In this instance, the Court found that the actions taken by authorities were justified, as they were proportionate to the legitimate aim of full participation in education and social integration (for migrants) and that the fine issued to the parents for non-compliance was not unduly harsh.

11.96 Submissions made to the ALRC reflected different understandings of the role of the state. For instance, one submission suggested that parents

are responsible for the quality and content of their [child's] education. For a Government to assume this authority establishes a dictatorship, contrary to democracy and common sense.<sup>189</sup>

11.97 In contrast, another submission stated:

Of course, all schools are obliged to follow the government's curriculum as well [as] regulations concerning the well being of children, adults and staff in each of these [religious educational] institutions. But within this framework, much diversity can be achieved and should be encouraged.<sup>190</sup>

11.98 While a parent's duty and liberty to give direction to their child in the exercise of the right to freedom of religion or belief in accordance with the child's evolving capacities, and to choose private denominational education for their children, is to be respected by the state, this right does not displace the duty of the state to set and approve educational standards.<sup>191</sup> Some have suggested that this role incorporates

186 See *Osmanoğlu and Kocabaş v Switzerland* (European Court of Human Rights, Court (Third Section), Application No 29086/12, 10 January 2017); *Konrad v Germany* (European Court of Human Rights, Court (Fifth Section), Application No 35504/03, 11 September 2006) 6; *BN and SN v Sweden* (European Commission of Human Rights, Second Chamber, Application No 17678/91, 30 June 1993), citing *Campbell and Cossans v United Kingdom* (European Court of Human Rights, Chamber, Application No 7511/76 and 7743/76, 25 February 1982). See also Lerwall (n 142) 146.

187 *Osmanoğlu and Kocabaş v Switzerland* (European Court of Human Rights, Court (Third Section), Application No 29086/12, 10 January 2017).

188 The case of *Osmanoğlu and Kocabaş v Switzerland* centred on whether mandatory attendance of mixed-gender swimming classes by female Muslim students at a public school, against the will of their parents, violated art 9 of the ECHR (which protects a right to freedom of religion or belief). On the basis of its proportionality analysis, the ECtHR found that there was interference with rights protected under art 9, but no violation.

189 A Hodge, *Submission 113*.

190 M Vieira, *Submission 137*.

191 On this point, see the decision by the England and Wales High Court: *Birmingham City Council v Afsar* (No 3) [2019] EWHC 3217 (QB) [61]. See also Heiner Bielefeldt, Special Rapporteur, *Elimination of all Forms of Religious Intolerance*, 70th sess, UN Doc A/70/286 (5 August 2015) [50].

an obligation to ‘oversee education in the light of the interest of society and children’,<sup>192</sup> with the aim of preserving a democratic society through the promotion of pluralism.<sup>193</sup>

11.99 It is the responsibility of a state to respect and protect all rights concerned, not only, for example, the rights of the child and the right to education. Intervention in parental rights, on behalf of a child, is recognised as serious and requiring minimum interference on a sound legal basis. Notwithstanding this, a state’s responsibilities, as duty bearer and with respect to the right of education, includes supporting diversity and pluralism through the curriculum.

11.100 Submissions reflected different understandings of whether the parental liberty to choose religious education for their child extends to control of what is delivered through the whole curriculum. Some submissions understood the curriculum to be encompassed by this liberty,<sup>194</sup> or as a matter for religious educational institutions without state interference.<sup>195</sup> Others saw the curriculum as within the purview of the state.<sup>196</sup>

11.101 The *travaux préparatoires* of the ICESCR clarify that the curriculum does not fall under the scope of the parental liberty enshrined in art 13(3) of the ICESCR (nor its corollary in art 18(4) of the ICCPR), as it was deemed by delegates that this may lead to teachings contrary to the principles set out in art 13(1) of the ICESCR.<sup>197</sup>

## Right to freedom of expression

11.102 The right to freedom of expression was broadly recognised in some submissions as associated with the expression of freedom of religion or belief — including evolving expressions of faith — and in some instances, in relation to equality.<sup>198</sup>

11.103 While art 18 of the ICCPR provides a guarantee for freedom of expression in relation to religion or belief, a free-standing right is recognised and protected under art 19 of the ICCPR, which states:

192 Marcel Maussen and Veit Bader, ‘Non-Governmental Religious Schools in Europe: Institutional Opportunities, Associational Freedoms, and Contemporary Challenges’ (2015) 51(1) *Comparative Education* 1, 10.

193 See *Kjeldsen, Busk Madsen and Pedersen v Denmark* (European Court of Human Rights, Chamber, Application No 5095/71, 5920/72, 5926/72, 7 December 1976) [50]; *Relaño* (n 142) 23. The contribution of freedom of religion to a democratic society is also recognised: *Lerwall* (n 142) 151–2.

194 A Hodge, *Submission 113*.

195 W Larkin, *Submission 15*.

196 M Vieira, *Submission 137*; Independent Education Union, *Submission 387*.

197 Carlos Manuel Cox, Special Rapporteur, *Draft International Covenants on Human Rights: Report of the Third Committee*, 12th sess, UN Doc A/3764 (5 December 1957) 7.

198 University of Divinity, *Submission 115*; Queensland Human Rights Commission, *Submission 125*; Freedom for Faith, *Submission 203*; K Donnelly, *Submission 227*; A Rasul, *Submission 282*; Kingsford Legal Centre, *Submission 339*; Australian Human Rights Commission, *Submission 384*; Institute for Civil Society, *Submission 399*; Australian National Imams Council, *Submission 401*; Law Council of Australia, *Submission 428*.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

11.104 The Human Rights Committee, in General Comment No 34, has recognised freedom of expression and freedom of opinion as ‘indispensable conditions for the full development of the person’, ‘essential for any society’, and a ‘foundation stone for every free and democratic society’.<sup>199</sup> This right includes the right to receive and impart information and ideas through teaching,<sup>200</sup> religious discourse,<sup>201</sup> and discussion of human rights.<sup>202</sup>

11.105 The right to freedom of expression is also protected under arts 4 and 5 of CERD and arts 12 and 13 of the CRC.

## Right to freedom of association

11.106 The freedom of association with others is enshrined in art 22 of the ICCPR, art 5 of CERD, and art 15 of the CRC. This right encompasses ‘the right of individuals to form associations for common purposes, free from government interference’.<sup>203</sup> It includes ‘the right of the association to independently to determine its membership, appoint officers, employ staff, and generally conduct its own affairs subject only to the law’, including prohibitions on discrimination.<sup>204</sup>

11.107 While not binding, the Joint Guidelines for Freedom of Association, established by the European Commission for Democracy Through Law and the OSCE (Organisation for Security and Cooperation in Europe) Office for Democratic

199 Human Rights Committee, *General Comment No 34: Article 19 (Freedoms of Opinion and Expression)*, 102th sess, UN Doc CCPR/C/GC/34 (12 September 2011) [2].

200 See Human Rights Committee, *Views: Communication No 736/1997*, 70th sess, UN Doc CCPR/C/70/D/736/1997 (26 October 2000, adopted 18 October 2000) (*‘Ross v Canada’*).

201 See *ibid*.

202 See Human Rights Committee, *Views: Communication No 1022/2001*, 85th sess, UN Doc CCPR/C/85/D/1022/2001 (23 November 2005, adopted 20 October 2005) (*‘Velichkin v Belarus’*).

203 Dominic McGoldrick, ‘Thought, Expression, Association, and Assembly’ in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 4th ed, 2022) 209, 226.

204 *Ibid*.

Institutions and Human Rights, state that ‘associations shall be free to determine their rules for membership, subject only to non-discrimination’:<sup>205</sup>

The right to freedom of association generally entitles those forming an association and those belonging to one to choose with whom they form it or whom to admit as members. However, this aspect of the right to association is subject to the prohibition on discrimination. As such, there must be a reasonable justification for any differential treatment of persons with respect to the formation or membership of an association based on ... personal characteristics or statuses [including gender, gender identity, religion or belief, sexual orientation, or other status]. In case of ... gender and sexual orientation, only ‘weighty reasons’ may justify differential treatment.<sup>206</sup>

11.108 The right to freedom of association was recognised in some submissions as central to freedom of religion or belief,<sup>207</sup> and as entailing a freedom to exclude particular persons when determining the membership of the association.<sup>208</sup> Some submissions suggested that this right applies in the context of religious educational institutions, and that, consequently, those institutions have the right to exclude particular students or staff from the institution on the basis of religion or on grounds in the *Sex Discrimination Act*.<sup>209</sup> However, there is no jurisprudence at international law to indicate that this right (including any ability to exclude particular persons when determining membership) extends to the selection of staff for employment, or to the enrolment of students in religious educational institutions. It is questionable whether it is appropriate to apply this right in the context of religious educational institutions, given that this right ordinarily applies to voluntary organisations (such as unions, churches, and clubs), rather than in the context of compulsory education and the employment of staff for that purpose.

11.109 If it were appropriate to apply the right to freedom of association in the context of religious educational institutions, under art 22(2) of the ICCPR it would be permissible to limit the right if the restriction was prescribed by law, and the restriction was ‘necessary in a democratic society in the interests of ... the protection of the rights and freedoms of others’. Subjecting associations to generally applicable anti-discrimination law would be a justifiable limitation on the right to freedom of association. Consequently, restricting this freedom in the context of religious educational institutions — to subject them to the same generally applicable anti-discrimination laws as other educational institutions and other employers — would be a justified limitation.

205 European Commission for Democracy Through Law and OSCE Office for Democratic Institutions and Human Rights, *Joint Guidelines on Freedom of Association*, Doc No CDL-AD(2014)046, adopted by the European Commission 101st plen sess, 13–14 December 2014 [28].

206 Ibid [95] (citations omitted).

207 Institute of Public Affairs, *Submission 250*; S French, *Submission 305*. See also Australian Law Reform Commission, ‘What We Heard’ (Background Paper ADL2, December 2023) [97]–[101]; Patrick Parkinson and Nicholas Aroney, ‘Associational Freedom, Anti-Discrimination Law and the New Multiculturalism’ (2019) 44 *Australasian Journal of Legal Philosophy* 1, 6.

208 A Deagon, *Submission 4*.

209 Ibid; S French, *Submission 305*.

11.110 Freedom of association was also discussed in other submissions with respect to employee rights,<sup>210</sup> a perceived need for exceptions for religious educational institutions to protect this right,<sup>211</sup> potential state interference with the freedom to associate,<sup>212</sup> and more generally as relevant to the Inquiry.<sup>213</sup>

## Right to health and right to life

11.111 The right to health is protected under several treaties,<sup>214</sup> including art 12(1) of the ICESCR, which states that the

States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

11.112 This right is closely related to, and dependent on, the realisation of the right to education, the right to non-discrimination and equality, and the right to work (amongst others).<sup>215</sup> A right to (mental) health is recognised here in the context of education<sup>216</sup> and work.<sup>217</sup>

11.113 The right to health includes a right to enjoy the highest attainable standard of mental health. The Special Rapporteur on the right to health has identified determinants of mental health to include a safe school environment, a healthy workplace, and respect for diversity.<sup>218</sup> In acknowledging adolescence as a critical phase for achieving human potential, the Special Rapporteur recognised social relationships and environment as integral to 'shap[ing] capabilities that are the

210 Queensland Human Rights Commission, *Submission 125*.

211 M Fowler, *Submission 201*; Institute for Civil Society, *Submission 399*.

212 E Brown, *Submission 38*; Australian Christian Higher Education Alliance, *Submission 208*.

213 P Parkinson, *Submission 95*; Australian Union Conference of Seventh-day Adventists, Adventist Schools Australia, *Submission 138*; Queensland Council for Civil Liberties, *Submission 156*; S Lamont, *Submission 302*; National Catholic Education Commission, *Submission 409*.

214 See, eg, CEDAW art 10(h); CRC art 24; CERD art 5(e)(iv).

215 Committee on Economic, Social, and Cultural Rights, *General Comment No 14: The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 22nd sess, UN Doc E/C.12/2000/4 (11 August 2000) [3].

216 Dainius Pūras, Special Rapporteur, *Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, 41st sess, UN Doc A/HRC/41/34 (12 April 2019) [64].

217 Committee on Economic, Social, and Cultural Rights, *General Comment No 14: The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 22nd sess, UN Doc E/C.12/2000/4 (11 August 2000) [4]. The right to health is acknowledged in relation to a safe and healthy working environment by the Committee. This right is also enshrined in art 4 of the ILO 155. Rights afforded to employees under the ILO 158 were recognised by Queensland Human Rights Commission, *Submission 125*. See also Anand Grover, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, 20th sess, UN Doc A/HRC/20/15 (10 April 2012) [44], which recognises psychosocial hazards in the workplace that can lead to psychological disorders (such as anxiety and depression) and physical conditions (including cardiovascular disease, musculoskeletal disorders, gastro-intestinal disorders, and impaired immune competence).

218 Dainius Pūras, Special Rapporteur, *Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, 41st sess, UN Doc A/HRC/41/34 (12 April 2019) [26]–[27].

foundation for future health and well-being'.<sup>219</sup> The role of schools was expressly identified, with the Special Rapporteur stating that schools

play a crucial role in nurturing the development of adolescents, and are especially important in mitigating the effects of violence and conflict. There is considerable evidence of the effectiveness of a whole-school approach to promote mental health and to tackle problems such as bullying ... Education should equip children to flourish socially, emotionally and economically.<sup>220</sup>

11.114 In its submission, LGBTIQ+ Health Australia expressed that it 'is vital for all schools to provide supportive and inclusive environments — regardless of sexuality or gender', based on a concern that

any exposure to stigma, discrimination and other body, gender and sexuality shaming in educational institutions may have extensive and long-lasting adverse health and wellbeing implications [for LGBTIQ+ students and staff].<sup>221</sup>

11.115 In the context of the rights of the child and young people, in its submission the Public Health Association of Australia raised the issue of the right to enjoy the highest attainable standard of health, alongside the importance of education on gender, sexuality, sex, and relationships, stating:

Young people's right to health includes freedom and control over their bodies, including their sexual and reproductive health choices. These entitlements include access to supportive adults, systems, resources, services, and conditions that provide equality of opportunity for every young person to enjoy the highest attainable standard of health. ... [A] lack of information intersects with and compounds other social determinants of health that can further marginalise children and young people.<sup>222</sup>

11.116 The right to health can also be understood in light of the right to life, which is also relevant to the Inquiry. Protected under art 6(1) of the ICCPR, this right includes that every 'human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'.

11.117 The Human Rights Committee, in General Comment No 36, has considered the right to life a fundamental right,

the effective protection of which is the prerequisite for the enjoyment of all other human rights and the content of which can be informed by other human rights.<sup>223</sup>

11.118 The Committee has interpreted the right to include the ability of all persons to enjoy life with dignity,<sup>224</sup> and has urged states to 'take adequate measures ... to

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219 Ibid [63].

220 Ibid [64].

221 LGBTIQ+ Health Australia, *Submission* 372.

222 Public Health Association of Australia, *Submission* 421.

223 Human Rights Committee, *General Comment No 36: Article 6 (Right to Life)*, 124th sess, UN Doc CCPR/C/GC/36 (3 September 2019) [2].

224 Ibid [3].

prevent suicides, especially among individuals in particularly vulnerable situations'.<sup>225</sup> Children and LGBTQ+ persons were among those expressly identified by the Committee as being vulnerable and requiring the state to fulfil its duty to take special measures towards their protection.<sup>226</sup>

11.119 The right to life is also protected under art 6 of the CRC:

1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

11.120 In General Comment No 5, the Committee on the Rights of the Child stated that it expects states to interpret 'development'

in its broadest sense as a holistic concept, embracing the child's physical, mental, spiritual, moral, psychological and social development. Implementation measures should be aimed at achieving the optimal development for all children.<sup>227</sup>

11.121 A right to 'development' has, in turn, been understood to be interdependent and mutually reinforcing with the realisation of human rights and fundamental freedoms,<sup>228</sup> which includes a right to be free from discrimination and a right to education.

11.122 Derogation from this right is not permitted under either the ICCPR or CRC.

## Right to privacy

11.123 Article 17 of the ICCPR states:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.<sup>229</sup>

11.124 The Special Rapporteur on the right to privacy has recognised that while

not an absolute right, the right to privacy is essential to the free development of an individual's personality and identity. It is a right that both derives from

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<sup>225</sup> Ibid [9].

<sup>226</sup> Ibid [23], [60].

<sup>227</sup> Committee on the Rights of the Child, *General Comment No 5: General Measures of Implementation of the Convention on the Rights of the Child (Arts 4, 42 and 44, Para 6)*, 34th sess, UN Doc CRC/GC/2003/5 (27 November 2003) 4.

<sup>228</sup> Human Rights Council, *The Contribution of Development to the Enjoyment of All Human Rights*, 41st sess, GA Res 441/19, UN Doc A/HRC/RES/41/19 (17 July 2019, adopted 12 July 2019).

<sup>229</sup> In addition to art 17, a child's right to privacy is also safeguarded under art 16 of the CRC.



and conditions the innate dignity of the person and facilitates the exercise and enjoyment of other human rights.<sup>230</sup>

11.125 Relevantly, the right to privacy protects the intimate matters of a person's life — including adult consensual sexual activity,<sup>231</sup> gender identity,<sup>232</sup> and relationship status<sup>233</sup> — from arbitrary or unlawful interference. In General Comment No 31, the Human Rights Committee identified protection of the right to privacy from interference by private actors as a particular area where the guarantees must be protected by law.<sup>234</sup>

11.126 The basis upon which the right to privacy can be limited derives from the words 'arbitrary and unlawful' in art 17 of the ICCPR. This permissible limitation was clarified by the Human Rights Committee in General Comment No 16, in which the Committee stated that any 'interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the ICCPR'.<sup>235</sup> The Committee stressed that where information is requested about an individual's private life, it should only be called for to the extent that such knowledge is 'essential in the interests of society as understood under the [ICCPR]'.<sup>236</sup> In *Toonen v Australia*, the Committee interpreted the requirement of reasonableness to imply that 'any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case'.<sup>237</sup>

230 Joseph Cannataci, Special Rapporteur, *Right to Privacy*, 40th sess, UN Doc A/HRC/40/63 (16 October 2019) [50].

231 Human Rights Committee, *Views: Communication No 488/1992*, 50th sess, UN Doc CCPR/C/50/D/488/1992 (4 April 1994, adopted 31 March 1994) ('*Toonen v Australia*') [8.2].

232 Human Rights Committee, *Views: Communication No 2172/2012*, 119th sess, UN Doc CCPR/C/119/D/2172/2012 (28 June 2017) ('*G v Australia*') [7.2].

233 See *Schüth v Germany* (European Court of Human Rights, Court (Fifth Section), Application No 1620/03, 23 December 2010) [53].

234 Human Rights Committee, *General Comment No 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant: International Covenant on Civil and Political Rights*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004, adopted 29 March 2004) [8].

235 Human Rights Committee, *General Comment No 16: Article 17 (The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation)*, 32th sess, UN Doc HRI/GEN/1/Rev.9 (Vol I) (8 April 1988) [3].

236 Ibid [7].

237 Human Rights Committee, *Views: Communication No 488/1992*, 50th sess, UN Doc CCPR/C/50/D/488/1992 (4 April 1994, adopted 31 March 1994) ('*Toonen v Australia*') [8.3], applying the principle of 'reasonableness' articulated in Human Rights Committee, *General Comment No 16: Article 17 (The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation)*, 32th sess, UN Doc HRI/GEN/1/Rev.9 (Vol I) (8 April 1988) [4]. For the Committee's further application of this principle, see Human Rights Committee, *Views: Communication No 2172/2012*, 119th sess, UN Doc CCPR/C/119/D/2172/2012 (28 June 2017) ('*G v Australia*') [7.4]; Human Rights Committee, *Views: Communication No 2452/2014*, 119th sess, UN Doc CCPR/C/119/D/2425/2014 (11 July 2017) ('*Whelan v Ireland*') [7.8]; Human Rights Committee, *Views: Communication No 2273/2013*, 123th sess, UN Doc CCPR/C/123/D/2273/2013 (10 August 2018) ('*Vandom v Republic of Korea*') [8.6]–[8.8]; Human Rights Committee, *Views: Communication No 2326/2013*, 120th sess, UN Doc CCPR/C/120/D/2326/2013/Rev.1 (10 January 2018) ('*NK v Netherlands*') [9.5].

11.127 While not binding, jurisprudence from the ECtHR offers interpretative guidance on the degree to which a person's right to privacy may be impinged, where that person is employed by a religious body.<sup>238</sup> In the cases it has considered, the particular role of the individual concerned was relevant to consideration of whether the interference was proportionate. This jurisprudence is considered in [Appendix I](#).

11.128 A right to privacy was acknowledged in submissions with respect to employment practices,<sup>239</sup> including the use of an organisation's ethos to limit employee rights,<sup>240</sup> and in relation to a person's identity as a LGBTQ+ person and relationship status.<sup>241</sup>

## Right to work

11.129 The right to work is enshrined in arts 6 and 7 of the ICESCR which state that state parties are to recognise:

6(1). ... the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

7. ... the right of everyone to the enjoyment of just and favourable conditions of work which ensure ... safe and healthy working conditions [and] 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 ...

11.130 The right to work is further protected under art 11(1) of CEDAW, whereby states parties must 'take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights'. Article 11(1) includes:

(a) The right to work as an inalienable right of all human beings;

(b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;

(c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;

(d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;

238 See, eg, *Schüth v Germany* (European Court of Human Rights, Court (Fifth Section), Application No 1620/03, 23 December 2010).

239 M Fowler, *Submission 201*; Victorian Equal Opportunity and Human Rights Commission, *Submission 255*; Australian Human Rights Commission, *Submission 384*; Law Council of Australia, *Submission 428*.

240 Queensland Human Rights Commission, *Submission 125*.

241 Australian Human Rights Commission, *Submission 384*.

(e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;

(f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

11.131 The Committee on Economic, Social, and Cultural Rights has established that ‘the right to work is essential for realizing other human rights and forms an inseparable and inherent part of human dignity’.<sup>242</sup> As set out by the Committee, a core obligation under the Covenant, that Australia must fulfil, is avoiding

any measure that results in discrimination and unequal treatment in the private and public sectors of disadvantaged and marginalized individuals and groups or in weakening mechanisms for the protection of such individuals and groups.<sup>243</sup>

11.132 As highlighted by the Law Council of Australia in its submission,<sup>244</sup> the right to work and a person’s rights when at work may only be restricted in conformity with art 4 of the ICESCR whereby

the State may subject such rights only 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.

11.133 Australia is also obliged, under art 2 of the ILO 111, to ensure that the right to work is protected from discrimination:

Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

11.134 The right to work, as protected under the ICESCR, ILO 111, and CEDAW, is underpinned by the principles of equality and non-discrimination.<sup>245</sup> As noted by the Law Council of Australia in its submission, Australia has voluntarily declared that it considers ‘marital status’ and ‘sexual preference’ to be protected characteristics under the ILO 111.<sup>246</sup>

11.135 Case law from the IACtHR also illustrates how courts interpret the right to work. In *Pavez Pavez v Chile*,<sup>247</sup> a teacher of Catholic religion in a state school had her duties reassigned when it became publicly known that she was living with

242 Committee on Economic, Social and Cultural Rights, *General Comment No 18: The Right to Work*, 35th sess, UN Doc E/C.12/GC/18 (6 February 2006) [1].

243 Ibid [31]. Rights afforded to employees under the ILO 111 were recognised as relevant to this Inquiry by the Queensland Human Rights Commission, *Submission 125*.

244 Law Council of Australia, *Submission 428*

245 See Committee on Economic, Social and Cultural Rights, *General Comment No 18: The Right to Work*, 35th sess, UN Doc E/C.12/GC/18 (6 February 2006) [33]; ILO 111 art 2.

246 Law Council of Australia, *Submission 428*. See ILO 111 art 1(1)(a).

247 *Pavez Pavez v Chile* (Inter-American Court of Human Rights, Series C No 449, 4 February 2022).

her same-sex partner. The IACtHR determined that the detrimental impact to the teacher's job security constituted a restriction to her right to work.<sup>248</sup>

11.136 Some submissions flagged concern that discrimination on the grounds of a religious ethos,<sup>249</sup> or not being a co-religionist,<sup>250</sup> could also infringe an employee's or prospective employee's right to work.

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248 See *ibid* [140]. For further discussion of this case, see **Appendix I**.

249 Thorne Harbour Health, Brave Network and SOGICE Survivors, *Submission 213*; Australian Council of Trade Unions, *Submission 411*.

250 Australian Human Rights Commission, *Submission 384*.

# 12. Anti-Discrimination Legislation

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## Introduction

12.1 This chapter and **Chapter 13** set out the Australian domestic laws that are most relevant to this Inquiry. This chapter examines dedicated anti-discrimination legislation, while **Chapter 13** discusses constitutional law, relevant provisions of the *Fair Work Act* and *Australian Human Rights Commission Act*, and other relevant legal obligations (such as common law duties, and work health and safety requirements).

12.2 Exceptions to prohibitions on discrimination for religious educational institutions are found in only a small number of provisions of Commonwealth anti-discrimination and workplace legislation. Nevertheless, any reforms must take into account the range of other domestic legal issues discussed in these chapters.

12.3 This chapter proceeds in two parts. The first part examines key features of Commonwealth anti-discrimination laws, including key provisions of the *Sex Discrimination Act* that are relevant to this Inquiry. The second part examines relevant provisions of state and territory anti-discrimination laws.

## Fitting it all together

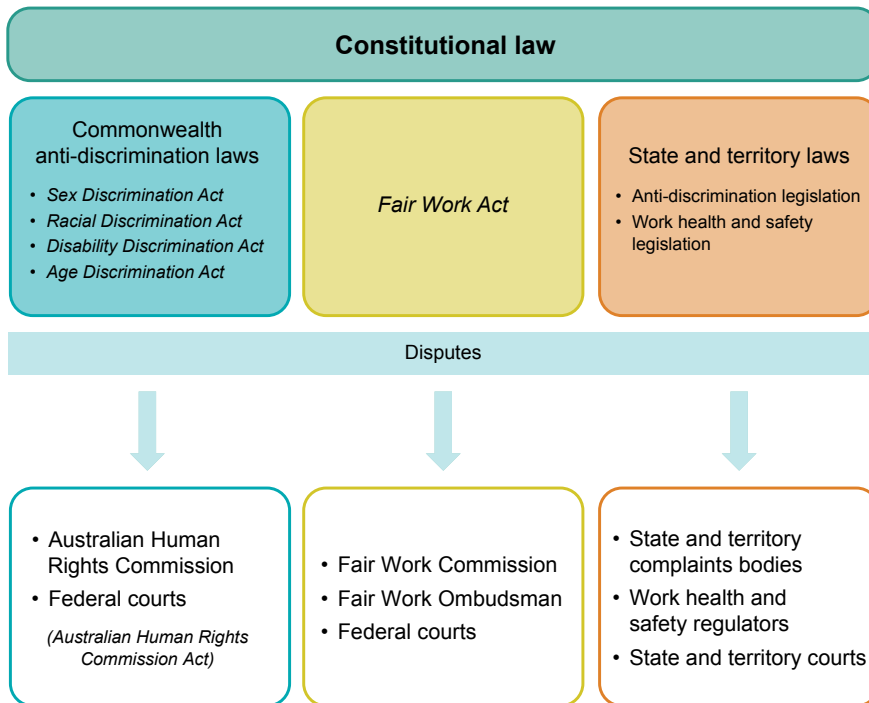
12.4 Before examining dedicated Commonwealth, state, and territory anti-discrimination legislation in more detail, this section provides a brief high-level summary of the ways in which the various areas of law discussed in this chapter and **Chapter 13** relate to each other. More detail on each area is contained in the remainder of this chapter and in **Chapter 13**.

12.5 Prohibitions on discrimination (along with various exceptions relevant to religious educational institutions) are found in Commonwealth, state, and territory anti-discrimination laws. These laws are not identical but vary between jurisdictions, and may operate concurrently. The constitutional law of each of the Commonwealth, states, and territories regulates the power of their respective parliaments to enact such legislation. Statutes and constitutional law also regulate the relationship between Commonwealth, state, and territory anti-discrimination laws. To the extent that Commonwealth, state, and territory laws operate concurrently, it is necessary to comply with the most restrictive law applicable in a given jurisdiction to achieve full compliance.<sup>1</sup>

12.6 Prohibitions on discrimination specifically in employment are also found in the *Fair Work Act*. Depending on the nature of a dispute under that Act, federal courts, the Fair Work Commission, or the Fair Work Ombudsman may be involved in resolving or determining the dispute. In addition, under the *Australian Human Rights Commission Act*, the Australian Human Rights Commission can endeavour to conciliate a range of complaints of discrimination. In some cases, a complainant may apply to a federal court for relief if the complaint is not resolved at conciliation.

12.7 Finally, various other legal obligations arising out of the common law, or provided for in work health and safety legislation, may also be relevant in circumstances in which it is alleged that discrimination has occurred.

12.8 **Figure 12.1** below sets out some of the laws that are discussed in this chapter and **Chapter 13**, and some of the bodies that may be involved in disputes under each area of law. Common law obligations are not reflected in the figure, but operate alongside the areas of law that are shown in the figure.

**Figure 12.1: Select domestic laws relevant to discrimination**

## Commonwealth anti-discrimination laws

12.9 Four core Commonwealth Acts prohibit discrimination against a person based on particular personal attributes: the *Racial Discrimination Act*, *Sex Discrimination Act*, *Disability Discrimination Act*, and *Age Discrimination Act*. The *Racial Discrimination Act* and *Disability Discrimination Act* also prohibit discrimination against a person based on attributes held by a relative or ‘associate’.<sup>2</sup>

12.10 Of relevance to this Inquiry and subject to various exceptions, the *Sex Discrimination Act* prohibits discrimination on the grounds of sex, sexual orientation, gender identity, intersex status,<sup>3</sup> marital or relationship status, pregnancy or potential pregnancy, breastfeeding, and family responsibilities.<sup>4</sup> That Act was enacted to

<sup>2</sup> *Racial Discrimination Act 1975* (Cth) ss 11, 12(1), 13, 15(1)–(3); *Disability Discrimination Act 1992* (Cth) s 7.

<sup>3</sup> In the context of the debate on the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (Cth), Tony Burke MP conveyed the government’s commitment to replacing ‘intersex status’ with ‘sex characteristics’ across all relevant Commonwealth legislation: Commonwealth, *Parliamentary Debates*, House of Representatives, 10 November 2022, 2858 (Tony Burke).

<sup>4</sup> *Sex Discrimination Act 1984* (Cth) ss 5, 5A, 5B, 5C, 6, 7, 7AA, 7A.

give effect to certain provisions of CEDAW as well as provisions of other relevant international instruments, such as the ICCPR, ICESCR, CRC, and ILO 111.<sup>5</sup>

12.11 There is currently no Commonwealth Act dedicated to the prohibition of discrimination on the ground of religious belief or activity, although the Terms of Reference for this Inquiry refer to the Australian Government's commitment to introduce such legislation. However, members of some religious groups that can also be classified as ethnic groups, such as Sikh and Jewish people, are protected from discrimination and vilification under the *Racial Discrimination Act*.<sup>6</sup> The *Fair Work Act* and *Australian Human Rights Commission Act* also include provisions concerning discrimination on religious (and other) grounds.<sup>7</sup>

12.12 In addition, both the *Sex Discrimination Act* and the *Age Discrimination Act* provide specific exceptions for religious bodies and religious educational institutions.<sup>8</sup>

## Key features of anti-discrimination laws

12.13 The Commonwealth anti-discrimination Acts prohibit discriminatory treatment of people based on protected attributes across certain aspects of daily life, including education, employment, and the provision of goods and services. Each of these laws prohibits both 'direct' and 'indirect' discrimination.<sup>9</sup> The difference between these two types of discrimination, examined in further detail below, was summarised by the ACT Law Reform Advisory Council as follows:

Direct discrimination occurs when a person is treated unfavourably because they have a protected attribute. For example, it is direct discrimination in employment when an employer refuses to employ a young woman because she may go on maternity leave at some stage. Indirect discrimination occurs when someone imposes an unreasonable condition or requirement which disadvantages a person because they have a protected attribute. For example, it is indirect discrimination in provision of services if the only way to enter a public building is by a set of stairs, because this is a requirement for entry that applies to everyone but will disadvantage, for example, people confined to wheelchairs.<sup>10</sup>

5 Ibid ss 3(a), 4(1) (definition of 'relevant international instrument').

6 See, eg, *Jones v Scully* (2002) 120 FCR 243.

7 See **Chapter 13**.

8 See, eg, *Sex Discrimination Act 1984* (Cth) ss 37, 38; *Age Discrimination Act 2004* (Cth) s 35.

9 Although, while the courts have accepted that s 9(1) of the *Racial Discrimination Act* covers direct discrimination, Chris Ronalds SC and the Hon Justice E Raper have noted that 'it is still open to debate' whether s 10 covers both direct and indirect discrimination: Chris Ronalds and Elizabeth Raper, *Discrimination Law and Practice* (The Federation Press, 5th ed, 2019) 33.

10 ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)* (Final Report, 2015) 28. See further Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination Law and Equal Opportunity Law* (The Federation Press, 3rd ed, 2018) 86–92.



### **Direct discrimination**

12.14 In Commonwealth anti-discrimination laws, direct discrimination is generally defined as less favourable treatment by reason of an attribute held by an individual.<sup>11</sup> For example, s 5 of the *Sex Discrimination Act* provides:

(1) For the purposes of this Act, a person (in this subsection referred to as the **discriminator**) discriminates against another person (in this subsection referred to as the **aggrieved person**) on the ground of the sex of the aggrieved person if, by reason of:

- (a) the sex of the aggrieved person;
- (b) a characteristic that appertains generally to persons of the sex of the aggrieved person; or
- (c) a characteristic that is generally imputed to persons of the sex of the aggrieved person;

the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of a different sex.

12.15 The reference to ‘less favourable treatment’ requires a comparison between the treatment received by the person with a protected attribute or associated characteristic, and treatment that was or would have been afforded to a ‘comparator’ (a real or hypothetical person without the protected attribute) in the same circumstances.<sup>12</sup>

12.16 It is not necessary to prove that the discriminator intended to take the aggrieved person’s protected attribute into account.<sup>13</sup> Rather, the

motive, reasons or suggested justifications of the detriment are irrelevant, if it can be shown that there is a differentiation of treatment, which results in detriment to the person affected ...<sup>14</sup>

12.17 The phrase ‘by reason of’ has been interpreted as requiring ‘a relationship of cause and effect’ between the attribute and the less favourable treatment.<sup>15</sup> That is, the protected attribute ‘explains (or partially explains ...) the treatment or conduct of the discriminator which resulted in the less favourable treatment’.<sup>16</sup>

11 *Sex Discrimination Act 1984* (Cth) s 5(1); *Disability Discrimination Act 1992* (Cth) s 5(1); *Age Discrimination Act 2004* (Cth) s 14. For the specific approach under the Religious Discrimination Act, see Rees, Rice and Allen (n 10) 133–4.

12 See *Waters v Public Transport Corporation* (1991) 173 CLR 349, 392 (Dawson and Toohey JJ). Ronalds and Raper (n 9) 34–5; Rees, Rice and Allen (n 10) 52–3.

13 Rees, Rice and Allen (n 10) 93.

14 *Haines v Leves* (1987) 8 NSWLR 442, 471 (Kirby P). See Ronalds and Raper (n 9) 34–5.

15 *Human Rights and Equal Opportunity Commission v Mount Isa Mines Ltd* (1993) 46 FCR 301, cited in *Thomson v Orica Australia Pty Ltd* (2002) 116 IR 186 [158]–[161]. See Ronalds and Raper (n 9) 35–6.

16 *Sklavos v Australasian College of Dermatologists* (2017) 347 ALR 78 [23].

12.18 All four Commonwealth anti-discrimination Acts in effect provide that a particular protected attribute need not be the only reason for any less favourable treatment. For example, s 8 of the *Sex Discrimination Act* provides that a reference

to the doing of an act by reason of a particular matter includes a reference to the doing of such an act by reason of 2 or more matters that include the particular matter, whether or not the particular matter is the dominant or substantial reason for the doing of the act.<sup>17</sup>

### **Indirect discrimination**

12.19 Indirect discrimination relates to ‘activities which are fair in form but discriminatory in outcome’.<sup>18</sup> Such discrimination occurs when ‘a condition, requirement or practice disadvantages a person because of an attribute that they hold *and* is not reasonable in the circumstances’.<sup>19</sup> In the context of the *Sex Discrimination Act*, the determination of reasonableness includes a consideration of the proportionality of the disadvantage experienced by the aggrieved person to the result sought by the discriminator.

12.20 Section 7B(2) of the *Sex Discrimination Act* provides that:

The matters to be taken into account in deciding whether a condition, requirement or practice is reasonable in the circumstances include:

- (a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; and
- (b) the feasibility of overcoming or mitigating the disadvantage; and
- (c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice.

12.21 Section 7C of the Act shifts the burden of proving reasonableness to the person who is alleged to have discriminated, rather than the person making the complaint. Section 7D relates to special measures taken for the purpose of achieving substantive equality, considered further below.

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17 See also *Racial Discrimination Act 1975* (Cth) s 18; *Disability Discrimination Act 1992* (Cth) s 10; *Age Discrimination Act 2004* (Cth) s 16.

18 Rees, Rice and Allen (n 10) 53.

19 Australian Discrimination Law Experts Group, *Submission 75*. See *Racial Discrimination Act 1975* (Cth) s 9; *Sex Discrimination Act 1984* (Cth) ss 5(2), 5A(2), 5B(2), 5C(2), 6(2), 7(2), 7AA(2), 7B; *Disability Discrimination Act 1992* (Cth) s 6; *Age Discrimination Act 2004* (Cth) s 15.

### **Exceptions, exemptions, and special measures**

12.22 Each of the Commonwealth anti-discrimination Acts describes certain situations in which less favourable treatment or disadvantage based on a protected attribute is not prohibited. These include:

- General exceptions in a particular area of activity (such as employment). This includes, for example, where differential treatment arises from a 'genuine occupational qualification/requirement' or is related to an 'inherent requirement' of a role (see below at [12.24]–[12.38]).
- Specific exceptions to particular provisions for particular types of institutions or individuals, such as exceptions applying to religious institutions, clubs, and political parties.<sup>20</sup>
- Temporary exemptions from the operation of some or all of the relevant Act for a limited time, granted by a tribunal or administrative agency to an identified person or class of persons. Such exemptions may be granted, for example, to allow a person or organisation time to make changes to comply with the law.<sup>21</sup>
- Provision for special measures to address 'ongoing inequality experienced by a group of people with a protected attribute' (sometimes known as 'positive discrimination' or 'affirmative action').<sup>22</sup>

12.23 Chris Ronalds SC and the Hon Justice E Raper have explained that exception provisions are construed in isolation from one another, so that where

there is an overlap between two exemptions, or a general exemption and an exception applying in one area only, it has been held that one exemption should not be read down as a method of construction to bring it in line with an apparently narrower exemption.<sup>23</sup>

### **Genuine occupational qualifications and inherent requirements**

12.24 Section 30 of the *Sex Discrimination Act* provides a genuine occupational qualification exception to the prohibition on discrimination in employment on the ground of sex. Inherent requirements exceptions are found in s 21A of the *Disability Discrimination Act* and s 18(3) of the *Age Discrimination Act*.

20 For examples of specific exceptions for religious institutions see, eg, *Sex Discrimination Act 1984* (Cth) ss 37, 38; *Age Discrimination Act 2004* (Cth) s 35.

21 Under s 44 of the *Sex Discrimination Act*, a person or persons can apply to the Australian Human Rights Commission for a temporary exemption from their obligation to comply with provisions of the Act for up to five years. The Australian Human Rights Commission has published guidelines explaining the criteria it applies in deciding whether to grant an exemption and the process for doing so: Australian Human Rights Commission, *Commission Guidelines: Temporary Exemptions under the Sex Discrimination Act* (2009). See **Chapter 9**.

22 Rees, Rice and Allen (n 10) 53. See, eg, *Racial Discrimination Act 1975* (Cth) s 8; *Sex Discrimination Act 1984* (Cth) s 7D; *Disability Discrimination Act 1992* (Cth) s 45; *Age Discrimination Act 2004* (Cth) s 33.

23 Ronalds and Raper (n 9) 145, citing *Commonwealth of Australia v The Human Rights and Equal Opportunity Commission* (1998) 76 FCR 513, affd in *X v Commonwealth* (1999) 200 CLR 177.

12.25 In *Qantas Airways Ltd v Christie*, the High Court held that an inherent requirement of employment means something that is 'essential' to the position.<sup>24</sup> Gaudron J suggested that a

practical method of determining whether or not a requirement is an inherent requirement, in the ordinary sense of that expression, is to ask whether the position would be essentially the same if that requirement were dispensed with.<sup>25</sup>

12.26 Brennan CJ further suggested that

whether a requirement is inherent in a position must be answered by reference not only to the terms of the employment contract but also by reference to the function which the employee performs as part of the employer's undertaking and ... by reference to that organisation.<sup>26</sup>

12.27 Gaudron J emphasised that

an employer cannot create an inherent requirement ... by stipulating for something that is not essential or, even, by stipulating for qualifications or skills which are disproportionately high when related to the work to be done.<sup>27</sup>

12.28 This indicates that whether or not a requirement is inherent in a role is an objective test ultimately to be determined by a court, and cannot be arbitrarily defined by an employer seeking to rely on the exception.<sup>28</sup>

12.29 Similarly, in *X v Commonwealth*, the High Court held that inherent requirements are those which are characteristic or essential requirements of particular employment, not those which are peripheral.<sup>29</sup> McHugh J further elaborated that

employment is not a mere physical activity in which the employee participates as an automaton. It takes place in a social, legal and economic context. Unstated, but legitimate, employment requirements may stem from this context. It is therefore always permissible to have regard to this context when determining the inherent requirements of a particular employment.<sup>30</sup>

12.30 Although the High Court has provided clear guidance on the meaning of inherent requirements, it has not yet considered the meaning of genuine occupational qualifications.

12.31 In *Chivers v Queensland*, the Queensland Court of Appeal accepted that it was not contentious that the expressions 'inherent requirements' and 'genuine

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24 *Qantas Airways Ltd v Christie* (1998) 193 CLR 280 [34]–[36] (Gaudron J), [74], [114], [164] (McHugh J).

25 *Ibid* [36].

26 *Ibid* [1].

27 *Ibid* [34].

28 See also *ibid* [81]–[82] (McHugh J).

29 *X v Commonwealth* (1999) 200 CLR 177 [31] (McHugh J), [102] (Gummow and Hayne JJ), [163] (Kirby J).

30 *Ibid* [33].

occupational requirements' are 'so similar in meaning that tests formulated by the High Court as applicable to the former are applicable to the latter'.<sup>31</sup>

12.32 However, in *Davies v Victoria*, the Victorian Civil and Administrative Tribunal held that the relevant legislative phrase under consideration ('genuine and reasonable requirements of employment') was 'significantly different' from each of 'inherent requirements' and 'genuine occupational requirements'. It also held that the phrase was

wider than the inherent or essential requirements of the employment, ...  
The term covers the whole range of [employment] requirements, and not just the 'essential' ones.<sup>32</sup>

12.33 As such, tests articulated by the High Court in relation to inherent requirements were not applicable in the case.

12.34 It is unclear from *Davies* whether the Tribunal considered 'genuine occupational requirements' to be the same as 'inherent requirements'. Subsequent reforms to the *Equal Opportunity Act 2010* (Vic) have amended the exception such that it now refers to 'genuine occupational requirements'.<sup>33</sup>

12.35 Some academics have supported the view that inherent requirements and genuine occupational qualifications are different. For example, Emeritus Professor Rees, Professor Rice, and Associate Professor Allen have suggested that inherent requirements are literal requirements of a job (as in, the job cannot be undertaken without the particular requirement), while genuine occupational qualifications are requirements that, if not met, would alter the character of the role.<sup>34</sup> For example, they have observed that

the inherent requirements of being a domestic violence counsellor do not preclude a person with any attribute doing the job, but it might be a genuine occupational qualification that the person is a woman.<sup>35</sup>

12.36 In contrast,

an inherent requirement of being a HTML editor may be that a person has certain technical knowledge, but the job will not be better or preferably done by someone with a particular attribute.<sup>36</sup>

12.37 Ultimately, while it is clear that inherent requirements are the essential elements of a role, it is less clear what constitutes a genuine occupational qualification. It is possible that genuine occupational qualifications are equivalent to essential requirements, but they might also be wider than this. The question has significant

31 *Chivers v Queensland* [2014] QCA 141 [40].

32 *Davies v Victoria* [2000] VCAT 819.

33 *Equal Opportunity Act 2010* (Vic) s 26.

34 Rees, Rice and Allen (n 10) 576.

35 *Ibid* (n 10).

36 *Ibid*.

implications for employers and employees. If the concept of genuine occupational qualifications is wider than inherent requirements, then legislative exceptions that refer to genuine occupational qualifications may give greater latitude to employers to determine the relevant occupational requirements for roles within their organisation. However, the word 'genuine' would likely require that any requirement set by an employer be objectively appropriate or reasonable.<sup>37</sup>

12.38 Background Paper ADL1 discussed various general exceptions to the prohibition on discrimination in employment in several jurisdictions outside Australia.<sup>38</sup> These include, for example:

- a genuine and determining occupational requirements exception in the EU and Ireland (which necessitates that any requirements be a defining aspect of the job);
- a genuine, legitimate, and justified occupational requirements exception in the EU and Ireland (a less strict test than the genuine and determining occupational requirements exception that necessitates consideration of the appropriateness and necessity of any requirements);
- a genuine occupational requirement exception in New Zealand, England, and Wales; and
- a bona fide occupational requirement exception in Canada.

### **Positive duties**

12.39 In late 2022, a positive duty to eliminate discrimination, sexual harassment, hostile workplace environments, and victimisation was introduced into the *Sex Discrimination Act*. This duty requires employers and persons conducting a business or undertaking ('duty holders') to 'take reasonable and proportionate measures to eliminate' (amongst other things) discrimination on the ground of sex in employment and against contract workers.<sup>39</sup> This includes discrimination by duty holders, their agents, employees, and other workers.<sup>40</sup>

12.40 To determine whether measures to eliminate discrimination are reasonable and proportionate, the *Sex Discrimination Act* requires several matters to be taken into account. These include:

- the size, nature, and circumstances of the business or undertaking;
- the duty holder's resources;
- the practicability and cost of the measures; and
- any other relevant matter.<sup>41</sup>

37 See, eg, *Graham v Norlyn Investments* (Supreme Court of New South Wales, Donovan A J, 23 March 1998) 8–9; *Morison v Department of Child Safety, Youth and Women (Qld)* [2020] QIRC 203 [38]; *One Key Workforce v CFMEU* (2018) 262 FCR 527 [143].

38 Australian Law Reform Commission, 'International Comparisons' (Background Paper ADL1, November 2023).

39 *Sex Discrimination Act 1984* (Cth) ss 47C(1)–(2).

40 *Ibid* s 47C(3).

41 *Ibid* s 47C(6).

12.41 The positive duty in the *Sex Discrimination Act* is in addition to, and does not replace, prohibitions against discrimination. It shifts the burden from individuals (who have to take action to remedy a breach of the Act) to employers and other duty holders who are now required to intervene early to prevent discrimination on the ground of sex.<sup>42</sup>

### ***Dispute resolution under Commonwealth anti-discrimination Acts***

12.42 A person who alleges that an act, omission, or practice is prohibited by any of the Commonwealth anti-discrimination Acts can make a cost-free complaint (without the need for a lawyer) to the Australian Human Rights Commission.<sup>43</sup> The Commission is required to decide whether to terminate the complaint without inquiry, or inquire into the complaint and attempt to conciliate it.<sup>44</sup> Even after an inquiry into a complaint has begun, the complaint can still be terminated by the Commission or withdrawn by the complainant.<sup>45</sup>

12.43 Conciliation is informal, flexible, and usually confidential, and can be undertaken via an exchange of letters, telephone negotiation between the Australian Human Rights Commission and involved parties, or conciliation conference (via telephone or face-to-face).<sup>46</sup> A conciliation conference is not a public hearing nor a court or tribunal hearing.<sup>47</sup> This means that

parties do not have to prove or disprove the complaint. Instead conciliation allows people to state their point of view, discuss the issues in dispute and settle the matter on their own terms.<sup>48</sup>

12.44 In conducting conciliation, the Australian Human Rights Commission acts as an impartial third party that is required to treat both the complainant and the respondent fairly.<sup>49</sup> The Commission assists parties to 'consider different options to resolve the complaint and provide information about possible terms of settlement' as well as assisting to write up a conciliation agreement.<sup>50</sup> Possible agreements include an apology, reinstatement, compensation for lost wages, changes to a policy, or putting in place anti-discrimination policies.<sup>51</sup>

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42 See Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 221–4.

43 *Australian Human Rights Commission Act 1986* (Cth) ss 46P, 3(1) (definition of 'unlawful discrimination'). For more on the Australian Human Rights Commission, see [Chapter 13](#).

44 *Ibid* ss 46PD, 46PF(1).

45 *Ibid* ss 46PG, 46PH.

46 Australian Human Rights Commission, 'Conciliation – How It Works' <[www.humanrights.gov.au/complaints/complaint-guides/conciliation-how-it-works](http://www.humanrights.gov.au/complaints/complaint-guides/conciliation-how-it-works)>.

47 *Ibid*.

48 *Ibid*.

49 *Australian Human Rights Commission Act 1986* (Cth) s 46PF(6).

50 Australian Human Rights Commission, *Conciliation – How It Works* (n 46).

51 *Ibid*.

## 12.45 According to the Australian Human Rights Commission:

Conciliation is a very successful way of resolving complaints. Feedback shows that most people find our process fair, informal and easy to understand. It also helps them to better understand the issues and come up with solutions that are appropriate to their circumstances.<sup>52</sup>

12.46 If a complaint is terminated by the Commission, a person may make an application to the Federal Court or the Federal Circuit and Family Court of Australia (Division 2) alleging unlawful discrimination.<sup>53</sup> If the court is satisfied that there has been unlawful discrimination, the court can make 'such orders ... as it thinks fit', including, for example, orders requiring the respondent to perform any reasonable act to redress any loss or damage suffered by the applicant, orders requiring the respondent to employ or re-employ the applicant, or orders requiring the respondent to pay damages.<sup>54</sup>

### The Sex Discrimination Act and educational institutions

12.47 As outlined above and subject to various exceptions, the *Sex Discrimination Act* provides that it is unlawful to discriminate based on protected attributes, namely sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding, and family responsibilities. Prohibitions apply in a number of specified contexts, including work, education, accommodation, and the provision of goods, services, and facilities. However, the particular attributes that are protected in each context varies.

12.48 **Discrimination in education:** Section 21 of the *Sex Discrimination Act* makes it unlawful for a body or person administering a school, college, university, or other institution at which education or training is provided to discriminate against a student or prospective student on the grounds of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding in the provision of education. In particular, it is unlawful on these grounds to:

- refuse a prospective student's application for admission as a student;
- discriminate in the terms or conditions on which the educational institution is prepared to admit a prospective student;
- deny or limit a student's access to any benefit provided by the educational authority;
- expel the student; or
- subject the student to any other detriment.

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52 Australian Human Rights Commission, 'Complaints' <[www.humanrights.gov.au/complaints#main-content](http://www.humanrights.gov.au/complaints#main-content)>.

53 *Australian Human Rights Commission Act 1986* (Cth) s 46PO(1).

54 *Ibid* s 46PO(4).



**12.49 Discrimination in employment:** Section 14 of the *Sex Discrimination Act* makes it unlawful for an employer to discriminate against a person on the grounds of the 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;
- in the terms or conditions of employment;
- by denying or limiting access to the opportunities for promotion, transfer, or training, or to any other benefits associated with employment;
- by dismissing the employee; or
- by subjecting the employee to any other detriment.

**12.50 Discrimination against contract workers:** Section 16 of the *Sex Discrimination Act* makes it unlawful for a principal to discriminate against a contract worker on the grounds of the contract worker's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding, or family responsibilities:

- in the terms or conditions of work;
- by not allowing the contract worker to work or continue to work;
- by denying or limiting access to any benefits associated with work; or
- by subjecting the contract worker to any other detriment.<sup>55</sup>

12.51 'Contract workers' under the *Sex Discrimination Act* are persons who do work for another person (the principal) pursuant to a contract between the employer of the first-mentioned person and that other person.<sup>56</sup>

### ***Relevant general exceptions under the Sex Discrimination Act***

12.52 The *Sex Discrimination Act* provides that it is not unlawful to discriminate against a person on the ground of the other person's sex where it is a 'genuine occupational qualification' to be a person of the other sex:

- in the arrangements made for the purpose of determining who should be offered employment;
- in determining who should be offered employment; or
- by not allowing a contract worker to work or continue to work.<sup>57</sup>

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55 *Sex Discrimination Act 1984* (Cth) s 16.

56 *Ibid* s 4.

57 *Ibid* s 30(1).

12.53 The Act provides that, without limiting the generality of the exception, it is a genuine occupational qualification to be a person of a particular sex in certain situations. These include, for example, where:

the duties of the position need to be performed by a person of the relevant sex to preserve decency or privacy because they involve the fitting of clothing for persons of that sex;

the duties of the position include the conduct of searches of the clothing or bodies of persons of the relevant sex ...<sup>58</sup>

12.54 The Act also provides that regulations may declare specific positions for which it is a genuine occupational qualification to be a person of a particular sex.<sup>59</sup>

12.55 In addition, the *Sex Discrimination Act* makes provision for single-sex educational institutions by providing that the prohibition on discrimination in education does not apply to refusals to accept a person's application for admission as a student where the educational institution is conducted solely for students of a different sex.<sup>60</sup> Similar provisions also provide that prohibitions on discrimination in education and employment (amongst other areas) do not apply to the provision of accommodation to students where the accommodation is provided solely for students of one sex.<sup>61</sup>

### **Exceptions for religious bodies**

12.56 Religious bodies are the subject of certain specific exceptions in the *Sex Discrimination Act*. These exceptions initially applied only to the grounds of sex, marital status, and pregnancy<sup>62</sup> — the only grounds covered by the *Sex Discrimination Act* as originally enacted. However, amendments to the *Sex Discrimination Act* in 2013 saw the introduction of three new grounds (sexual orientation, gender identity, and intersex status) as well as the extension of marital status to 'marital or relationship status'.<sup>63</sup>

12.57 The 2013 amendments had the effect of expanding the exceptions for religious bodies to include these new grounds.<sup>64</sup> In introducing the amending Bill to parliament, then Attorney-General Mark Dreyfus noted that these exceptions 'have

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58 Ibid ss 30(2)(c)–(d).

59 Ibid s 30(2)(h).

60 Ibid s 21(3)(a). Or, except in the case of tertiary education, the education or training at the level at which the applicant is seeking is provided only or mainly for students of a different sex from the sex of the applicant: *ibid* s 21(3)(b).

61 Ibid s 34(2).

62 Note, the exception for the provision of accommodation by charities (see below at [12.71]) did not initially apply to pregnancy.

63 *Sex Discrimination Amendment (Sexual Orientation, Gender Identity, and Intersex Status) Act 2013* (Cth).

64 Except for the exception that concerns the provision of accommodation by charities: see below at [12.71].

been in place for many years' and, as such, would 'continue under this bill and encompass the new grounds'.<sup>65</sup>

**12.58 Section 37 (religious bodies):** Section 37(1) provides that the prohibitions on discrimination in the *Sex Discrimination Act* do not apply to:

- the ordination, appointment, training, or education of 'priests, ministers of religion or members of any religious order';
- the selection of persons to perform functions in connection with, or otherwise to participate in, 'any religious observance or practice'; and
- 'any other act or practice of a body established for religious purposes ... 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'.

12.59 The exceptions contained in s 37(1) are broad, in that they relate to every protected attribute contained in the *Sex Discrimination Act* and apply in all contexts specified in the Act. Section 37(1)(d) (summarised in the third dot point above) is particularly broad in its potential application, relating to 'any other act or practice' of a potentially wide range of bodies established for religious purposes.

12.60 The phrase 'is necessary to avoid injury to the religious susceptibilities of adherents of that religion or creed', used in s 37(1)(d), is widespread throughout Commonwealth, state, and territory anti-discrimination laws.<sup>66</sup> It has been criticised by some for elevating the religious susceptibilities of adherents of the religion above the right to non-discrimination.<sup>67</sup>

12.61 The phrase has been considered by the Federal Court (in relation to an equivalent provision that existed in the *Workplace Relations Act 1996* (Cth)). In *Hozack v Church of Jesus Christ of Latter-Day Saints*, the Court commented that action

aimed at the avoidance of mere offence to the presumed social mores of church members, or of alarm to a faction not clearly amounting to 'injury' to religious susceptibilities, would not suffice.<sup>68</sup>

12.62 A similar meaning was ascribed to the phrase by the Victorian Court of Appeal (in relation to a similar provision that existed in the *Equal Opportunity Act 1995* (Vic)). In *Christian Youth Camps v Cobaw*, the court agreed with the Victorian Civil and Administrative Tribunal that avoiding injury to the religious sensitivities of adherents

<sup>65</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2013, 2895 (Mark Dreyfus). See also Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth) 8.

<sup>66</sup> See, eg, *Sex Discrimination Act 1984* (Cth) s 38; *Australian Human Rights Commission Act 1986* (Cth) s 3(1) (definition of 'discrimination'); *Fair Work Act 2009* (Cth) ss 153(2)(b), 195(2)(b), 351(2)(c), 772(2)(b). See also **Appendix E**.

<sup>67</sup> See, eg, Australian Discrimination Law Experts Group, *Submission 75*.

<sup>68</sup> *Hozack v Church of Jesus Christ of Latter-Day Saints* (1997) 79 FCR 441, 444. In this case, the court ordered the church to pay compensation for terminating the employment of a receptionist who had been involved in an adulterous relationship, on the basis that the church could not demonstrate that the reason for the termination was 'based on the operational requirements of the undertaking' as was then required by the *Workplace Relations Act 1996* (Cth).

must involve respect for, or not treating with disrespect, those matters intimately or closely connected with, or of real significance to, the beliefs or practices of the adherents of the religion. To satisfy the need for the sensitivities to be religious sensitivities, the beliefs or practices must be based on the doctrines of the religion or the religious beliefs of the adherents of the religion.<sup>69</sup>

12.63 The Court further explained that for injury to arise, acting in a non-discriminatory manner would need to be

an affront to the reasonable expectation of adherents that the body be able to conduct itself in accordance with the doctrines to which they subscribed and the beliefs which they held.<sup>70</sup>

12.64 Furthermore, the Court stressed that any injury to religious susceptibilities must be 'significant and unavoidable' and have a 'real and direct impact on the religious sensitivities' of adherents, with those engaging in the discriminatory conduct 'required or compelled by the doctrines of their religion' to act as they did.<sup>71</sup>

12.65 In *OV and OW v Members of the Board of the Wesley Mission Council*, then Allsop J of the NSW Court of Appeal held that 'the religious susceptibilities of the adherents of that religion' does not mean the susceptibilities of all adherents.<sup>72</sup> Rather, His Honour stated that it 'is a mistake to identify quantity or number, beyond saying that "the adherents" must be a significant proportion of the group, such that the phrase as a matter of fact is satisfied'.<sup>73</sup>

12.66 The exception for religious bodies in s 37(1)(d) of the *Sex Discrimination Act* is subject to s 37(2) which provides that s 37(1)(d) does not apply to an act or practice of a religious institution providing Commonwealth-funded aged care services (unless the act or practice is connected with employing people to provide those services). Section 37(2) was introduced into the *Sex Discrimination Act* with the other reforms in 2013. In a joint media release with the Attorney-General, then Minister for Ageing, Mark Butler, said the amendment was necessary because

when such services are provided with tax payer dollars, it is not appropriate for providers to discriminate in the provision of those services.<sup>74</sup>

69 *Christian Youth Camps v Cobaw Community Health Services* [2014] VSCA 75 [299]–[300].

70 *Ibid* [301].

71 *Ibid* [299]–[301].

72 *OV and OW v Members of the Board of the Wesley Mission Council* (2010) 79 NSWLR 606 [12]. In this case, the phrase was considered in the context of s 56(d) of the *Anti-Discrimination Act 1977* (NSW).

73 *Ibid* [12].

74 Mark Dreyfus and Mark Butler, 'New Protections for Sexual Orientation, Gender Identity and Intersex People Pass the House' (Media Release, 20 May 2013), quoted in Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 [Provisions]* (Report, June 2013) [2.31].

12.67 The Senate Legal and Constitutional Affairs Legislation Committee recommended that such an amendment be included in the *Sex Discrimination Act* on the basis that it would ‘provide important legislative protection for older LGBTI Australians’ and that it is

consistent with the current practice of several of the major religious aged care providers, which have stated publicly that they already provide services on a non-discriminatory basis.<sup>75</sup>

12.68 The Minority Report of the Senate Committee argued against introduction of the amendment on the basis that

removal of such an exemption could compromise the capacity of some religious organisations to operate aged care facilities in accordance with the principles which underpin and define their existence.<sup>76</sup>

12.69 The Minority Report further suggested that ‘nearly identical concerns arise’ in relation to educational and health facilities as in the case of aged care facilities, such that it would be anomalous to treat them differently.<sup>77</sup>

12.70 In contrast, the Australian Greens recommended that the exceptions for religious bodies (and for religious educational institutions specifically — see below) should be removed entirely because they ‘do not strike the right balance between freedom of religion and protection from arbitrary discrimination’.<sup>78</sup>

12.71 **Other exceptions relating to accommodation:** Another specific exception applies to religious bodies in connection with the provision of accommodation,<sup>79</sup> while a more specific exception to the prohibition on discrimination in accommodation disapples the prohibition for charities, in relation to the grounds of sex and marital or relationship status.<sup>80</sup>

### ***Exceptions for religious educational institutions***

12.72 Other exceptions, contained in s 38 of the *Sex Discrimination Act*, relate specifically to educational institutions ‘conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed’ (religious educational

75 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia (n 74) [3.64], rec 1.

76 Minority Report to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 [Provisions]* (Report, June 2013) [1.2].

77 Ibid [1.7].

78 Australian Greens Comments to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 [Provisions]* (Report, June 2013) [1.7].

79 *Sex Discrimination Act 1984* (Cth) s 23(3)(b).

80 Ibid s 23(3)(c).

institutions).<sup>81</sup> The *Sex Discrimination Act* defines 'educational institution' as 'a school, college, university or other institution at which education or training is provided'.<sup>82</sup>

12.73 The exceptions in s 38 provide that some aspects of the prohibitions on discrimination in employment, contract work, and education do not make discrimination unlawful if it is done 'in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed'. The meaning and scope of this phrase is discussed above.<sup>83</sup>

12.74 The s 38 exceptions were expanded in 2013 to encompass newly introduced grounds of discrimination for the same reason that the general exceptions for religious bodies had been expanded: that is, the exceptions had been in place for a long time.<sup>84</sup> However, they were expanded only to apply to the grounds of sexual orientation and gender identity, and not to intersex status. The Government stated that it was not necessary to extend the exceptions to intersex status because it had 'not been informed of any religious doctrines which require discrimination' on that ground and that no religious organisation 'identified how intersex status could cause injury to the religious susceptibilities of its adherents', given it is a 'physical characteristic' that is 'conceptually different' to sexual orientation and gender identity.<sup>85</sup> The Government considered that these amendments would 'not alter the right to freedom of thought, conscience, and religion or belief'.<sup>86</sup>

12.75 In its submission to this Inquiry, however, the Australian Human Rights Commission considered that there

did not appear to have been a careful evaluation of whether these exemptions were too broad or whether they were appropriate at all in light of the aims of the amending legislation ...<sup>87</sup>

12.76 The exceptions for religious educational institutions in s 38 of the *Sex Discrimination Act* operate more narrowly than the exceptions for religious bodies in s 37. For example, in relation to employment of staff, s 38(1) provides that it is not unlawful to discriminate on certain grounds in:

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81 This aspect of s 38 of the *Sex Discrimination Act* has not been judicially considered. However, the Western Australia Equal Opportunity Tribunal has considered the phrase in the context of s 73 of the *Equal Opportunity Act 1984* (WA). In *Goldberg v Korsunski Carmel School* (2000) EOC 93-074, the Tribunal noted that, in determining whether the school was conducted in accordance with a particular religion or creed, it was relevant to consider whether a religious credo was present in the school's constitution and prospectus, and whether elements of this credo were evidenced in the daily life and activities of the school and its students: at 34–5.

82 *Sex Discrimination Act 1984* (Cth) s 4(1).

83 See above at [12.60]–[12.65].

84 See Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2013, 2895 (Mark Dreyfus). See also Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth) 8.

85 Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth) 8–9, 20.

86 *Ibid* 8–9.

87 Australian Human Rights Commission, *Submission 384*.


- making arrangements for determining who should be offered employment;
- determining who should be offered employment; or
- dismissing the employee.<sup>88</sup>


12.77 There are no exceptions to the prohibition on discrimination in relation to the terms or conditions of employment; denying or limiting an employee's access to opportunities for promotion, transfer, training, or other benefits associated with the employment; or subjecting an employee to any other detriment.

12.78 In addition, the exception in s 38(1) applies to discrimination on the grounds of sex, sexual orientation, gender identity, marital or relationship status, or pregnancy, but not on grounds of intersex status, potential pregnancy, breastfeeding, or family responsibilities. **Table 12.1** below illustrates the scope of the exception in s 38(1) relating to employees.

**Table 12.1: The exception in s 38(1) of the Sex Discrimination Act relating to employees**

Grounds	Prohibited Conduct					
	Arrangements for determining who should be offered employment	Determining who should be offered employment	Terms or conditions of employment	Denial of access to promotion, transfer, training, or other benefits	Dismissal	Subjection to detriment
Sex						
Sexual orientation						
Gender identity						
Intersex status						
Marital / relationship status						
Pregnancy						
Potential pregnancy						
Breastfeeding						
Family responsibilities						


 = the exception for religious educational institutions applies.


 = the exception for religious educational institutions does not apply.

12.79 In relation to contract workers, s 38(2) of the *Sex Discrimination Act* provides that it is not unlawful to discriminate on the grounds of sex, sexual orientation, gender identity, marital or relationship status, or pregnancy (but not on the grounds of intersex status, potential pregnancy, breastfeeding, or family responsibilities) by not allowing the contract worker to work or continue to work.<sup>89</sup> The exception does not apply to the prohibition on discrimination in the terms or conditions of work, by denying or limiting a contract worker's access to benefits associated with work, or by subjecting a contract worker to any other detriment. **Table 12.2** below illustrates the scope of the exception in s 38(2) relating to contract workers.

**Table 12.2: The exception in s 38(2) of the Sex Discrimination Act relating to contract workers**

Grounds	Prohibited Conduct			
	Terms of conditions of work	Not allowing to work or continue to work	Denial of access to benefits	Subjection to detriment
Sex				
Sexual orientation				
Gender identity				
Intersex status				
Marital / relationship status				
Pregnancy				
Potential pregnancy				
Breastfeeding				
Family responsibilities				

 = the exception for religious educational institutions applies.

 = the exception for religious educational institutions does not apply.

12.80 In relation to students, s 38(3) of the *Sex Discrimination Act* provides that it is not unlawful to discriminate on certain grounds in relation to:

- refusing a person's application for admission as a student;
- the terms or conditions on which admission is accepted;
- denying or limiting a student's access to any benefits;
- expelling a student; or
- subjecting a student to any other detriment.<sup>90</sup>

<sup>89</sup> Ibid s 38(2).


<sup>90</sup> Ibid s 38(3).




12.81 The s 38 exception for students applies to discrimination on the grounds of sexual orientation, gender identity, marital or relationship status, or pregnancy, but not on grounds of sex (noting the separate provision for single sex schools discussed at [12.55]), intersex status, potential pregnancy, breastfeeding, or family responsibilities. **Table 12.3** below illustrates the scope of the exception in s 38(3) relating to students.

**Table 12.3: The exception in s 38(3) of the Sex Discrimination Act relating to students**

Grounds	Prohibited Conduct				
	Refusal to accept for admission	Terms or conditions of admission	Denial of access to benefits	Expulsion	Subjection to detriment
Sex					
Sexual orientation					
Gender identity					
Intersex status					
Marital / relationship status					
Pregnancy					
Potential pregnancy					
Breastfeeding					

 = the exception for religious educational institutions applies.

 = the exception for religious educational institutions does not apply.

12.82 **Other potentially relevant exceptions:** The *Sex Discrimination Act* also includes other exceptions that may be relevant to religious educational institutions. These include exceptions for:

- benefits conferred for a charitable purpose;<sup>91</sup> and
- participation in competitive sport where ‘the strength, stamina or physique of competitors is relevant’.<sup>92</sup>

91 Ibid s 36.

92 Ibid s 42(1).

## State and territory anti-discrimination laws

12.83 Each Australian state and territory has an equality or anti-discrimination law which covers essentially the same attributes as those protected under the *Sex Discrimination Act*. Most also prohibit discrimination on religious grounds. Unlike Commonwealth law, prohibitions on discrimination in each state and territory are generally found in a single Act, rather than being found across separate pieces of legislation.

12.84 As noted above, Commonwealth, state, and territory laws that prohibit discrimination may overlap, and may differ in scope. Commonwealth anti-discrimination laws indicate that they are intended to operate concurrently with state and territory anti-discrimination laws, and a person may seek remedies under the law most favourable to them.<sup>93</sup> In the context of this Inquiry, the practical effect of this is that, if a state or territory law provides greater protection from discrimination than the Commonwealth *Sex Discrimination Act* (for example, because it has a more restrictive exception for religious educational institutions or covers additional attributes), religious educational institutions in that state or territory must comply with the more restrictive state or territory law.<sup>94</sup>

12.85 None of the state or territory anti-discrimination provisions that are relevant to the issues considered in this Inquiry are drafted in exactly the same way, nor are there any state or territory laws that are identical to the *Sex Discrimination Act*. However, all but one of the states and territories provides greater protection to students and staff from discrimination on the grounds contained in the *Sex Discrimination Act* (as well as the ground of religion) than that currently provided by Commonwealth law. Additionally, there is a trend towards crafting narrower exceptions for religious educational institutions.

12.86 [Table 12.4](#) and [Table 12.5](#) compare protections for attributes contained in the *Sex Discrimination Act*, as well as the attribute of religion or belief, in relation to students and staff across state and territory jurisdictions. These tables also categorise the scope of specific exceptions applying to religious educational institutions. [Appendix E](#) provides greater detail about the specifics of the law in each jurisdiction. The remainder of this section provides a high-level summary of key points and trends in relation to state and territory anti-discrimination law.

## Protected attributes in state and territory laws

12.87 As set out in [Table 12.4](#) and [Table 12.5](#), and further in [Appendix E](#), each state and territory generally prohibits discrimination in education and employment on all of the grounds contained in the *Sex Discrimination Act*. However, there are differences in the wording of particular attributes.<sup>95</sup> For example, NSW protects

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93 See [Chapter 13](#).

94 See [Chapter 13](#).

95 See [Appendix E](#).

'homosexuality', 'transgender grounds', and 'marital or relationship status',<sup>96</sup> while Queensland protects 'sexuality', 'gender identity', and 'relationship status'.<sup>97</sup>

12.88 Discrimination on the ground of religion in education and employment is also prohibited in all states and territories, except for NSW and SA. These two states do not specifically prohibit discrimination on this ground, although discrimination on the ground of religious appearance or dress is specifically prohibited in SA,<sup>98</sup> and some discrimination on religious grounds has been held to amount to prohibited race discrimination in NSW.<sup>99</sup>

12.89 Again, in those jurisdictions prohibiting discrimination on religious grounds, there are differences in terminology used, with prohibitions on discrimination on the grounds of 'religious conviction' (ACT and WA), 'religious belief or activity' (NT and Victoria), 'religious belief or religious activity' (Queensland), and 'religious belief or affiliation, or religious activity' (Tasmania).<sup>100</sup>

## Exceptions for religious educational institutions: students

12.90 **Exceptions to prohibition on discrimination on grounds contained in the *Sex Discrimination Act*:** Most state and territory laws do not provide exceptions for religious educational institutions to prohibitions on discrimination against students on grounds contained in the *Sex Discrimination Act*.<sup>101</sup> In the majority of Australian states and territories it is therefore already unlawful for religious educational institutions to directly or indirectly discriminate against a student on the grounds of sex, sexual orientation, gender identity, marital or relationship status, or pregnancy.

12.91 The only states that do have exceptions in relation to students concerning grounds contained in the *Sex Discrimination Act* are NSW (applying to all private schools<sup>102</sup>) and WA (giving preference is allowed in 'good faith in favour of adherents of that religion or creed generally, but not in a manner that discriminates against a particular class or group of persons who are not adherents of that religion or creed'<sup>103</sup>). However, the Western Australian government is currently considering a recommendation made in 2022 by the Law Reform Commission of WA to remove this exception.<sup>104</sup>

96 *Anti-Discrimination Act 1977* (NSW) ss 49ZH, 49ZO, 38C, 38K, 40, 46A.

97 *Anti-Discrimination Act 1991* (Qld) ss 7, 14, 15, 38, 39.

98 *Equal Opportunity Act 1984* (SA) ss 85T(7), 85U, 85ZD.

99 See, eg, *Jones and Harbour Radio Pty Ltd v Trad (No 2)* [2011] NSWADTAP 62.

100 See **Appendix E**.

101 Subject to particular exceptions in relation to single sex schools, accommodation, and the training of religious leaders.

102 *Anti-Discrimination Act 1977* (NSW) ss 31A(3), 38K(3), 46A(3), 49ZO(3).

103 *Equal Opportunity Act 1984* (WA) s 73(3).

104 Law Reform Commission of Western Australia, *Project 111: Review of the Equal Opportunity Act 1984* (WA) (Final Report, May 2022) rec 81.

**12.92 Exceptions to prohibition on discrimination on religious grounds:** Of the jurisdictions that prohibit discrimination against students on the ground of religion, all but one (the NT) provide an exception for religious educational institutions.<sup>105</sup> However, each of these exceptions is subject to certain qualifications. For example:

- In Tasmania, religious educational institutions can discriminate against prospective students on the grounds of religious belief or affiliation or religious activity (of the student, their parents, or grandparents), but only at the time of first enrolment and in accordance with the institution's policy on admission.<sup>106</sup> Discrimination on religious grounds is therefore prohibited once a student is enrolled. The legislation also specifically states that this exception 'does not permit discrimination on any grounds' other than religious belief or affiliation or religious activity.<sup>107</sup>
- In the ACT, the exception applies only in schools conducted solely for students of one religious conviction, only at enrolment, and only where there is a published policy.<sup>108</sup>
- In Queensland and Victoria, an exception for religious educational institutions applies in schools conducted wholly or mainly for students of a particular religion.<sup>109</sup> The Queensland government has accepted in principle a recommendation of the Queensland Human Rights Commission that Queensland's exception be amended to specify that the exception applies only at enrolment, and only on the ground of 'religion' (not religious belief or activity).<sup>110</sup>
- In Victoria, another exception provides that the prohibition on discrimination against students on the basis of religious belief or activity does not apply to reasonable and proportionate action that conforms to the doctrines, beliefs, or principles of the religion, and is reasonably necessary to avoid injury to the religious susceptibilities of adherents.<sup>111</sup>

105 NT law previously provided for such an exception, but this exception was repealed in December 2022: *Anti-Discrimination Amendment Act 2022* (NT) s 15. Discrimination against students or prospective students on the ground of their religious belief or activity is therefore now prohibited, whether at enrolment or otherwise.

106 *Anti-Discrimination Act 1998* (Tas) s 51A(4).

107 *Ibid* s 51A(3).

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





109 *Anti-Discrimination Act 1991* (Qld) s 41; *Equal Opportunity Act 2010* (Vic) s 39.






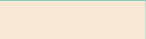





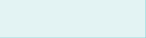























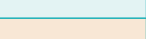


















110 Queensland Human Rights Commission (n 42) rec 40.1; Queensland Government, *Final Queensland Government Response to the Queensland Human Rights Commission's Report, Building Belonging – Review of Queensland's Anti-Discrimination Act 1991* (Report, April 2023).

111 *Equal Opportunity Act 2010* (Vic) s 83. Note that this exception does not apply in relation to employment.

**Table 12.4: Exceptions for religious educational institutions: students**

This table sets out key exceptions to prohibitions on discrimination in each jurisdiction for religious schools in respect of students and prospective students. The table includes exceptions specific to religious educational institutions only (or, in the absence of a specific exception for religious educational institutions, applicable exceptions available to religious bodies, or to private schools). Exceptions on the basis of sex for single-sex educational institutions have not been included in the comparison, nor have specific exceptions in relation to the provision of accommodation or narrower exceptions applying to the selection or training of religious leaders.

	= Less restrictive exceptions	<i>Categorisation of exceptions as less restrictive or more restrictive was determined by a range of factors, including: when the exception applies (at enrolment, selection or otherwise), whether the exception is qualified in any way, and whether there are additional requirements (such as publication of a policy).</i>
	= More restrictive exceptions	
	= No exceptions	
	= No prohibition	

	Sex	Gender Identity	Marital / Relationship Status	Pregnancy	Sexual Orientation	Religion or Belief
ACT						
Cth						
NT						
NSW						
Qld						 *
SA						
Tas						
Vic						
WA	 *	 *	 *	 *	 *	 *

\* Reform recommendations further limiting relevant exceptions represented in the table have been accepted (Queensland) or are under consideration (WA).

## Exceptions for religious educational institutions: staff

**12.93 Exceptions to prohibition on discrimination on grounds contained in the *Sex Discrimination Act*:** In relation to staff, there is greater divergence between states and territories in relation to the availability of exceptions for religious educational institutions to prohibitions on discrimination on the grounds of sex, sexual orientation, gender identity, marriage or relationship status, and pregnancy. However, there is a broad trend towards removing such exceptions. For example:

- The majority of jurisdictions (the ACT, the NT, Tasmania, and Victoria) have no religious educational institutions exception for discrimination on these grounds (except for a narrow exception applying to the selection and training of religious leaders).<sup>112</sup>
- Two states (Queensland and SA) have exceptions that are more restrictive than those available under Commonwealth law. In Queensland, this exception relates to taking action that is 'not unreasonable' in relation to selection, conduct in the course of a person's work, or doing something connected with a person's work.<sup>113</sup> In SA, the exception is limited to the grounds of sexual orientation, gender identity, intersex status, or marital or relationship status, and action taken must be in accordance with a public policy.<sup>114</sup> However, the Queensland government has accepted recommendations made by the Queensland Human Rights Commission to repeal the exception in Queensland's legislation, and the South Australian Law Reform Commission has also recommended repealing the exception in SA.<sup>115</sup>
- Two states (NSW and WA) have exceptions that are similar to, or broader than, those found in Commonwealth law.<sup>116</sup> However, the WA government is considering a recommendation by the Law Reform Commission of WA to repeal the exception under WA law.<sup>117</sup>

**12.94 Exceptions to prohibition on discrimination on religious grounds:** The greatest differences between the states and territories lie in their approaches to exceptions to discrimination against staff on religious grounds. The following summarises the position in each of the states and territories, from the most restrictive to least restrictive approach:

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<sup>112</sup> See **Appendix E**.

<sup>113</sup> *Anti-Discrimination Act 1991* (Qld) s 25(2)(a).

<sup>114</sup> *Equal Opportunity Act 1984* (SA) ss 34(3), 85Z(2).

<sup>115</sup> Queensland Government (n 110) rec 39.1; Queensland Human Rights Commission (n 42) rec 39.1; South Australian Law Reform Institute, '*Lawful Discrimination*': *Exceptions under the Equal Opportunity Act 1984 (SA) to Unlawful Discrimination on the Grounds of Gender Identity, Sexual Orientation and Intersex Status* (Report, June 2016) rec 3.

<sup>116</sup> *Equal Opportunity Act 1984* (WA) ss 73(1), (2); *Anti-Discrimination Act 1977* (NSW) ss 25(3)(c), 38C(3)(c), 40(3)(c), 49ZH(3)(c).

<sup>117</sup> Law Reform Commission of Western Australia (n 104) rec 79.

- In the NT there is no longer a specific exception available to religious educational institutions in relation to the prohibition on discrimination in employment on the ground of religion. Rather, such employers can only rely on a generally applicable 'genuine occupational qualifications' or 'inherent requirements' exception.<sup>118</sup>
- In Victoria, a religious educational institution can discriminate in employment on the basis of religious belief or activity only where conformity with the doctrines, beliefs, or principles of the religion is an inherent requirement of the position and the discrimination is reasonable and proportionate in the circumstances.<sup>119</sup> This exception expressly states that it 'does not permit discrimination on the basis of any attribute' other than religious belief or activity.
- In the ACT, the prohibition on discrimination in employment does not make it unlawful for a religious educational institution to discriminate on the ground of religious conviction in relation to selection and appointment of staff:
  - (a) where the duties of employment involve, or would involve, the participation by the employee or worker in the teaching or practice of the relevant religion;<sup>120</sup> or
  - (b) where the discrimination is intended to enable, or better enable, the institution to be conducted in accordance with its doctrines, tenets, beliefs, or teachings, as long as it is in accordance with a published policy that is readily accessible by prospective and current employees and contractors at the institution.<sup>121</sup>
- In Queensland, a legislative note provides that 'employing persons of a particular religion to teach in a school established for students of the particular religion' is an example of a genuine occupational requirement (which is a general exception that applies to all grounds and all types of employment).<sup>122</sup> The Queensland Human Rights Commission has, however, recommended removing this legislative note.<sup>123</sup>

Queensland also has a specific exception for religious educational institutions that provides that it is not unlawful to discriminate in employment (in relation to any protected attribute<sup>124</sup>) in a way that is not unreasonable if the employee or prospective employee openly acts in a way that they know, or ought reasonably know, is contrary to the employer's religious beliefs, in selection, in the course of the persons' work, or in the course of doing something connected

118 *Anti-Discrimination Act 1992* (NT) s 35.

119 *Equal Opportunity Act 2010* (Vic) s 83A.

120 *Discrimination Act 1991* (ACT) s 44. Note that amendments have recently been introduced to this section by the *Discrimination Amendment Act 2023* (ACT). These amendments will come into force in April 2024. Until then, the exception also applies to staff involved in the 'observance' of the particular religion.

121 *Discrimination Act 1991* (ACT) ss 46(2)(b), 46(4)(b).

122 *Anti-Discrimination Act 1991* (Qld) s 25(1). See above at [\[12.24\]](#)–[\[12.37\]](#).

123 Queensland Human Rights Commission (n 42) rec 39.1.

124 Except for age, race, and impairment: *Anti-Discrimination Act 1991* (Qld) s 25(6).

with the work.<sup>125</sup> It must also be a genuine occupational requirement that the person act consistently with the employer's religious beliefs in connection with their work.<sup>126</sup> Again, the Queensland Human Rights Commission has recommended repeal of this section and replacement with an exception to the prohibition on discrimination on the ground of religious belief or activity if the differential treatment is reasonable and proportionate in the circumstances, and the participation of the person in the teaching, observance, or practice of a particular religion is a genuine occupational requirement.<sup>127</sup>

- In Tasmania, religious educational institutions can discriminate against a staff member or prospective staff member on the grounds of religious belief or affiliation or religious activity 'if the discrimination is in order to enable, or better enable, the educational institution to be conducted in accordance with those tenets, beliefs, teachings, principles or practice'.<sup>128</sup>
- In WA, an exception similar to that under the *Sex Discrimination Act* applies to religious educational institutions for discrimination in employment on both religious grounds and grounds contained in the *Sex Discrimination Act*.<sup>129</sup> A separate exception also applies in relation to private schools, where the duties of the employment or work are connected with the participation of the employee in any religious observance or practice.<sup>130</sup> The Law Reform Commission of Western Australia has recommended repealing these exceptions and replacing them with a provision similar to Victoria's — providing an exception to the prohibition on discrimination on the ground of religious conviction only, where it is reasonable and proportionate, and conformity with doctrines, tenets, or beliefs of the religion is an inherent requirement of the job.<sup>131</sup>
- SA and NSW laws do not prohibit discrimination in employment on the ground of religion.<sup>132</sup>

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125 Ibid s 25(3)(a).

126 Ibid s 25(3)(b).

127 Queensland Human Rights Commission (n 42) rec 39.2.

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

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

130 Ibid s 66(1).

131 Law Reform Commission of Western Australia (n 104) rec 79.

132 Although, in SA, discrimination on the ground of religious appearance or dress is prohibited. Specifically, an exception applies 'if the discrimination is for the purposes of enforcing a standard of appearance or dress reasonably required for the employment or engagement': *Equal Opportunity Act 1984* (SA) s 85Z(5).



**Table 12.5: Exceptions for religious educational institutions: staff**

This table sets out key exceptions to prohibitions on discrimination in each jurisdiction for religious schools in respect of staff and prospective staff. The table includes exceptions specific to religious educational institutions only (or, in the absence of a specific exception for religious educational institutions, applicable exceptions available to religious bodies, or to private schools). More general exceptions in relation to employment, or accommodation, have not been included in the analysis.

	= Less restrictive exceptions	<i>Categorisation of exceptions as less restrictive or more restrictive was determined by a range of factors, including: when the exception applies (at selection or otherwise), whether the exception is qualified in any way, and whether there are additional requirements (such as publication of a policy).</i>
	= More restrictive exceptions	
	= No exceptions	
	= No prohibition	

	Sex	Gender Identity	Marital / Relationship Status	Pregnancy	Sexual Orientation	Religion or Belief
ACT						
Cth						
NT						
NSW						
Qld	*	*	*	*	*	*
SA						
Tas						
Vic						
WA	*	*	*	*	*	*

\* Reform recommendations further limiting relevant exceptions represented in the table have been accepted (Queensland) or are under consideration (WA).

## Positive duties in state and territory laws

12.95 Victoria is the only state or territory to include a positive duty to take reasonable and proportionate measures to eliminate discrimination, sexual harassment, or victimisation as far as possible in its anti-discrimination laws.<sup>133</sup> This duty largely mirrors the duty found in s 47C of the *Sex Discrimination Act*, although it applies to all protected attributes under the *Equal Opportunity Act 2010* (Vic) (not just the ground of sex). Recommendations have been made to introduce similar positive duties into anti-discrimination laws in the ACT, WA, and Queensland.<sup>134</sup>

12.96 A more limited duty to ‘reasonably accommodate a special need that another person has because of an attribute’ is found in the NT,<sup>135</sup> while a similar duty to make ‘reasonable adjustments’ for employees or prospective employees exists in Victoria.<sup>136</sup>

## Protection of associates in state and territory laws

12.97 The ACT, the NT, Queensland, Tasmania, and Victoria protect individuals from discrimination on the basis of their association with a person who possesses any protected attribute (including attributes protected under the *Sex Discrimination Act*).<sup>137</sup> NSW, SA, and WA also protect individuals from discrimination based on a (more limited) range of attributes that associates might possess.<sup>138</sup> However, these protections are subject to the exceptions for religious educational institutions described above.

<sup>133</sup> *Equal Opportunity Act 2010* (Vic) s 15.

<sup>134</sup> ACT Law Reform Advisory Council (n 10) 48–9; Law Reform Commission of Western Australia (n 104) 237–46, recs 121–132; Queensland Human Rights Commission (n 42) rec 15.1.

<sup>135</sup> *Anti-Discrimination Act 1992* (NT) s 24.

<sup>136</sup> *Equal Opportunity Act 2010* (Vic) s 20. Similarly, under the Commonwealth *Disability Discrimination Act*, conduct will be discrimination if the discriminator does not make ‘reasonable adjustments’ for the person and failure to do so has the effect that the aggrieved person is treated less favourably than a person without the disability, or is disadvantaged: ss 5(2), 6(2).

<sup>137</sup> *Anti-Discrimination Act 1991* (Qld) s 7(p); *Anti-Discrimination Act 1998* (Tas) s 16(s); *Equal Opportunity Act 2010* (Vic) s 6(q); *Discrimination Act 1991* (ACT) s 7(1)(c); *Anti-Discrimination Act 1992* (NT) s 19(1)(r).

<sup>138</sup> These grounds include the grounds of sex, transgender, marital or domestic status, and homosexuality (*Anti-Discrimination Act 1977* (NSW) ss 24(1), 38B(1), 39(1), 49ZG(1)); sex, gender identity, sexual orientation, intersex status, marital or domestic partnership status, pregnancy, breastfeeding, and caring responsibilities (*Equal Opportunity Act 1984* (SA) ss 29(2)(d), 29(2a)(e), 29(3)(d), 29(4)(d), 85T(2)(d), 85T(4)(d), 85T(5)(b), 85T(6)(d)); and sexual orientation (*Equal Opportunity Act 1984* (WA) s 35O(2)). A recent review by the Law Reform Commission of Western Australia has recommended the introduction of a new protected attribute of personal association into the *Equal Opportunity Act 1984* (WA) which would extend protection for associates to all grounds protected under the Act: Law Reform Commission of Western Australia (n 104) rec 50.

## Instruments relating to employment

12.98 Some state and territory anti-discrimination legislation explicitly details how such legislation interacts with instruments relating to employment, such as enterprise agreements and modern awards. For example, s 53 of the *Anti-Discrimination Act 1992* (NT) provides that a person is permitted to discriminate if the act

is necessary to comply with, or is specifically authorised by: ...

(d) an order or award of a court or tribunal having power to fix minimum wages and other terms and conditions of employment; or

(e) an industrial agreement in existence at the commencement of this Act ...

12.99 Similar provisions are found in s 106 of the *Anti-Discrimination Act 1991* (Qld) and s 54 of the *Anti-Discrimination Act 1977* (NSW).<sup>139</sup>

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139 Similar exceptions also exist in SA and WA in relation to the prohibition on age discrimination: *Equal Opportunity Act 1984* (SA) s 85F(4); *Equal Opportunity Act 1984* (WA) s 66ZS(1)(b).



# 13. Other Domestic Law

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## Introduction

13.1 This chapter sets out various aspects of domestic law relevant to this Inquiry to complement the discussion of dedicated anti-discrimination legislation in [Chapter 12](#). The chapter proceeds in four parts by discussing aspects of constitutional law (the first part), the *Fair Work Act* (the second part), the *Australian Human Rights Commission Act* (the third part), and common law duties, duties of care, and work health and safety requirements (the final part).

13.2 A brief summary of the broad relevance of these areas of law to this Inquiry is contained in the introduction to [Chapter 12](#). A more detailed discussion of the relevant content of each area of law follows in the remainder of this chapter.

## Constitutional law

13.3 The *Australian Constitution* provides for certain protections from interference with the free exercise of religion (and other freedoms) by the Commonwealth Parliament and Commonwealth Government. In addition, the *Australian Constitution* provides the source of power for the Commonwealth Government to make anti-discrimination laws, and to legislate in respect of religious educational institutions. Moreover, the

*Australian Constitution* regulates the interaction between Commonwealth, state, and territory laws. Each of these issues is examined in turn below.

## Constitutional protection of religious freedom

13.4 The *Australian Constitution*, unlike many other constitutions around the world, does not contain a bill of rights, nor does it expressly protect many individual rights.

13.5 Religious freedom is, however, one of the few freedoms that ‘receives some constitutional protection in Australia’.<sup>1</sup> Section 116 of the *Australian Constitution* provides that:

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

13.6 The High Court has consistently interpreted this provision as offering limited protection<sup>2</sup> and, as such, the provision has not frequently been invoked.<sup>3</sup> Conceptually, s 116 of the *Australian Constitution* provides a limitation on Commonwealth legislative power, rather than conferring individual rights.<sup>4</sup>

13.7 The High Court has also interpreted s 116 as purposive in nature — that is, it is directed at laws that explicitly have the prohibited aim (of, for example, interfering with the free exercise of religion), rather than just an indirect effect on those aims.<sup>5</sup> The High Court has taken a wide view of what comes within the ambit of ‘religion’, but has recognised that the state may place restrictions on its citizens and on religious communities by general laws to preserve and protect society.<sup>6</sup> In *Adelaide Company of Jehovah’s Witnesses v Commonwealth* (the ‘*Jehovah’s Witnesses* case’), Latham CJ said that s 116

is based upon the principle that religion should, for political purposes, be regarded as irrelevant. It assumes that citizens of all religions can be good citizens, and that accordingly there is no justification in the interests of the community for prohibiting the free exercise of any religion.

1 Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws* (Report No 129, December 2015) [5.25].

2 See, eg, *Adelaide Company of Jehovah’s Witnesses v Commonwealth* (1943) 67 CLR 116, 157; *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 135–6; *Kruger v Commonwealth* (1997) 190 CLR 1, 46, 124–5.

3 Carolyn Evans, *Legal Protection of Religious Freedom in Australia* (Federation Press, 2012) 74–9.

4 *Kruger v Commonwealth* (1997) 190 CLR 1, 46, 124–5.

5 See *ibid* 40 (Brennan CJ), 86 (Toohey J); *Minister for Immigration and Ethnic Affairs v Lebanese Moslem Association* (1987) 17 FCR 373; *Attorney-General (Vic) v Ex Rel Black v Commonwealth* (1981) 146 CLR 559; *Cheedy v Western Australia* (2011) 194 FCR 562 [88]–[89]. See also Evans (n 3) 74–9. Cf Luke Beck, ‘The Case against Improper Purpose as the Touchstone for Invalidity under Section 116 of the Australian Constitution’ (2016) 44(3) *Federal Law Review* 505.

6 *Adelaide Company of Jehovah’s Witnesses v Commonwealth* (1943) 67 CLR 116, 131–2 (Latham CJ); *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 135–6. See further below at [13.9]–[13.10].

[A number of examples] illustrate the difficulty of the problem with which a court is confronted when it is asked to determine whether or not a particular law infringes the constitutional provision by prohibiting 'the free exercise of ... religion'. Can any person, by describing (and honestly describing) his beliefs and practices as religious exempt himself from obedience to the law? Does s 116 protect any religious belief or religious practice, irrespective of the political or social effect of that belief or practice?<sup>7</sup>

13.8 In the *Jehovah's Witnesses* case, the High Court found that s 116 was not infringed by what was a very significant interference with religious freedom (the Commonwealth Government's effective ban on Jehovah's Witnesses under wartime regulations due to their opposition to war), although the ordinance was held to be unlawful on other grounds.<sup>8</sup>

### **Religion and the scope of religious freedom**

13.9 The concept of religion and the bounds of religious freedom under s 116 have been considered in significant detail by the High Court in *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)*. The judgment of Mason ACJ and Brennan J has provided a widely accepted definition of 'religion' in Australian law. It also emphasised the importance of freedom of religion to a democratic society and provided important insights into its scope and limits:

Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society. The chief function in the law of a definition of religion is to mark out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint. Such a definition affects the scope and operation of s. 116 of the Constitution and identifies the subject matters which other laws are presumed not to intend to affect. Religion is thus a concept of fundamental importance to the law. ...

Though religious freedom and religious equality are beneficial to all true religions, minority religions — not well established and accepted — stand in need of especial protection. ... It is more accurate to say that protection is required for the adherents of religions, not for the religions themselves. Protection is not accorded to safeguard the tenets of each religion; no such protection can be given by the law, and it would be contradictory of the law to protect at once the tenets of different religions which are incompatible with one another. Protection is accorded to preserve the dignity and freedom of each man so that he may adhere to any religion of his choosing or to none. The freedom of religion being equally conferred on all, the variety of religious beliefs which are within the area of legal immunity is not restricted. ...

But the area of legal immunity marked out by the concept of religion cannot extend to all conduct in which a person may engage in giving effect to his faith in the supernatural. The freedom to act in accordance with one's religious beliefs is not as inviolate as the freedom to believe, for general laws to preserve and protect society are not defeated by a plea of religious obligation to breach

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<sup>7</sup> *Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116, 126.  
<sup>8</sup> *Ibid.*

them ... Religious conviction is not a solvent of legal obligation. ... Conduct in which a person engages in giving effect to his faith in the supernatural is religious, but it is excluded from the area of legal immunity marked out by the concept of religion if it offends against the ordinary laws, i.e. if it offends against laws which do not discriminate against religion generally or against particular religions or against conduct of a kind which is characteristic only of a religion.

We would therefore hold that, for the purposes of the law, the criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief, 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. Those criteria may vary in their comparative importance, and there may be a different intensity of belief or of acceptance of canons of conduct among religions or among the adherents to a religion. The tenets of a religion may give primacy to one particular belief or to one particular canon of conduct. Variations in emphasis may distinguish one religion from other religions, but they are irrelevant to the determination of an individual's or a group's freedom to profess and exercise the religion of his, or their, choice.<sup>9</sup>

#### 13.10 Wilson and Deane JJ adopted a similar approach to the definition of 'religion':

One of the more important indicia of 'a religion' is that the particular collection of ideas and/or practices involves belief in the supernatural, that is to say, belief that reality extends beyond that which is capable of perception by the senses. If that be absent, it is unlikely that one has 'a religion'. Another is that the ideas relate to man's nature and place in the universe and his relation to things supernatural. A third is that the ideas are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices having supernatural significance. A fourth is that, however loosely knit and varying in beliefs and practices adherents may be, they constitute an identifiable group or identifiable groups. A fifth, and perhaps more controversial, indicium ... is that the adherents themselves see the collection of ideas and/or practices as constituting a religion.<sup>10</sup>

### Implied freedoms

13.11 Two implied constitutional freedoms arguably have some relevance in this Inquiry: freedom of political communication and freedom of association. Freedom of political communication is derived from the constitutional system of representative government, which the High Court has recognised requires 'an implication of freedom of communication of information and opinions about matters relating to the government of the Commonwealth'.<sup>11</sup> Freedom of association is a corollary.<sup>12</sup>

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<sup>9</sup> *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 130–6.

<sup>10</sup> *Ibid* 174.

<sup>11</sup> *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 72–3. See further *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 559.

<sup>12</sup> See *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 [148]; *Tajjour v New South Wales* (2014) 254 CLR 508 [143] (Gageler J). See also *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 212; *Kruger v Commonwealth* (1997) 190 CLR 1, 115.



13.12 These two implied freedoms are not individual rights (in terms of conferring justiciable rights on individuals), but rather restrict the Commonwealth from imposing laws that interfere with communication about politics and the government.<sup>13</sup>

13.13 Some have argued that because political speech can be motivated or informed by religion, ‘the implied freedom of political communication operates to protect religious speech’.<sup>14</sup> Others have suggested that

as the implied freedom of association is a corollary of the implied freedom of political communication, laws impeding a religion’s ability to organise would impermissibly infringe the implied freedom of political communication.<sup>15</sup>

13.14 In contrast, others, including Professor Williams, have emphasised that the implied rights are implied in the ‘broader structures of the Constitution — to establish a judiciary, [and] a representative government’, and are not related to religion.<sup>16</sup>

13.15 Implied constitutional freedoms are not absolute.<sup>17</sup> A law can interfere with communication about government or politics (or freedom of association) without breaching the implied freedom if the law is ‘reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of’ the system of government reflected in the *Australian Constitution*.<sup>18</sup>

13.16 The question of whether a particular law is ‘reasonably appropriate and adapted to serve a legitimate end’ involves consideration of whether the law is:

- ‘suitable’ (that is, ‘having a rational connection to the purpose of the provision’);
- ‘necessary’ (that is, ‘there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom’); and
- ‘adequate in its balance’ (that is, ‘requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom’).<sup>19</sup>

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13 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 566–7. See further Australian Law Reform Commission (n 1) [4.17]–[4.27], [6.16]–[6.18].

14 Alex Deagon, ‘Defining the Interface of Freedom and Discrimination: Exercising Religion, Democracy and Same-Sex Marriage’ (2017) 20 *International Trade and Business Law Review* 239, 257.

15 Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into the Status of the Human Right to Freedom of Religion or Belief* (Interim Report, November 2017) [4.47].

16 Evidence to Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, Sydney, 6 July 2017 (Professor George Williams) 2–3, cited in Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia (n 15) [4.41].

17 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561, 565–7.

18 *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1 [67]. See George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory* (Federation Press, 7th ed, 2018) [29.89].

19 *McCloy v New South Wales* (2015) 257 CLR 178, 194–5 (French CJ, Kiefel, Bell and Keane JJ).

13.17 The High Court has described this approach as ‘structured proportionality’ and has applied it in a number of political communication cases, as well as in relation to other constitutional rights and contexts.<sup>20</sup>

## Constitutional power to legislate

13.18 The Commonwealth Parliament has power to make laws only in relation to matters that are specifically assigned to it under the *Australian Constitution*.<sup>21</sup> In contrast, state and territory parliaments have much broader powers to legislate, including in respect of many matters also within Commonwealth power.<sup>22</sup>

13.19 As such, for a Commonwealth law to be constitutionally valid, the law must be capable of being characterised as a law with respect to one or more of the matters specifically assigned to the Commonwealth under the *Australian Constitution*. Sometimes, a Commonwealth statute will be supported by a ‘patchwork of constitutional powers’,<sup>23</sup> with some provisions in a statute supported by one head of power and other provisions in the same statute supported by other heads of power. Commonwealth anti-discrimination statutes expressly reference multiple heads of Commonwealth legislative power — including the external affairs power, the trade and commerce power, and the corporations power — as sources of power for the operation of their provisions.<sup>24</sup>

13.20 The external affairs power<sup>25</sup> has been interpreted broadly to support laws implementing Australia’s treaty obligations as well as laws with respect to matters external to Australia.<sup>26</sup> In implementing Australia’s treaty obligations, legislation does not need to precisely reflect the terms of the treaty nor does the whole of the treaty need to be implemented. However, legislation must still be consistent with obligations under the treaty and be ‘reasonably capable of being considered appropriate and adapted to implementing the treaty’.<sup>27</sup>

13.21 Treaties relevant to the enactment of Commonwealth anti-discrimination legislation include those referred to in **Chapter 10**, such as the ICCPR, ICESCR,

20 Dane Luo, ‘The “March of Structured Proportionality”: The Future of Rights and Freedoms in Australian Constitutional Law’ <[www.auspublaw.org/blog/2022/04/the-march-of-structured-proportionality-the-future-of-rights-and-freedoms-in-australian-constitutional-law](http://www.auspublaw.org/blog/2022/04/the-march-of-structured-proportionality-the-future-of-rights-and-freedoms-in-australian-constitutional-law)>.

21 See, eg, *Australian Constitution* ss 51, 52.

22 Ibid s 107; *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 22; *Northern Territory (Self-Government) Act 1978* (Cth) s 6. See further Williams, Brennan and Lynch (n 18) 274–5, 388–92.

23 *Thomas v Mowbray* (2007) 233 CLR 307 [167].

24 See *Disability Discrimination Act 1992* (Cth) s 12; *Age Discrimination Act 2004* (Cth) s 10; *Sex Discrimination Act 1984* (Cth) s 9.

25 *Australian Constitution* s 51(xxix). See also Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Sexuality Discrimination* (Report, December 1997) [3.8].

26 See *Commonwealth v Tasmania* (1983) 158 CLR 1; *Victoria v Commonwealth* (1996) 187 CLR 416.

27 *Victoria v Commonwealth* (1996) 187 CLR 416, 487.

CRC, CRPD, ILO 11, CERD, and CEDAW.<sup>28</sup> Treaties that recognise rights to freedom of religion, such as the ICCPR, ICESCR, and CRC, may also support a constitutional foundation for exceptions for religious institutions in anti-discrimination legislation.

13.22 The trade and commerce<sup>29</sup> and corporations<sup>30</sup> powers are also potential sources of power for the Commonwealth to legislate with respect to religious educational institutions (including in anti-discrimination laws). As Professor Beck has explained:

A corporation is an entity that has legal personhood (ie perpetual succession, and the ability to sue and be sued) regardless of how it is described. A trading corporation is such an entity that has some substantial trading activities. Selling education, which is what non-government schools do, is trade and non-governmental schools are corporations.<sup>31</sup>

13.23 In relation to the territories, the Commonwealth has a ‘plenary’ power to legislate for territories (such as the ACT and the NT).<sup>32</sup> This broad power includes the power to enact anti-discrimination legislation.

## Relationship between Commonwealth, state, and territory laws

13.24 As outlined above, state and territory parliaments may make laws with respect to most matters for which the Commonwealth Parliament also has legislative power. For example, all states and territories, as well as the Commonwealth, have passed anti-discrimination laws.

13.25 Section 109 of the *Australian Constitution* provides that where ‘a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid’. Accordingly, in order to determine whether this provision applies, it is necessary to determine whether there is an ‘inconsistency’ between a state law and a Commonwealth law.

13.26 The High Court has held that inconsistency will arise when a state law would ‘alter, impair, or detract from’ the operation of a Commonwealth law.<sup>33</sup> The High Court has identified three broad ways in which inconsistency might arise:<sup>34</sup>

28 Regarding the prohibited grounds of discrimination covered under relevant treaties, see **Chapter 11**.

29 *Australian Constitution* s 51(i).

30 *Ibid* s 51(xx).

31 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Legislative Exemptions That Allow Faith-Based Educational Institutions to Discriminate against Students, Teachers and Staff* (Report, November 2018) 26 [2.23].

32 *Australian Constitution* s 122. See also *Berwick Ltd v Gray* (1976) 133 CLR 60, 607; Williams, Brennan and Lynch (n 18) 371–88.

33 *Dickson v The Queen* (2010) 241 CLR 491 [13].

34 See Williams, Brennan and Lynch (n 18) 397.

- when it is not possible to obey both the state law and the Commonwealth law because one requires a person to do X while the other requires a person *not* to do X;<sup>35</sup>
- when one law confers a legal right, privilege, or entitlement but the other takes it away or diminishes it (for example, one law says a person can do X while the other says a person cannot do X);<sup>36</sup> and
- when a Commonwealth law is intended to be the only law on the topic, but a state law operates within that same field.<sup>37</sup>

13.27 Some submissions argued that the *Sex Discrimination Act* is inconsistent with various state anti-discrimination laws such that s 109 of the *Australian Constitution* applies.<sup>38</sup> Those submissions argued that state anti-discrimination laws that do not include equivalent exceptions to prohibitions on discrimination for religious educational institutions diminish entitlements conferred on those institutions under the *Sex Discrimination Act*. Consequently, the submissions argued that those state laws are invalid to the extent of the inconsistency, such that religious educational institutions in those states can, and do, rely on the exceptions in s 38 of the *Sex Discrimination Act*.

13.28 However, an alternative view is that no such inconsistency arises because ss 10(3) and 11(3) of the *Sex Discrimination Act* provide (respectively) that the Act is 'not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently' with the Act, and that the Act is 'not intended to exclude or limit the operation of a law of a State or Territory that furthers the objects of a relevant international instrument and is capable of operating concurrently' with the Act.

13.29 Williams and others have argued that ss 10(3) and 11(3) of the *Sex Discrimination Act* are likely to be accepted by the High Court as 'a virtually conclusive indication of legislative intent' that Commonwealth, state, and territory laws are to operate concurrently.<sup>39</sup> Indeed, when introducing the Sex Discrimination Bill to the Senate in 1983, Senator Susan Ryan noted that its provisions would

operate to ensure the preservation of State sex discrimination legislation and enable that legislation to operate concurrently with the Commonwealth Sex Discrimination Act.<sup>40</sup>

13.30 While s 109 of the *Australian Constitution* does not apply to the ACT and the NT, those territories are subject to a similar rule as applied to that Constitutional

35 See, eg, *R v Brisbane Licensing Court; Ex Parte Daniell* (1920) 28 CLR 23.

36 See, eg, *Colvin v Bradley Bros Pty Ltd* (1943) 68 CLR 151.

37 See, eg, *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466.

38 Australian Christian Churches, *Submission 80*; M Fowler, *Submission 201*; Freedom for Faith, *Submission 203*; Australian Christian Lobby, *Submission 299*; Catholic Education Tasmania, *Submission 397*; Australian Catholic Bishops Conference, *Submission 406*.

39 Williams, Brennan and Lynch (n 18) 423.

40 Commonwealth, *Parliamentary Debates*, Senate, 2 June 1983, 1186 (Senator Susan Ryan).

provision.<sup>41</sup> Section 28(1) of the *Australian Capital Territory (Self-Government) Act 1978* (Cth) provides that an enactment of the ACT has ‘no effect to the extent that it is inconsistent with’ a law of the Commonwealth, although an ACT enactment shall be taken to be consistent with a Commonwealth law ‘to the extent that it is capable of operating concurrently with that law’.<sup>42</sup>

13.31 The *Northern Territory (Self-Government) Act 1988* (Cth) does not contain a provision speaking to inconsistency between laws in the NT and Commonwealth laws. However, Professor Williams, Associate Professor Brennan, and Professor Lynch have suggested that a similar result to s 109 of the *Australian Constitution* ‘may flow from covering cl 5 of the Constitution, which extends the binding effect of Commonwealth laws to the “people ... of every part of the Commonwealth”’ and that, nevertheless, ‘the result has been held to follow from the doctrine of “paramountcy”’.<sup>43</sup> The doctrine of paramountcy was explained by Lockhart J in *Attorney-General (NT) v Minister for Aboriginal Affairs*:

It is beyond the power of the Northern Territory of Australia to make laws repugnant to or inconsistent with laws of the Commonwealth or to exercise powers conferred by Northern Territory Laws in a manner inconsistent with, or repugnant to laws of the Commonwealth. It is not a question of inconsistency between the two sets of laws which may otherwise be valid, rather it is a question going to the competency of the subordinate legislature to enact laws or to cause laws to operate in a manner inconsistent with or repugnant to laws of the paramount legislature.<sup>44</sup>

13.32 Ultimately, the constitutional implications of state and territory anti-discrimination laws that remove or diminish exceptions in Commonwealth anti-discrimination laws have not yet been tested in a court, and these issues therefore ‘await resolution’.<sup>45</sup> In the absence of any litigated challenge to the validity of state or territory anti-discrimination laws, the ALRC has made its recommendations in this Inquiry on the basis that state and territory anti-discrimination laws operate concurrently with the *Sex Discrimination Act*.

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41 Section 122 of the *Australian Constitution* also gives the Commonwealth Parliament power to override laws enacted by the NT and ACT Legislative Assemblies.

42 See *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, 448–54.

43 Williams, Brennan and Lynch (n 18) 388–9.

44 *Attorney-General (NT) v Minister for Aboriginal Affairs* (1989) 25 FCR 345, 366–7.

45 Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination Law and Equal Opportunity Law* (The Federation Press, 3rd ed, 2018) [2.14.23]–[2.14.24]. In *Citta Hobart Pty Ltd v Cawthorn* (2022) 96 ALJR 476, the High Court considered whether the Tasmanian Anti-Discrimination Tribunal had jurisdiction under the *Anti-Discrimination Act 1998* (Tas) to determine a complaint made by the respondent that he had been discriminated against by the appellants, in circumstances where the appellants had asserted that parts of the Tasmanian Act were inconsistent with the *Disability Discrimination Act 1992* (Cth) and standards made under that Act, and were therefore inoperative by force of s 109 of the *Australian Constitution*. The Tribunal had concluded that it did not have jurisdiction to hear the complaint and, as such, it dismissed the complaint without considering the merits of the Constitutional defence. The High Court held that the Tribunal reached the correct conclusion on the issue of its jurisdiction. However, it did not consider the merits of the s 109 issue.

13.33 To the extent that state and territory anti-discrimination laws operate concurrently with the *Sex Discrimination Act*, it is necessary to comply with whichever law is more restrictive, whether that be the Commonwealth law or the state or territory law. The Attorney-General's Department (Cth) has explained as follows:

There are already inconsistencies between the exemptions in existing Commonwealth, State and Territory anti-discrimination laws. ... There is no evidence that such inconsistencies prohibit these anti-discrimination laws from operating concurrently, particularly given the Commonwealth Acts explicitly preserve such concurrent operation. The effect of inconsistent exemptions is that conduct which is covered by an exemption under one law but not the other law would not be unlawful under the former law but would be under the latter. This means a person could not sustain a complaint under the former law, but may be able to under the latter law. The same principle applies whether it is the Commonwealth or State law which has the narrower exemption.<sup>46</sup>

13.34 In practical terms, this would have implications for an applicant in determining which body to approach for dispute resolution and relief. The jurisdiction with the most restrictive law may be chosen in preference to the jurisdiction with the less restrictive law.

13.35 The *Fair Work Act* provides that it is not intended to apply to the exclusion of any of the state or territory anti-discrimination Acts.<sup>47</sup> The relevance of state and territory anti-discrimination Acts to the *Fair Work Act* (in particular, under s 351(2)(a) of that Act) is discussed in the following part.<sup>48</sup>

## Fair Work Act

13.36 In addition to Commonwealth anti-discrimination legislation discussed in **Chapter 12**, the *Fair Work Act* is another piece of Commonwealth legislation that provides protection from discrimination in some employment contexts. The grounds protected under the *Fair Work Act* overlap significantly with those found in Commonwealth anti-discrimination legislation, including all of the grounds contained in the *Sex Discrimination Act* (except that the *Fair Work Act* does not prohibit discrimination on the grounds of either 'potential pregnancy' or 'relationship status').<sup>49</sup> However, the *Fair Work Act* also applies beyond this to other grounds too — notably for this Inquiry, to the ground of religion.

46 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 [Provisions]* (June 2013) 28, quoting responses to questions on notice provided by the Attorney-General's Department on 21 May 2013, at 11.

47 *Fair Work Act 2009* (Cth) ss 26, 27.

48 See below at [\[13.40\]](#)–[\[13.41\]](#).

49 The *Fair Work Act* covers the protected attribute of 'marital status', rather than 'marital or relationship status', and the protected attribute of 'pregnancy' rather than 'pregnancy or potential pregnancy': *Fair Work Act 2009* (Cth) ss 153, 195, 351, 772. Cf *Sex Discrimination Act 1984* (Cth) ss 6–7. See further [Chapter 9](#).

13.37 There are several provisions of the *Fair Work Act* that are particularly relevant to this Inquiry. These include:

- the prohibition against discriminatory terms in **modern awards** (s 153(1)) and **enterprise agreements** (ss 194, 195(1));<sup>50</sup>
- protection from **adverse action** taken in relation to an employee or prospective employee on discriminatory grounds (s 351(1));<sup>51</sup> and
- protection from **termination** of employment on discriminatory grounds (s 772(1)(f)).<sup>52</sup>

13.38 Adverse action is taken by an employer against an employee if the employer:

- (a) dismisses the employee; or
- (b) injures the employee in his or her employment; or
- (c) alters the position of the employee to the employee's prejudice; or
- (d) discriminates between the employee and other employees of the employer.<sup>53</sup>

13.39 The High Court has held, in relation to an equivalent provision in earlier workplace relations legislation, that

- 'injuring' an employee in their employment 'covers injury of any compensable kind'; and
- altering the position of an employee to the employee's prejudice 'is a broad additional category which covers not only legal injury but any adverse affection of, or deterioration in, the advantages enjoyed by the employee before the conduct in question'.<sup>54</sup>

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50 These provisions of the *Fair Work Act* only apply in relation to 'national system employees': *Fair Work Act 2009* (Cth) ss 133, 170. National system employees are individuals employed by a constitutional corporation, the Commonwealth, a Commonwealth authority, a body corporate incorporated in a territory, a person who carries on an activity (whether of a commercial, governmental, or other nature) in a territory, and a person who employs the individual as a flight crew officer, maritime employee, or waterside worker in connection with constitutional trade or commerce: at ss 13, 14.

51 These provisions only apply to national system employees: *ibid* ss 338, 339.

52 In these provisions, 'employee' has its ordinary meaning and, as such, extends beyond the scope of 'national system employees': *ibid* ss 15, 770.

53 *Ibid* s 342(1) item 1.

54 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 [4] (Brennan CJ, McHugh, Gummow, Kirby, and Hayne JJ). The relevant provision in that case was s 298K(1) of the *Workplace Relations Act 1996* (Cth).

13.40 The protection from adverse action on discriminatory grounds found in s 351(1) of the *Fair Work Act* is subject to an exception in s 351(2)(a) which provides that s 351(1) does not apply to action that is ‘not unlawful under any anti-discrimination law in force in the place where the action is taken’ (that is, any Commonwealth, state, or territory anti-discrimination law). This exception was

intended to ensure that where action is not unlawful under a relevant anti-discrimination law (e.g. because of the application of a relevant statutory exemption) then it is not adverse action under subclause 351(1).<sup>55</sup>

13.41 The aim was to avoid ‘a result whereby the [*Fair Work Act*] imposed more onerous obligations upon an employer than those already imposed upon her or him under general anti-discrimination laws’.<sup>56</sup>

13.42 While it is clear that s 351(2)(a) of the *Fair Work Act* applies in relation to express exceptions to prohibitions on discrimination contained in Commonwealth, state, and territory anti-discrimination laws,<sup>57</sup> some courts have interpreted the provision more broadly to mean that the protection afforded by s 351(1) ‘is no greater than that provided by an anti-discrimination law in force in the place where the action was taken’ (such as where particular action is ‘not expressed to be unlawful’ in legislation).<sup>58</sup> That is, the provisions wholly exempt ‘conduct in jurisdictions where there is no legislation to enforce the prohibition of discriminatory conduct’.<sup>59</sup>

13.43 An application for orders regarding alleged adverse action or termination on discriminatory grounds can be made to either the Federal Court or the Federal Circuit and Family Court of Australia (Division 2).<sup>60</sup> A court may make ‘any order the court considers appropriate’ if satisfied that a person has contravened, or proposes to contravene, a relevant provision.<sup>61</sup> For example, a court may make orders granting an injunction, awarding compensation, or for reinstatement of a person.<sup>62</sup> In addition, if satisfied that a person has contravened a relevant provision, a court may order the person to pay a pecuniary penalty that the court considers appropriate.<sup>63</sup> A court may order a party to pay costs incurred by another party only in limited circumstances, such as when proceedings are instituted vexatiously or without reasonable cause, when a party’s unreasonable act or omission caused the other party to incur costs, or when a party has unreasonably refused to participate in related matters in the

55 Supplementary Explanatory Memorandum, Fair Work Bill 2008 (Cth) [220].

56 *RailPro Services Pty Ltd v Flavel* (2015) 242 FCR 424 [113].

57 Supplementary Explanatory Memorandum, Fair Work Bill 2008 (Cth) [220]; Department of Employment and Workplace Relations (Cth), *Updating the Fair Work Act 2009 to Provide Stronger Protections for Workers against Discrimination* (Consultation Paper, April 2023) 9.

58 *Fair Work Ombudsman v Foot Thai Massage (No 4)* [2021] FCA 1242 [762]. See also *Krcho v University of New South Wales* (2021) 309 IR 1 [37]–[40]; *Rumble v HWL Ebsworth* (2019) 289 IR 72 [140]–[146]. For a discussion of the effect of this aspect of the provision, see Rees, Rice and Allen (n 45) [17.2.25]–[17.2.27].

59 Department of Employment and Workplace Relations (Cth) (n 57) 9.

60 *Fair Work Act 2009* (Cth) s 539(2) item 11.

61 *Ibid* s 545(1).

62 *Ibid* s 545(2).

63 *Ibid* s 546.



Fair Work Commission.<sup>64</sup> Otherwise, each party ordinarily bears its own costs of the proceedings. A contravention of the provisions relating to discriminatory adverse action or termination is not an offence.<sup>65</sup>

13.44 Overall, the provisions of the *Fair Work Act* listed above have the following practical effect (subject to the exceptions discussed below):

- The provisions extend protection from discrimination because of the person's religion in the context of enterprise agreements, modern awards, and termination (but not adverse action) to employees in NSW and SA (the only states in which there is otherwise no such protection).<sup>66</sup>
- The provisions give employees access to remedies under the *Fair Work Act* for discrimination because of a number of attributes (including religion and some attributes equivalent to those contained in the *Sex Discrimination Act*), in the context of enterprise agreements, modern awards, and termination. However, if an employee prefers to take action under applicable state or territory legislation instead (for example, when narrower exceptions may apply under state or territory legislation than under the *Fair Work Act*), then the employee must ordinarily make a complaint to a relevant state or territory body, or commence proceedings in a state or territory court.
- The provisions give employees access to remedies under the *Fair Work Act* for adverse action because of a number of attributes, including religion (in states and territories other than NSW and SA) and some attributes equivalent to those contained in the *Sex Discrimination Act*. However, if a broader exception is available under an applicable Commonwealth, state, or territory anti-discrimination law compared to the exceptions available under the *Fair Work Act*, the broader exception effectively applies under the *Fair Work Act* as well. If a narrower exception is available under an applicable Commonwealth, state, or territory anti-discrimination law than under the *Fair Work Act*, an employee can ordinarily take action under that other law, and the narrower exception will apply in those circumstances.

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64 Ibid s 570.

65 Ibid s 549.

66 In relation to the ground of political opinion, see *McIntyre v Special Broadcasting Services Corporation* [2015] FWC 6768. In that case, McIntyre made an application against the SBS under s 351(1) of the *Fair Work Act* alleging adverse action on the ground of political opinion, on the advice of his lawyers. However, the Commission found that the application would fail by operation of s 351(2)(a), as discrimination on the basis of political opinion was not unlawful under relevant NSW legislation (the Commission also noted that discrimination on the ground of religion was not unlawful under the NSW legislation, and that a similar position appeared to apply in SA). McIntyre consequently made an application under s 773 of the *Fair Work Act* alleging unlawful termination under s 773, although this application was not made within the timeframes required by the Act. The Commission held that exceptional circumstances existed such that the time for making the application should be extended.

## Fair Work Commission

13.45 The *Fair Work Act* establishes the Fair Work Commission and sets out its functions and powers. These include dealing with disputes under the Act, such as through mediation, conciliation, making recommendations, or (if expressly authorised by a provision of the Act) arbitration.<sup>67</sup> However, the Commission only has power to deal with disputes if authorised to do so by another provision of the Act.

13.46 Under the *Fair Work Act*, the Fair Work Commission is empowered to hear disputes in relation to the adverse action and termination provisions (including ss 351 and 772 of the *Fair Work Act*).<sup>68</sup> However, an employee can only make an application to the Commission alleging termination on discriminatory grounds if they are not entitled to make an adverse action application.<sup>69</sup> Adverse action disputes are treated differently depending on whether the dispute involves a dismissal or action other than a dismissal.

13.47 If the dispute involves a dismissal, the Commission must deal with the dispute, such as through mediation, conciliation, making recommendations, or expressing an opinion.<sup>70</sup> If the Commission is satisfied that all reasonable attempts to resolve the dispute have been unsuccessful, or are not likely to succeed, then it must issue a certificate stating so.<sup>71</sup> Parties then have the option of either agreeing to arbitration (where orders for reinstatement, payment of compensation, or the maintenance of employment can be made, for example) or of applying for a court order.<sup>72</sup> If the Commission considers that arbitration or a court application would not have a reasonable prospect of success, it must advise the parties accordingly.<sup>73</sup>

13.48 If an adverse action dispute involves action other than a dismissal, then the employee can choose whether to lodge a complaint with the Fair Work Commission or to make an application to a court.<sup>74</sup> However, a court application cannot be made if an application or complaint has already been made under another anti-discrimination law.<sup>75</sup> If a complaint is made to the Fair Work Commission, and the parties agree, the Commission can deal with the dispute by conducting a conference.<sup>76</sup> This could involve mediation or conciliation, or result in the Commission making recommendations or expressing an opinion.<sup>77</sup> The Commission is not required to issue a certificate

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67 *Fair Work Act 2009* (Cth) ss 576(2), 595.

68 *Ibid* ss 365, 372, 773.

69 *Ibid* s 723.

70 *Ibid* ss 368(1), 776(1).

71 *Ibid* ss 368(3)(a), 776(3)(a).

72 *Ibid* ss 369(2), 370, 777(2), 778. Civil remedies may be available for contraventions of some of these orders: s 539.

73 *Ibid* ss 368(3)(b), 776(3)(b).

74 *Ibid* ss 372, 539(2) item 11, 734.

75 *Ibid* s 734. Similarly, if a general protections court application has been made in relation to an adverse action that does not involve a dismissal, then an application or complaint under anti-discrimination law cannot be made: *ibid*.

76 *Ibid* s 374.

77 *Ibid*.

following the conference, but it is required to advise the parties if it considers that a court order would not have a reasonable prospect of success.<sup>78</sup>

13.49 In relation to discriminatory terms in an enterprise agreement or modern award, the Fair Work Commission has different powers. For example, the *Fair Work Act* provides that the Commission must approve an enterprise agreement only if satisfied that the agreement does not contain any unlawful terms (including those that are discriminatory or objectionable).<sup>79</sup>

13.50 A modern award must also not contain discriminatory or objectionable terms, and any such term is of no effect.<sup>80</sup> In addition, the Fair Work Commission can make a determination to vary or revoke an award 'if necessary to achieve the modern award objective' (which aims to provide 'a fair and minimum safety net of terms and conditions',<sup>81</sup> taking into account, for example, the need to achieve gender equality in the workplace, promote social inclusion, and improve access to secure work).<sup>82</sup> An employer or employee can apply to the Commission to vary, omit, or include terms in a modern award.<sup>83</sup>

13.51 Additionally, the Fair Work Commission is required to review a modern award if it is referred to the Fair Work Commission by the Australian Human Rights Commission, and to vary the award if the award 'requires' a person to do an act that is unlawful under the *Age Discrimination Act*, *Disability Discrimination Act*, or *Sex Discrimination Act*.<sup>84</sup> Similar provisions also apply to enterprise agreements referred to the Fair Work Commission by the Australian Human Rights Commission.<sup>85</sup>

## Exceptions

13.52 Each of the relevant provisions of the *Fair Work Act* listed above (those concerning discriminatory terms in modern awards and enterprise agreements, adverse action on discriminatory grounds, and termination on discriminatory grounds) are subject to an inherent requirements exception and an exception for religious institutions. The prohibition on adverse action on discriminatory grounds is also subject to the exception in s 351(2)(a) which was discussed above.<sup>86</sup> In addition, the prohibition on discriminatory terms in enterprise agreements is also subject to an exception in s 195(2)(c) relating to special measures to achieve equality.

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78 Ibid s 375.

79 Ibid s 186(4).

80 Ibid ss 136, 137, 150, 153.

81 Ibid s 134(1).

82 Ibid ss 134(1)(aa), (1)(ab), (1)(c), 157.

83 Ibid s 158.

84 Ibid s 161. This provision applies if the discriminatory act would be unlawful 'but for the fact that the act would be done in direct compliance' with the modern award.

85 Ibid s 218. This provision applies if the discriminatory act would be unlawful 'but for the fact that the act would be done in direct compliance' with the enterprise agreement.

86 See above at [13.40]–[13.42].

**13.53 Inherent requirements exceptions:** The inherent requirements exceptions apply in relation to all protected grounds where the reason for the discriminatory term, action, or termination is the 'inherent requirements of the particular position'.<sup>87</sup> Similar exceptions are found in other Commonwealth anti-discrimination laws.<sup>88</sup>

**13.54 Religious institutions exceptions:** The exceptions for religious institutions in the *Fair Work Act* are similar to the exception for religious educational institutions in s 38 of the *Sex Discrimination Act*.<sup>89</sup> However, the *Fair Work Act* exceptions apply to all religious institutions (not just educational institutions) as well as to all grounds protected under the *Fair Work Act* (including religion). Specifically, the *Fair Work Act* exception applies to an employee of 'an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed' where the discriminatory term, action, or termination is done 'in good faith' and 'to avoid injury to the religious susceptibilities of adherents of that religion or creed'.<sup>90</sup>

**13.55** The religious institutions exceptions to the prohibition on discriminatory terms in enterprise agreements has been held to 'clearly' apply to a term of an enterprise agreement concerning teachers that specified that the agreement would not apply 'to members of a recognised religious order and/or clerks in Holy Orders, and/or Ministers of Religion'.<sup>91</sup>

## Unfair dismissals

**13.56** In addition to the provisions of the *Fair Work Act* discussed above, employees of educational institutions may also be able to utilise the Act's unfair dismissal provisions. However, these provisions only apply to national system employees who have completed a minimum period of employment with their employer (generally a period of continuous service of six or 12 months) where a modern award covers the person, an enterprise agreement applies to the person, or the person's annual rate of earnings is less than the high income threshold.<sup>92</sup>

**13.57** A person will be considered to have been unfairly dismissed if their dismissal was 'harsh, unjust, or unreasonable', was not consistent with the Small Business Fair Dismissal Code, and was not a case of genuine redundancy.<sup>93</sup>

**13.58** If the Fair Work Commission finds that a person has been unfairly dismissed, it can make an order for reinstatement or, if this is inappropriate, for the payment of compensation.<sup>94</sup> These remedies may be available to an employee as an alternative

87 *Fair Work Act 2009* (Cth) ss 153(2)(a), 195(2)(a), 351(2)(b), 772(2)(a).

88 See **Chapter 12**.

89 See **Chapter 12**.

90 *Fair Work Act 2009* (Cth) ss 153(2)(b), 195(2)(b), 351(2)(c), 772(2)(b).

91 *Re Teachers Enterprise Agreement 2011* [2010] FWAA 10025 [3], [8].

92 *Fair Work Act 2009* (Cth) ss 13, 333, 382–384.

93 *Ibid* ss 385, 386, 388, 389. Criteria for considering whether the dismissal was harsh, unjust, or unreasonable are found in s 387 of the *Fair Work Act*.

94 *Ibid* ss 390–392.

to (and not in addition to) any applicable remedies relating to termination on discriminatory grounds.<sup>95</sup>

## Australian Human Rights Commission Act

13.59 The *Australian Human Rights Commission Act* establishes the Australian Human Rights Commission and sets out its duties, functions, and powers. These functions include inquiring into and conciliating complaints of discrimination and breaches of human rights.

13.60 There are three pathways by which complaints can be made to the Commission under the *Australian Human Rights Commission Act*: the ‘unlawful discrimination’ pathway, the ‘discrimination’ pathway, and the ‘human rights’ pathway.

### Unlawful discrimination pathway

13.61 As set out in [Chapter 12](#), the Australian Human Rights Commission can inquire into complaints about acts, omissions, or practices that are alleged to contravene various provisions of the four Commonwealth anti-discrimination Acts, including the *Sex Discrimination Act*. Under the *Australian Human Rights Commission Act*, these are called complaints of ‘unlawful discrimination’.<sup>96</sup> If a complaint of unlawful discrimination is not resolved by conciliation at the Commission, an application can be made to the Federal Court or Federal Circuit and Family Court of Australia (Division 2) in relation to the matter.<sup>97</sup>

13.62 In December 2022, the *Australian Human Rights Commission Act* was amended to introduce provisions empowering the Australian Human Rights Commission to inquire into any matter that may relate to ‘systemic unlawful discrimination’.<sup>98</sup> This power was introduced to provide the Commission with ‘a broad inquiry function to investigate issues of systemic discrimination’.<sup>99</sup>

13.63 Systemic unlawful discrimination is unlawful discrimination that affects a ‘class or group of persons’, and is ‘continuous, repetitive or forms a pattern’.<sup>100</sup> The Australian Human Rights Commission can only conduct an inquiry into systemic unlawful discrimination when requested by the relevant Minister or when ‘it appears

95 Ibid ss 725, 727–731.

96 *Australian Human Rights Commission Act 1986* (Cth) s 3 (definition of ‘unlawful discrimination’). From December 2023, in relation to the positive duty in s 47C of the *Sex Discrimination Act*, the Australian Human Rights Commission will also have power to inquire into a person’s compliance with the positive duty, make recommendations to prevent a failure to comply with the duty, issue a compliance notice, apply for a court order to enforce a compliance notice, and apply for an enforceable undertaking: *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) sch 2 pt 2 div 2 item 23.

97 *Australian Human Rights Commission Act 1986* (Cth) s 46PO.

98 Ibid s 35L(1).

99 Explanatory Memorandum, *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022* [24], [223].

100 *Australian Human Rights Commission Act 1986* (Cth) s 35L(2).

to the Commission to be desirable to do so'.<sup>101</sup> There is no dedicated provision for members of the public to make formal 'complaints' about systemic unlawful discrimination.

13.64 Further, after conducting an inquiry into a matter relating to systemic unlawful discrimination, the Commission only has the power to report to the Minister, or to publish a report generally, in relation to the inquiry (which may include non-binding recommendations to address the matter).<sup>102</sup> There is no provision for the matter to be heard by a court.

## Discrimination pathway

13.65 The 'discrimination' pathway under the *Australian Human Rights Commission Act* gives effect to Australia's obligations under the ILO 111,<sup>103</sup> and relates only to discrimination 'in employment or occupation'.<sup>104</sup> Attributes protected under the 'discrimination' pathway include several that are protected under Commonwealth anti-discrimination legislation, and so are also protected under the 'unlawful discrimination' pathway. However, additional protected attributes under the 'discrimination' pathway include religion, political opinion, irrelevant criminal record, social origin, medical record, and trade union activity.<sup>105</sup>

13.66 The Australian Human Rights Commission may 'inquire into any act or practice (including any systemic practice) that may constitute discrimination'<sup>106</sup> if requested by the Minister, when the Commission has received a written complaint, or when 'it appears to the Commission to be desirable to do so'.<sup>107</sup> If appropriate, the Commission may 'endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry'.<sup>108</sup> If the matter is not settled at conciliation, the complainant cannot apply to a court for a determination or remedy (that is, the complaint is not justiciable).<sup>109</sup> Rather, if the Commission is of the opinion that an act or practice constitutes discrimination, the Commission may make non-binding recommendations, and may report to the Minister.<sup>110</sup> Recommendations may relate to preventing a repetition of the act or continuation of the practice; payment of compensation; or taking other action to remedy or reduce any loss or damage suffered.<sup>111</sup>

101 Ibid s 35M.

102 Ibid s 35Q.

103 Australian Human Rights Commission, *Submission 384; Australian Human Rights Commission Act 1986* (Cth) sch 1.

104 *Australian Human Rights Commission Act 1986* (Cth) s 3 (definition of 'discrimination').

105 Ibid; *Australian Human Rights Commission Regulations 2019* (Cth) reg 6.

106 *Australian Human Rights Commission Act 1986* (Cth) s 31(b).

107 Ibid s 32(1).

108 Ibid s 31(b).

109 Rosalind Croucher, "Seeking Equal Dignity without Discrimination" – The Australian Human Rights Commission and the Handling of Complaints' (2019) 93(7) *Australian Law Journal* 571, 576.

110 *Australian Human Rights Commission Act 1986* (Cth) ss 32A, 35.

111 Ibid s 35(2).

13.67 As the Australian Human Rights Commission explained in its submission to this Inquiry, because the grounds of ‘unlawful discrimination’ and ‘discrimination’ overlap, in practice

where a complaint is covered by both definitions, the Commission usually treats the complaint as one of unlawful discrimination because this has the potential for justiciable remedies for the complainant.<sup>112</sup>

13.68 The Commission further submitted that the lack of judicial remedies under the *Australian Human Rights Commission Act* in relation to the ‘discrimination’ pathway make it ‘unsatisfactory’.<sup>113</sup> The Commission has advocated for various reforms to anti-discrimination law that would provide for appropriate remedies in relation to discrimination on the basis of all relevant protected attributes, such that the ‘discrimination’ pathway could ultimately be repealed.<sup>114</sup>

13.69 The definition of ‘discrimination’ in the *Australian Human Rights Commission Act* contains two exceptions — an inherent requirements exception and an exception in relation to employment as a member of staff at a religious institution.<sup>115</sup> The religious institutions exception provides that a distinction, exclusion, or preference will not amount to ‘discrimination’ when it is

in connection with employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, being a distinction, exclusion or preference made in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or that creed.<sup>116</sup>

## Human rights pathway

13.70 The third complaint pathway under the *Australian Human Rights Commission Act* empowers the Australian Human Rights Commission to inquire into complaints that acts or practices done by or on behalf of the Commonwealth are inconsistent with human rights (the ‘human rights’ pathway).<sup>117</sup> Under the Act, ‘human rights’ means the rights and freedoms recognised in the ICCPR, in a number of UN declarations, and in ‘any relevant international instrument’.<sup>118</sup> There is some overlap between the ‘human rights’ pathway, the ‘unlawful discrimination’ pathway, and the ‘discrimination’

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112 Australian Human Rights Commission, *Submission 384*.

113 *Ibid.*

114 Australian Human Rights Commission, *Free & Equal: A Reform Agenda for Federal Discrimination Laws* (Position Paper, December 2021) 258–69.

115 *Australian Human Rights Commission Act 1986* (Cth) s 3(1) (definition of ‘discrimination’).

116 *Ibid* s 3(1)(d). **Recommendation 8** relates to an amendment of this exception such that it would not apply in relation to discrimination on the basis of religion in the context of employment as a member of the staff of a religious educational institution: see **Chapter 8**.

117 *Ibid* ss 3 (definition of ‘human rights’), 11(1)(f), 20(1).

118 *Ibid* s 3 (definition of ‘human rights’).

pathway — for example, because the ICCPR and other international instruments include rights to non-discrimination.<sup>119</sup>

13.71 The functions of the Australian Human Rights Commission, and the remedies available to complainants, are the same under the ‘human rights’ pathway as under the ‘discrimination’ pathway. The Commission can inquire into and endeavour to conciliate matters, and if the Commission is of the opinion that an act or practice is inconsistent with or contrary to any human right, the Commission may make non-binding recommendations, and may report to the Minister.<sup>120</sup> If the complaint is not resolved through conciliation, the Act does not provide for any court application in relation to the matter.

## Other relevant legal obligations

13.72 There are a range of other legal obligations that apply to educational institutions and are relevant in the context of this Inquiry. These include:

- common law and contractual duties;
- duties of care; and
- workplace health and safety requirements.

## Common law and contractual duties

13.73 Several common law duties have been held to be implied terms in all employment contracts. Most relevant to this Inquiry are the duty to obey, and the duty of fidelity and loyalty. These duties place some limits on how employees (and sometimes contract workers)<sup>121</sup> can behave both inside and outside the workplace. These duties are relevant to the extent to which religious educational institutions can impose conduct requirements on staff, and terminate or otherwise take action against staff for non-compliance.

13.74 **Duty to obey:** Employees have an obligation to obey all lawful and reasonable commands given by their employer. Employees do not need to obey unlawful commands (such as commands that breach anti-discrimination law), nor are they required to perform duties outside the agreed scope of employment.<sup>122</sup> What falls within the agreed scope of employment is determined by reference to the nature of

119 See, eg, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 2(1), 26; *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 2.

120 *Australian Human Rights Commission Act 1986* (Cth) ss 11(1)(f)(ii), 20A, 29(2).

121 Contract workers may sometimes have a contract of employment with labour hire agencies, but they usually do not have an employment contract with the host business (and, as such, they are not subject to the common law duties): Carolyn Sappideen, Paul M O’Grady and Joellen Riley, *Macken’s Law of Employment* (Thomson Reuters, 8th ed, 2016) 76–84. However, sometimes there may be an implied term that agency employees cannot breach the duty of fidelity to the host business: *ibid* 212 (fn 389). See *Equity 8 Pty Ltd v Shaw Stockbroking Ltd* [2007] NSWSC 413, 8.

122 Sappideen, O’Grady and Riley (n 121) 200. See also *Bampton v Viterro* [2015] SASCFC 87.



the work, the express and implied terms of the employment contract, and customs of the industry.<sup>123</sup>

13.75 Employers are permitted to give directions that employees must obey (in some instances, even directions pertaining to conduct outside the workplace), such as email and internet usage policies, dress codes, and policies concerning behaviour in the workplace.<sup>124</sup> Such directions must be reasonable.<sup>125</sup> What is reasonable will depend on the particular employment and prevailing standards at the time.<sup>126</sup>

13.76 If an employee refuses to comply with a lawful and reasonable order and this amounts to a repudiation of the employment contract or is 'sufficiently serious to allow discharge of the contract of employment', an employer may be entitled to dismiss the employee.<sup>127</sup> Usually this will require a 'calculated and persistent course of disobedience', but ultimately requires consideration of the consequences resulting from the refusal to obey and the circumstances in which the order was given.<sup>128</sup>

13.77 **Duty of fidelity and loyalty:** This is one of the core obligations imposed on employees by the common law. While the specific obligations imposed are not easy to define, at

the most general level, the duty could be said to embrace every aspect of an employee's duty towards the employer, varying according to the nature of the employment. ... It can be understood to prohibit acts outside the workplace which are inconsistent with the continuation of employment.<sup>129</sup>

13.78 As such, not only could breach of this duty encompass acts that are inconsistent with (express or implied) terms of the employment contract, but it could also arise where acts are 'injurious to the proper performance of an employee's duties under the contract'.<sup>130</sup> Breach of the duty could justify damages (where the breach results in loss to the employer) or, if sufficiently serious, dismissal.<sup>131</sup>

13.79 The scope of the duty of fidelity and loyalty may differ between classes of employees.<sup>132</sup> For example, senior employees may owe a fiduciary duty to the employer which 'imposes obligations over and above that of a duty of fidelity'.<sup>133</sup>

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123 Sappideen, O'Grady and Riley (n 121) 349.

124 Ibid 200.

125 Ibid 201. See *R v Darling Island Stevedoring and Lighterage Co Ltd; Ex Parte Halliday and Sullivan* (1938) 60 CLR 601, 621–2, approved in *Harrison v P & T Tube Mills Pty Ltd* (2009) 181 IR 162 [279].

126 Sappideen, O'Grady and Riley (n 121) 201, 350.

127 Ibid 352.

128 Ibid 353. See *Re Barrett and Women's Hospital Crown Street* [1947] AR (NSW) 565; *Izdes v L G Bennett & Co* (1995) 61 IR 439.

129 Sappideen, O'Grady and Riley (n 121) 212.

130 Ibid.

131 Ibid ch 8, 212 (fn 391), 423–4.

132 Ibid 212.

133 Ibid 213–17.

Fiduciary duties are more likely to be imposed on employees whose position involves a high level of discretion and trust, such as directors or senior managers.<sup>134</sup>

13.80 Accordingly, religious educational institutions could take action against employees (especially those in leadership positions) for breaching the duty of fidelity and loyalty where their actions at work, or even outside work, are incompatible with their employment obligations.

13.81 **Other duties:** It is still not yet settled by the High Court whether a general duty of good faith exists in all employment contracts.<sup>135</sup> If the duty does exist, 'it operates as an organising principle inherent in all contracts rather than an implied term', setting minimum standards of behaviour that are expressed in more specific contractual duties.<sup>136</sup> These include a duty to cooperate, a duty to act honestly, and a duty to exercise contractual powers for a proper purpose and not capriciously or arbitrarily.<sup>137</sup> As an organising principle, it cannot be excluded by the contract (unlike implied terms).<sup>138</sup>

13.82 If the duty of good faith was an implied term, it would have to satisfy the 'necessity test'.<sup>139</sup> That is, 'enjoyment of the rights conferred by the contract would or could be, rendered nugatory, worthless, or, perhaps be seriously undermined' if the duty did not exist.<sup>140</sup>

## Duties of care

13.83 Employers have a duty to take reasonable care to ensure the safety of employees.<sup>141</sup> This is a non-delegable duty that is usually found as an implied term in the employment contract or derived from the law of tort.<sup>142</sup> The employer's duty of care includes providing a safe place of work and a safe system of work, although what this requires depends on the circumstances of the case.<sup>143</sup> However, the duty to provide a safe system of work has been held to encompass physical safety as well as providing a work environment free from bullying, harassment, and vilification.<sup>144</sup>

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134 Ibid 215.

135 Ibid 176.

136 Ibid 177.

137 Ibid.

138 Ibid 178.

139 Ibid 177.

140 *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169 [29].

141 Sappideen, O'Grady and Riley (n 121) 254, 261. See also *O'Connor v Commissioner for Government Transport* (1954) 100 CLR 225, 229.

142 Sappideen, O'Grady and Riley (n 121) 254–5, 260. See also *Czatytko v Edith Cowan University* (2005) 79 ALJR 839 [12].

143 Sappideen, O'Grady and Riley (n 121) 266–7.

144 Ibid 267, 276. See *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471 [339].

13.84 Employees also have duties to take reasonable care in carrying out all employment tasks.<sup>145</sup> This duty is found both as an implied term in the employment contract and as part of the law of torts. If employees breach this duty, the employer may be vicariously liable.<sup>146</sup>

13.85 In the context of educational institutions, school authorities have been held to owe a non-delegable duty of care to staff as well as to students, while teachers have also been held to owe a duty of care to students.<sup>147</sup> A duty of care 'may attach to several parties within a school system: individual teachers, the school principal, and the school authority itself'.<sup>148</sup>

13.86 The responsibilities of a school authority have been described as including a duty

to take all reasonable care to provide an adequate system to ensure that no child is exposed to any unnecessary risk of injury; and to take all reasonable care to see that the system is carried out.<sup>149</sup>

13.87 A school authority may be negligent if 'reasonable care has not been taken to provide a safe school environment'.<sup>150</sup>

13.88 For example, school authorities have a duty to take reasonable steps to ensure that students are protected from bullying (both physical and psychological), including 'taking reasonable steps to ascertain the identity of the perpetrators and to take such action as [is] reasonable to prevent repetition by those persons of such conduct'.<sup>151</sup>

13.89 In the recent case of *Kaplan v Victoria (No 8)*, the court upheld negligence claims on the basis of alleged racially discriminatory conduct by staff and students at a government school, which the applicants said had caused them psychiatric injury.<sup>152</sup> In that case, Mortimer CJ also noted the

difficulties of the tasks involved and of the circumstances under which people have to work [in schools]. ... The professionalism, dedication and standards of those engaged in the provision of educational services are such that cases of liability for negligence will be exceptional.<sup>153</sup>

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145 Sappideen, O'Grady and Riley (n 121) 202–3.

146 Ibid 255–8.

147 *Commonwealth v Introvigne* (1982) 150 CLR 258 establishes that a school authority owes a special category of non-delegable duty of care for students, as well as being vicariously liable for any breach of duty carried out by an employee. See also *Richards v Victoria* [1969] VR 136; *Geyer v Downs* (1977) 138 CLR 91.

148 *Victoria v Subramanian* (2008) 19 VR 335 [9].

149 *Commonwealth v Introvigne* (1982) 150 CLR 258, 274–5.

150 *New South Wales v Lepore* (2003) 212 CLR 511 [105].

151 *Oyston v St Patrick's College* [2013] NSWCA 135 [152]. See also *Cox v NSW* (2007) 71 NSWLR 225.

152 *Kaplan v Victoria (No 8)* [2023] FCA 1092 [10], [873]–[874], [882].

153 Ibid [144], quoting with approval *Phelps v Hillingdon London Borough Council* (2000) 3 WLR 776.

## Work health and safety

13.90 Duties concerning work health and safety are primarily found in the model *Work Health and Safety Act 2011* (Cth) (which has been adopted by all states and territories, except for Victoria).<sup>154</sup> This legislation requires employers to provide a healthy and safe work environment for employees and other workers where it is reasonably practicable to do so.<sup>155</sup> Under the legislation, health includes physical and psychological health,<sup>156</sup> while the ‘work environment’ extends beyond physical processes and structures to, for example, employment and business processes (which may give rise to psychological harm).<sup>157</sup> Accordingly, religious educational institutions — like other employers — must consider the effects of their practices and policies on all staff.

13.91 The model *Work Health and Safety Act 2011* (Cth) also imposes duties on employees. These include a duty to take reasonable care for the employee’s own health and safety, as well as the health and safety of others.<sup>158</sup>

13.92 While injured persons cannot claim compensation under the laws, breach of work health and safety duties is a criminal offence. A range of compliance and enforcement options are available to Commonwealth, state, and territory work health and safety regulators to respond to a breach.<sup>159</sup> These include encouraging and assisting compliance (through information, guidance, and education), directing compliance (through improvement or prohibition notices), and sanctions (such as infringement notices, enforceable undertakings, and criminal penalties).<sup>160</sup>

154 *Work Health and Safety Act 2011* (Cth); *Work Health and Safety Act 2011* (ACT); *Work Health and Safety Act 2011* (NSW); *Work Health and Safety (National Uniform Legislation) Act 2011* (NT); *Work Health and Safety Act 2011* (Qld); *Work Health and Safety Act 2012* (SA); *Work Health and Safety Act 2012* (Tas) (‘Model Work Health and Safety Act’). See also *Occupational Health and Safety Act 2004* (Vic); *Occupational Health and Safety Act 1984* (WA).

155 See Sappideen, O’Grady and Riley (n 121) 286–94. See generally Model Work Health and Safety Act s 19.

156 Model Work Health and Safety Act s 4 (definition of ‘health’).

157 Sappideen, O’Grady and Riley (n 121) 302.

158 Model Work Health and Safety Act s 28.

159 Work health and safety regulators include WorkSafe ACT, SafeWork NSW, NT WorkSafe, Workplace Health and Safety Queensland, SafeWork SA, WorkSafe Tasmania, WorkSafe Victoria, WorkSafe WA, and Comcare.

160 Sappideen, O’Grady and Riley (n 121) 313.

# **PART FOUR: APPENDICES**



# Appendix A

## Consultations

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*Note that individuals are listed with the affiliation and title held at the time of consultation.*

	<b>Name</b>	<b>Consultee location</b>
1	Leonie Campbell, Law Council of Australia	Canberra
2	Matthew Wood, Law Council of Australia	Canberra
3	Karen Toohey, ACT Human Rights Commission	Canberra
4	Gabrielle McKinnon, ACT Government	Canberra
5	Elizabeth Dixon, ACT Government	Canberra
6	Anthony Odgers, Independent Education Union	Melbourne
7	Alastair Lawrie, Public Interest Advocacy Centre	Sydney
8	Jonathon Hunyor, Public Interest Advocacy Centre	Sydney
9	Liam Elphick, Monash University and Australian Discrimination Law Experts Group	Melbourne
10	Professor Beth Gaze, University of Melbourne and Australian Discrimination Law Experts Group	Melbourne
11	Dr Alice Taylor, Bond University and Australian Discrimination Law Experts Group	Gold Coast
12	Dr Robin Banks, University of Tasmania and Australian Discrimination Law Experts Group	Hobart
13	Nick Jensen, Australian Christian Higher Education Alliance	Sydney
14	Peter McKeon, Australian Christian Higher Education Alliance and Excelsia College	Sydney
15	Dr Jeannie Trudel, Christian Heritage College	Brisbane
16	Mark Sneddon, Sneddon Legal and Consulting	Sydney
17	Bishop Michael Stead, Anglican Church Diocese of Sydney	Sydney

	<b>Name</b>	<b>Consultee location</b>
18	Peter Fowler, Anglican Schools Corporation	Sydney
19	Alexander Teh, Australian GLBTIQ Multicultural Council	Melbourne
20	Vanessa Cheng, Australian Association of Christian Schools	Melbourne
21	Adel Salman, Islamic Council of Victoria	Melbourne
22	Reverend Dr Garry Deverell, University of Divinity	Melbourne
23	Professor Luke Beck, Monash University	Melbourne
24	Leonard Hain, Australian Council of Jewish Schools	Melbourne
25	Nechama Bendet, Australian Council of Jewish Schools	Melbourne
26	Aaron Strasser, Adass Israel School	Melbourne
27	Rabbi Yochonon Goldblatt, Yesodei HaTorah College	Melbourne
28	Professor Patrick Parkinson, Freedom for Faith	Brisbane
29	Associate Professor Neil Foster, University of Newcastle and Freedom for Faith	Newcastle
30	Mike Southon, Freedom for Faith	Online
31	Kim Bailey, Freedom for Faith	Online
32	Christopher Brohier, Australian Christian Lobby	Brisbane
33	Wendy Francis, Australian Christian Lobby	Brisbane
34	Rob Norman, Australian Christian Lobby	Brisbane
35	Ann Rebgetz, Catholic Secondary Principals Australia	Brisbane
36	Helen Clapham-Burns	Brisbane
37	Emma Leitch	Brisbane
38	Sally Sievers, Northern Territory Anti-Discrimination Commission	Darwin
39	Traci Keys, Northern Territory Anti-Discrimination Commission	Darwin
40	Dr Karen Pack	Sydney
41	Bronte Scott	Sydney
42	Steph Lentz	Sydney



	<b>Name</b>	<b>Consultee location</b>
43	Rodney Croome AM, Just.Equal Australia	Hobart
44	Sally Goldner AM, Just.Equal Australia	Melbourne
45	Brian Greig OAM, Just.Equal Australia	Perth
46	Dr John Byrne, Equal Opportunity Commission (WA)	Perth
47	Reverend Dr Jo Inkipin, Equal Voices	Sydney
48	Benjamin Oh, Equal Voices and Rainbow Catholics for InterAgency for Ministry	Sydney
49	Sean Costello, Queensland Human Rights Commission	Brisbane
50	Heather Corkhill, Queensland Human Rights Commission	Brisbane
51	Matilda Alexander, Queensland Law Society and Rainbow Families Queensland	Brisbane
52	Bridget Burton, Queensland Law Society	Brisbane
53	Emma Phillips, Queensland Law Society	Brisbane
54	Jacinta Lewin, Law Council of Australia	Melbourne
55	Farzana Choudhury, ACT Law Society	Canberra
56	Gabrielle Sullivan, ACT Law Society	Canberra
57	Rebecca Davern, Victorian Bar	Melbourne
58	Mitchell Coidan, Law Society of New South Wales	Sydney
59	Simeon Beckett SC, New South Wales Bar Association	Sydney
60	Kate Barrett, New South Wales Bar Association	Sydney
61	Richard Easton, Law Council of Australia	Canberra
62	Alanna Condon, New South Wales Bar Association (Secretariat)	Sydney
63	Mark Spencer, Christian Schools Australia	Sydney
64	Anna Brown OAM, Equality Australia	Sydney
65	Ghassan Kasssieh, Equality Australia	Sydney
66	Oliver Ray, Equality Australia	Sydney

	<b>Name</b>	<b>Consultee location</b>
67	Beth Blackwood, Association of Heads of Independent Schools of Australia	Canberra
68	Gawaine Powell Davies, Federation of Australian Buddhist Councils	Sydney
69	Peter Wertheim AM, Executive Council of Australian Jewry	Sydney
70	Elizabeth Stone, National Council of Churches in Australia	Sydney
71	Awa Momtazian, Australian Baha'i Community	Sydney
72	Dr Lynne Doneley, Associated Christian Schools	Brisbane
73	Alistair Macpherson, Associated Christian Schools	Brisbane
74	Andrew Long, National Catholic Education Commission	Canberra
75	Sally Egan, National Catholic Education Commission	Sydney
76	Luke Foley, National Catholic Education Commission	Sydney
77	Annette Loughlin-Smith, National Catholic Education Commission	Sydney
78	Professor Carolyn Evans, Griffith University	Brisbane
79	Confidential	Hobart
80	Ro Allen, Victorian Human Rights and Equal Opportunity Commission	Melbourne
81	Aimee Cooper, Victorian Human Rights and Equal Opportunity Commission	Melbourne
82	Emily Yates, Victorian Human Rights and Equal Opportunity Commission	Melbourne
83	Graeme Edgerton, Australian Human Rights Commission	Sydney
84	John Grotorex	Melbourne
85	Reverend Angus McLeay	Melbourne
86	Helen McKenzie, Anti-Discrimination NSW	Sydney
87	Mia Zahra, Anti-Discrimination NSW	Sydney
88	Jackie Lyne, Anti-Discrimination NSW	Sydney

	<b>Name</b>	<b>Consultee location</b>
89	Dr Christopher Duncan, Association of Heads of Independent Schools Australia	Canberra
90	Reverend Peter Laurence OAM, Anglican Schools Australia	Perth
91	Aila Dann, Anglican Schools Commission	Perth
92	Confidential	Launceston
93	Confidential	Hobart
94	Confidential	Hobart
95	Professor Lucy Vickers, Oxford Brookes University	Oxford, United Kingdom
96	Professor Benjamin Berger, York University	Toronto, Canada
97	Professor Heiner Bielefeldt, University of Erlangen-Nürnberg	Nürnberg, Germany
98	Abdullah Khan OAM, Islamic Schools Association of Australia	Perth
99	Archbishop Peter Comensoli, Australian Catholic Bishops Conference	Melbourne
100	Dr Nigel Zimmermann, Australian Catholic Bishops Conference	Melbourne
101	Jeremy Stuparich, Australian Catholic Bishops Conference	Canberra
102	Stephanie Wood	Adelaide
103	Simon Herd, Hunter Christian College	Newcastle
104	Rita Jabri Markwell, Australian Muslim Advocacy Network	Brisbane
105	Reverend David Baker, Queensland Churches Together	Brisbane
106	Gavin Byrnes, Roman Catholic Archdiocese of Brisbane	Brisbane
107	Cathy Uechtritz, Roman Catholic Archdiocese of Brisbane	Brisbane
108	Matthew Harman, Roman Catholic Archdiocese of Brisbane	Brisbane

	<b>Name</b>	<b>Consultee location</b>
109	Michelle Pearce, Australian Christian Lobby	Sydney
110	Professor Simon Rice OAM, University of Sydney and Australian Discrimination Law Experts Group	Sydney
111	Dan Watson, Department of Employment and Workplace Relations	Melbourne
112	Peter Krizmanits, Department of Employment and Workplace Relations	Melbourne
113	Hea Hyun (Ariel) Chong, Department of Employment and Workplace Relations	Melbourne
114	Kathryn Wilkin, Department of Employment and Workplace Relations	Melbourne
115	Zoe Brightling, Department of Employment and Workplace Relations	Melbourne
116	Daniel Kirby, Department of Employment and Workplace Relations	Melbourne
117	Claudia Opie, Department of Employment and Workplace Relations	Melbourne
118	Toni Gascoigne, Department of Employment and Workplace Relations	Melbourne
119	The Hon Justice Elizabeth Raper, Federal Court of Australia	Sydney
120	Andrea Obeyesekere, Catholic School Parents Australia	Cairns
121	Siobhan Allen, Catholic School Parents Australia	Perth
122	Carmel Nash, Catholic School Parents Australia	Brisbane
123	Sarah Rose, Catholic School Parents Australia	Canberra
124	Jack Hensley, Rainbow Families	Sydney
125	Kate Eastman AM SC	Melbourne
126	Professor James Dalziel, Australian College of Theology	Sydney
127	Associate Professor Alex Deagon, Queensland University of Technology	Brisbane
128	Professor Claudia Geiringer, Te Aka Matua o te Ture (New Zealand) Law Commission	Wellington, New Zealand

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	<b>Name</b>	<b>Consultee location</b>
129	Jenny Ryan, Te Aka Matua o te Ture (New Zealand) Law Commission	Wellington, New Zealand
130	Associate Professor Cristy Clark, University of Canberra and Australian Discrimination Law Experts Group	Canberra
131	Adjunct Professor Mark Fowler, University of New England and University of Notre Dame	Sydney



## Appendix B

### Submissions

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1. P Nolan
2. C Bauer
3. G Grosvenor
4. Dr A Deagon
5. E Mathew
6. J Asquith
7. S Grosvenor
8. T Welsh
9. Healinglife Church and Ministries
10. D Welikala
11. J Normand
12. G Barnes
13. K Nunn
14. Not published
15. W Larkin
16. Not published
17. Campaign Submission 7
18. Z Kadour
19. M Sportia
20. Not published
21. R Gadsby
22. Not published
23. E Miller
24. K Conolly MP
25. G Small
26. B Wearne
27. J Man

28. J Vivian
29. L Wicks
30. Not published
31. I Truscott
32. D Peterson
33. Not published
34. Not published
35. Not published
36. G & N Dethlefs
37. Not published
38. E Brown
39. S Marshall
40. J Panton
41. Dr T Wright AM FACE
42. Dr M Rogerson
43. J Kerr
44. Drs S & P Kershaw
45. L Blume
46. A & P Gregory
47. J Bonner
48. D Powter
49. R Gupta
50. L Schwetz
51. E & E Pulfer
52. T Edmeades
53. R Dixon
54. K Mitchell
55. W Broad
56. R Nieass
57. R Mitchell
58. N Huxham



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59. B Wilding
  60. W Brown
  61. N Stott
  62. E Wicks
  63. G & S Wolhuter
  64. M White
  65. T King
  66. M Goode
  67. G Stitz
  68. J Guy
  69. T Ollis
  70. M Tsekoutanis
  71. M & R Pryor
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Human Rights Committee, *Views: Communication No 694/1996*, 67th sess, UN Doc CCPR/C/67/D/694/1996 (5 November 1999) ('*Waldman v Canada*')

Human Rights Committee, *Views: Communication No 736/1997*, 70th sess, UN Doc CCPR/C/70/D/736/1997 (26 October 2000, adopted 18 October 2000) ('*Ross v Canada*')

Human Rights Committee, *Views: Communication No 932/2000*, 75th sess, UN Doc A/57/40 (Vol II) (15 July 2002) ('*Gillot v France*')

Human Rights Committee, *Views: Communication No 941/2000*, 78th sess, UN Doc CCPR/C/78/D/941/2000 (18 September 2003) ('*Young v Australia*')

Human Rights Committee, *Views: Communication No 998/2001*, 78th sess, UN Doc CCPR/C/78/D/998/2001 (22 September 2003) ('*Althammer v Austria*')

Inter-American Commission on Human Rights, *Decision: Case 11.625, Report No. 4/01* (19 January 2001) ('*Morales de Sierra v Guatemala*')

*IR v JQ* (Court of Justice of the European Union, Grand Chamber, C68/17, ECLI:EU:C:2018:696, 11 September 2018)

*IX v WABE eV; and MH Müller Handels GmbH v MJ* (Court of Justice of the European Union, C-804/18 and C-341/19, ECLI:EU:C:2021:594, 15 July 2021)

*Kjeldsen, Busk Madsen and Pedersen v Denmark* (European Court of Human Rights, Chamber, Application No 5095/71, 5920/72, 5926/72, 7 December 1976)

*Konrad v Germany* (European Court of Human Rights, Court (Fifth Section), Application No 35504/03, 11 September 2006)

*Lombardi-Valluari v Italy* (European Court of Human Rights, Court (Second Section), Application No 39128/05, 20 October 2009)

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

*Osmanoğlu and Kocabaş v Switzerland* (European Court of Human Rights, Court (Third Section), Application No 29086/12, 10 January 2017)

*Pavez Pavez v Chile* (Inter-American Court of Human Rights, Series C No 449, 4 February 2022)

*Perovy v Russia* (European Court of Human Rights, Court (Third Section), Application No 47429/09, 19 April 2021)

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

*Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica (Advisory Opinion OC-4/84)* (Inter-American Court of Human Rights, Series A No 4, 19 January 1984)

*Schüth v Germany* (European Court of Human Rights, Court (Fifth Section), Application No 1620/03, 23 December 2010)

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*Siebenhaar v Germany* (European Court of Human Rights, Court (Fifth Section), Application No 18136/02, 3 February 2011)

*TC and UB v Komisija za zashtita ot diskriminatsia and VA (Opinion of Advocate General Saugmandsgaard Øe)* (Court of Justice of the European Union, C-824/19, ECLI:EU:C:2021:324, 22 April 2021)

*Travaš v Croatia* (European Court of Human Rights, Court (Second Section), Application No 75581/13, 30 January 2017)

*Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* (Court of Justice of the European Union, Grand Chamber, C-414/16, ECLI:EU:C:2018:257, 17 April 2018)





# Appendix D

## Methodology

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D.1 The methodology employed by the ALRC included three key research methods (in addition to doctrinal legal research) which generated the data that was relied on in this Inquiry:

- **Consultations:** with stakeholders (organisations and individuals) representing different groups and perspectives, to inform the ALRC on the topic area and the need for reform.
- **Formal submissions:** from stakeholders (organisations and individuals) elicited in response to the proposed law reforms in the *Consultation Paper*.
- **Survey responses:** from individuals involved in religious educational institutions reflecting their direct experiences of these institutions.

D.2 Over the course of the Inquiry, the ALRC spoke with **131 consultees**, received **428 formal submissions**, and received over **41,000 survey responses**. This data is analysed in Background Paper ADL2.



## Consultations

D.3 The ALRC spoke with 131 individuals and organisations in 68 different confidential consultation sessions from November 2022 to September 2023 (see [Appendix A](#)). Consultations were held in-person in Brisbane, Sydney, Canberra, and Melbourne, and online using videocall technology. Consultees were located across all Australian states and territories, as well as the United Kingdom, Canada, Germany, and New Zealand. Some stakeholders directly approached the ALRC and requested a consultation meeting. Other stakeholders were consulted by the ALRC because they:

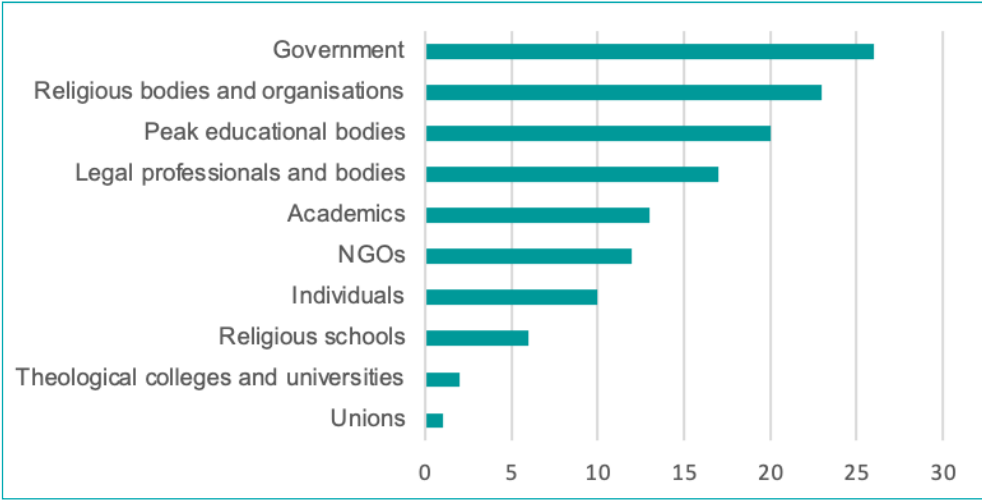
- had previously submitted to other relevant inquiries;
- had previously engaged with the ALRC in its former (discontinued) *Review into the Framework of Religious Exemptions in Anti-Discrimination Legislation*; or
- had been recommended by other stakeholders.

D.4 The ALRC endeavoured to speak with a broad and diverse group of stakeholders in consultations. The various categories of stakeholders and the number of people consulted by the ALRC are set out in **Figure D.1** below.

D.5 The ALRC developed consultation questions specific to the expertise and experience of each stakeholder. Consultees were given the opportunity to ask their own questions and to guide discussion. Consultations were attended by ALRC staff and ALRC Commissioners (where possible). The specific matters discussed in each consultation are kept confidential, in order to promote a free and frank exchange of ideas between consultees and the ALRC.

D.6 Given the confidential status of consultations, the ALRC does not attribute specific statements to individual consultees without express consent.

**Figure D.1: Consultees by category (number of people)<sup>1</sup>**



## Submissions

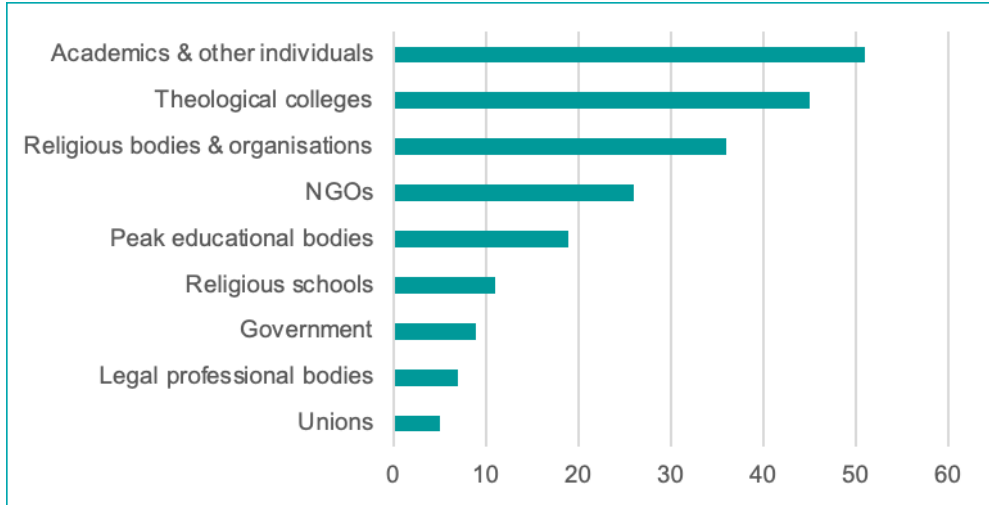
D.7 The ALRC received 428 formal submissions in response to the *Consultation Paper* which was released in January 2023. Of these, 301 submissions were made by individuals and 127 were made by organisations. Submissions provided the ALRC with feedback on the law reform propositions and proposals set out in the *Consultation Paper*. **Figure D.2** below outlines the number of formal submissions received by the ALRC, set out by stakeholder group.

D.8 Submissions made to the Inquiry are published on the **ALRC website**, with the exception of submissions made confidentially (submissions are also listed in

1 In some instances, the ALRC consulted with multiple representatives from one organisation. This graph represents the total number of consultees engaged, rather than the number of organisations consulted, or the number of consultation sessions conducted.

**Appendix B).** The ALRC sought and received permission from submission authors to include direct quotes from several confidential submissions in Background Paper ADL2. For privacy reasons, the ALRC has omitted the names of educational institutions from these direct quotes.

**Figure D.2: Submissions by category (number of authors)<sup>2</sup>**



D.9 For the purpose of substantively analysing submissions, the ALRC developed a number of specific codes to represent relevant topics raised in submissions. This process involved using NVivo software to identify sentiments and themes within a sample of submissions.<sup>3</sup> These sentiments and themes were then used to establish preliminary codes. All submissions were read and coded by ALRC staff.

D.10 Analysis of submissions was an iterative process — new themes were identified and established during the coding process, which required returning to and re-coding previously analysed submissions.

D.11 The ALRC identified 90 submissions as belonging to one of eight campaign templates. These 90 submissions used either an identical (unmodified) campaign template, or a campaign template with minor modifications. Each campaign submission was reflected separately in the sentiments analysis conducted by the ALRC, however, only one submission from each campaign was analysed for the purpose of understanding the themes raised in those submissions.

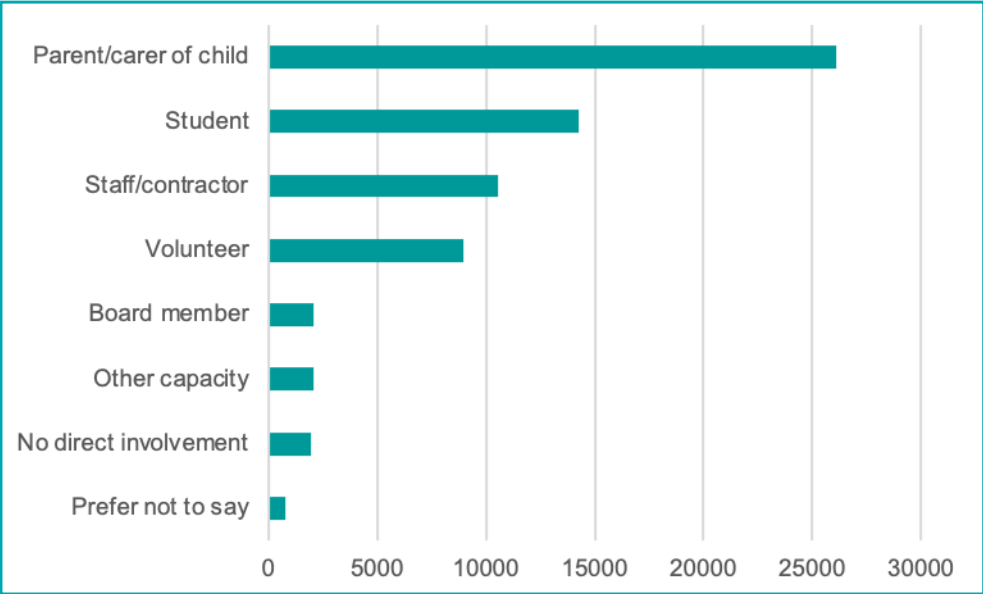
2 The ALRC received several submissions that were co-signed by multiple authors (for example, academics and theological colleges representing different organisations). To more accurately represent the submissions received, the number of authors of submissions is represented instead of the number of separate submissions.

3 Submissions were made in response to propositions and proposals set out in the *Consultation Paper*.

Survey

D.12 The ALRC created a public survey to capture the views and experiences of students, parents, staff, and others involved in religious educational institutions relating to key issues in the Inquiry. The ALRC received 41,057 responses. Survey results were anonymous. It was not compulsory for participants to answer any particular question in the survey, and respondents had the option to choose whether to share any demographic data. [Figure D.3](#) below depicts the number of responses, broken down by reference to the nature of the respondent’s involvement in a religious educational institution.

**Figure D.3: Number of survey responses by category (nature of involvement in a religious educational institution)<sup>4</sup>**



D.13 The survey was not intended to reflect a representative sample of the population. For this reason, sampling was not undertaken, and quantitative data has not been generated from survey responses.

4 The ALRC survey received 41,057 responses from individuals. In approximately 40% of these responses, individuals reported two or more categories of involvement with religious educational institutions. These included current and previous involvement (for instance, an individual may have previously been involved as a student and is currently involved as a parent of a child attending a religious educational institution). [Figure D.3](#) shows the total number of instances of involvements people have, and have had, with religious educational institutions. This figure reflects a total of 66,607 instances of involvement.

D.14 The survey was built using Qualtrics software and made available for completion online. The survey was promoted through the *Consultation Paper* and in the January 2023 *ALRC In Brief* electronic newsletter (2,814 recipients), which included a link to the survey. Other organisations (including religious educational institutions) shared a link to the survey with their parent and staff communities.

D.15 With the exception of questions aimed at capturing demographic data (such as the nature of the respondent's involvement with religious educational institutions), the survey was comprised of questions that would elicit open-ended responses. These included, for instance:

- Why did you choose to be involved with a religious educational institution?
- What do you see as the good things about religious educational institutions that you have been involved with?
- If you feel comfortable doing so, please describe in a few words how you have experienced or witnessed ... discrimination [on the basis of attributes protected under the *Sex Discrimination Act*]?
- What do you think about reforms to change the law so that religious educational institutions would not be allowed to discriminate against students on the grounds of sexual orientation, gender identity, marital or relationship status, or pregnancy?

D.16 Survey results were analysed by the consulting firm ACT xm. Using the Qualtrics text iQ tool, ACT xm research staff searched for keywords, patterns of words, and phrases to identify key themes and sentiments within open-ended responses to survey questions. A significant number of responses were manually checked to improve the accuracy of the algorithm used to analyse and group the data. ACT xm research staff manually searched and selected quotations to illustrate each broad theme or sentiment expressed.

D.17 The ALRC was given direct access to the full set of survey responses (as raw data), as well as data grouped by theme and sentiment.



# **Appendix E**

## **Exceptions for Religious Educational Institutions under State and Territory Law**

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E.1 This appendix gives a high-level summary of relevant prohibitions on discrimination, and exceptions to those prohibitions for religious educational institutions, under state and territory law.

### **Australian Capital Territory**

#### **Students**

E.2 Under ACT law, it is unlawful to discriminate against students and prospective students on the grounds of sex, sex characteristics, sexuality, gender identity, relationship status, pregnancy, and religious conviction (among others).<sup>1</sup>

E.3 An exception to this prohibition on discrimination exists for religious educational institutions conducted solely for students of one religious conviction. Such institutions do not discriminate if they do not admit students who have a different religious conviction,<sup>2</sup> as long as they have a published policy that is readily accessible by prospective and current students at the institution.<sup>3</sup>

E.4 Other more limited exceptions exist in relation to single-sex schools,<sup>4</sup> and the provision of accommodation for students of one sex.<sup>5</sup>

#### **Staff**

E.5 Under ACT law, it is unlawful to discriminate against staff and prospective staff on the grounds of sex, sex characteristics, sexuality, gender identity, relationship status, pregnancy, and religious conviction (among others).<sup>6</sup>

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1 *Discrimination Act 1991* (ACT) ss 7, 18.

2 *Ibid* s 46(1).

3 *Ibid* s 46(3).

4 *Ibid* s 36.

5 *Ibid* s 39(2).

6 *Ibid* ss 7, 10.

E.6 Two separate exceptions to the prohibition on discrimination on the ground of religious conviction exist for religious educational institutions:

- in relation to selection and appointment, such institutions can discriminate where the duties of employment involve, or would involve, participation by the employee or worker in the teaching, observance, or practice of the relevant religion;<sup>7</sup> or
- such institutions do not discriminate where the discrimination is intended to enable, or better enable, the institution to be conducted in accordance with its doctrines, tenets, beliefs, or teachings,<sup>8</sup> as long as it has a published policy that is readily accessible by prospective and current employees and contractors at the institution.<sup>9</sup>

## New South Wales

### Students

E.7 Under NSW law, it is unlawful to discriminate against students or prospective students on the grounds of sex,<sup>10</sup> homosexuality,<sup>11</sup> 'transgender grounds',<sup>12</sup> marital or domestic status,<sup>13</sup> and pregnancy<sup>14</sup> (among others). There is no prohibition on discrimination on the ground of religion or belief.

E.8 An unqualified exception applies to 'private educational authorities' in relation to all protected grounds.<sup>15</sup> The definition of 'private educational authorities' captures authorities of both religious and non-religious private educational institutions.<sup>16</sup>

### Staff

E.9 Under NSW law, it is unlawful to discriminate against staff or prospective staff on the grounds of sex,<sup>17</sup> homosexuality,<sup>18</sup> 'transgender grounds',<sup>19</sup> marital or domestic status,<sup>20</sup> and pregnancy<sup>21</sup> (among others). There is no prohibition on discrimination on the ground of religion or belief.

7 Ibid s 44.

8 Ibid s 46(2).

9 Ibid s 46(4).

10 *Anti-Discrimination Act 1977* (NSW) s 31A.

11 Ibid s 49ZO.

12 Ibid s 38K.

13 Ibid s 46A.

14 'Pregnancy' is treated as a characteristic of sex and the law states that pregnancy 'is a characteristic that appertains generally to women': ibid ss 24(1A)–(1B).

15 Ibid ss 31A(3)(a), 49ZO(3), 38K(3), 46A(3).

16 Ibid s 4.

17 Ibid s 25.

18 Ibid s 49ZH.

19 Ibid s 38C.

20 Ibid s 40.

21 'Pregnancy' is treated as a characteristic of sex and the law states that pregnancy 'is a characteristic that appertains generally to women': ibid ss 24(1A)–(1B).



E.10 An unqualified exception applies to 'private educational authorities' in relation to all protected grounds.<sup>22</sup>

## Northern Territory

### Students

E.11 Under NT law, amendments passed in November 2022<sup>23</sup> have made it unlawful to discriminate against students on the grounds of sex, sexual orientation, gender identity, relationship status, pregnancy, or religious belief or activity (among others).<sup>24</sup>

E.12 Although an exception to the prohibition on discrimination for religious educational institutions previously existed in relation to the ground of religion,<sup>25</sup> this provision was removed by operation of the amending Act passed in November 2022.

E.13 Under the 2022 amendments, religious bodies retain exceptions in relation to the training, selection, and ordination of priests, ministers, and religious leaders that are similar to those contained in ss 37(1)(a)–(c) of the *Sex Discrimination Act*.

### Staff

E.14 Under NT law, amendments passed in November 2022 have made it unlawful to discriminate against staff on the grounds of sex, sexual orientation, gender identity, relationship status, pregnancy, or religious belief or activity (among others).<sup>26</sup>

E.15 Although exceptions to the prohibition on discrimination for religious educational institutions previously existed in relation to the grounds of religious belief or activity, and 'sexuality',<sup>27</sup> these were removed by operation of the amending Act passed in November 2022.

E.16 Under the 2022 amendments, religious bodies retain exceptions concerning the training, selection, and ordination of priests, ministers, and religious leaders that are similar to those contained in ss 37(1)(a)–(c) of the *Sex Discrimination Act*.<sup>28</sup>

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22 Ibid ss 25(3)(c), 49ZH(3)(c), 38C(3)(c), 40(3)(c).

23 See *Anti-Discrimination Amendment Act 2022* (NT).

24 *Anti-Discrimination Act 1992* (NT) ss 19, 29.

25 Ibid s 30(2).

26 Ibid ss 19, 31.

27 Ibid s 37A.

28 Ibid s 51.

## Queensland

### Students

E.17 Under Queensland law, it is unlawful to discriminate against students or prospective students on the grounds of sex, sexuality, gender identity, relationship status, pregnancy, and religious belief or religious activity (among others).<sup>29</sup>

E.18 An exception to the prohibition on discrimination applies in relation to educational authorities operating wholly or mainly for students of a particular religion, allowing such institutions to exclude applicants who are not of the same religion as the institution.<sup>30</sup> A 2022 review by the Queensland Human Rights Commission recommended retaining this exception, but clarifying that the exception only applies to initial enrolment, and to 'religion', not 'religious belief or religious activity'.<sup>31</sup>

E.19 Other more limited exceptions exist in relation to single-sex schools,<sup>32</sup> and the provision of accommodation for students of one sex or religion.<sup>33</sup>

### Staff

E.20 Under Queensland law, it is unlawful to discriminate against staff or prospective staff on the grounds of sex, sexuality, gender identity, relationship status, pregnancy, and religious belief or religious activity (among others).<sup>34</sup>

E.21 An exception to the prohibition on discrimination provides that a person can impose 'genuine occupational requirements' for a position.<sup>35</sup> A legislative note gives an example of a genuine occupational requirement as 'employing persons of a particular religion to teach in a school established for students of the particular religion'.<sup>36</sup> The Queensland Human Rights Commission recommended that this note be removed.<sup>37</sup>

E.22 Another exception to the prohibition on discrimination exists specifically in relation to 'work for an educational institution (an employer) under the direction or control of a body established for religious purposes'.<sup>38</sup> This exception provides that such employers can discriminate in a way that is not unreasonable, if the employee or prospective employee openly acts in a way that they know or ought reasonably to know is contrary to the employer's religious beliefs, in the course of the person's

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29 *Anti-Discrimination Act 1991* (Qld) ss 7, 38–9.

30 *Ibid* s 41.

31 Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) rec 40.

32 *Anti-Discrimination Act 1991* (Qld) s 41.

33 *Ibid* s 89.

34 *Ibid* ss 7, 14–15.

35 *Ibid* s 25(1).

36 *Ibid*.

37 Queensland Human Rights Commission (n 31) rec 39.1.

38 *Anti-Discrimination Act 1991* (Qld) s 25(2)(a).

work, or in the course of doing something connected with the work.<sup>39</sup> Additionally, it must be a genuine occupational requirement that the person act consistently with the employer's religious beliefs in connection with their work.<sup>40</sup> To determine whether the action taken was reasonable, the court is directed to consider 'whether the action taken or proposed to be taken by the employer is harsh or unjust or disproportionate to the person's actions' as well as 'the consequences for both the person and the employer should the discrimination happen or not happen'.<sup>41</sup>

E.23 The Queensland Human Rights Commission recommended removing this exception and replacing it with an exception that allows

discrimination on the ground of religious belief or religious activity in relation to work for an organisation or related entity established for religious purposes ('religious organisation') if reasonable and proportionate in the circumstances and the participation of the person in the teaching, observance or practice of a particular religion is a genuine occupational requirement.<sup>42</sup>

E.24 The Commission recommended that the legislation include a non-exhaustive list of factors to guide whether it is reasonable and proportionate.<sup>43</sup>

## South Australia

### Students

E.25 Under SA law, it is unlawful to discriminate against students or prospective students on the grounds of sex, sexual orientation, gender identity, marital or domestic partnership status, and pregnancy (among others).<sup>44</sup> It is also unlawful to discriminate against students on the ground of religious appearance or dress.<sup>45</sup>

E.26 An exception to the prohibition on discrimination allows religious educational institutions to discriminate against a current or prospective student who dresses or wishes to dress 'in manner required by, or symbolic of, a different religion'.<sup>46</sup>

E.27 Other more limited exceptions exist in relation to single-sex schools or boarding facilities.<sup>47</sup>

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39 Ibid s 25(3).

40 Ibid.

41 Ibid s 25(5).

42 Queensland Human Rights Commission (n 31) rec 39.2.

43 Ibid rec 39.3.

44 *Equal Opportunity Act 1984* (SA) ss 37, 85ZD, 85ZE.

45 Ibid ss 85ZD, 85ZE.

46 Ibid s 85ZE(5).

47 Ibid s 37(3).

## Staff

E.28 Under SA law, it is unlawful to discriminate against staff or prospective staff on the grounds of sex, sexual orientation, gender identity, marital or domestic partnership status, and pregnancy (among others).<sup>48</sup> It is also unlawful to discriminate against staff on the grounds of religious appearance or dress.<sup>49</sup>

E.29 An exception to the prohibition on discrimination allows religious educational institutions to discriminate on the ground of marital or domestic partnership status in relation to staff or prospective staff in same sex domestic partnerships.<sup>50</sup> This exception is subject to the conditions that:

- the discrimination is founded on the precepts of the educational institution's religion;
- the institution has a written policy stating its position; and
- the educational authority has met requirements to provide, upon request and free of charge, a written policy stating its position to applicants, employees, students, prospective students and parents, and other members of the public.<sup>51</sup>

E.30 In 2016, the South Australian Law Reform Institute ('SARLI') recommended that this exception be 'replaced with an exemption that permits discrimination by religious educational authorities in the area of employment on the basis of religious belief'.<sup>52</sup> The SARLI further recommended that the replacement exception

be based on s 51 of the *Anti-Discrimination Act 1998* (Tas) but should preserve the requirement in the current South Australian provision for the religious educational authority to have a written policy outlining the basis on which it seeks to rely upon the exemption, and that this policy be made publicly available.

The replacement exemption should also include a requirement that the discrimination on the grounds of religious belief be not unreasonable in the circumstances. Guidance should be provided as to what is reasonable in the circumstances, as in s 25(5) of the *Anti-Discrimination Act 1991* (Qld) which requires consideration of: (a) whether the action taken or proposed to be taken by the employer is harsh or unjust or disproportionate to the person's actions; and (b) the consequences for both the person and the employer should the discrimination happen or not happen.<sup>53</sup>

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48 Ibid ss 30, 85U, 85V.

49 Ibid ss 85U, 85V.

50 Ibid s 85Z(2).

51 Ibid ss 34(3)(a)–(d).

52 South Australian Law Reform Institute, '*Lawful Discrimination: Exceptions under the Equal Opportunity Act 1984 (SA) to Unlawful Discrimination on the Grounds of Gender Identity, Sexual Orientation and Intersex Status*' (Report, June 2016) rec 3.

53 Ibid.

E.31 An exception to the prohibition on discrimination also allows religious educational institutions to discriminate against a current or prospective staff member who dresses or wishes to dress 'in manner required by, or symbolic of, a different religion'.<sup>54</sup>

## Tasmania

### Students

E.32 Under Tasmanian law, it is unlawful to discriminate against students or prospective students on the grounds of gender, sexual orientation, gender identity, marital status, relationship status, pregnancy, religious belief or affiliation, and religious activity (among others).<sup>55</sup>

E.33 An exception to the prohibition on discrimination allows religious educational institutions to discriminate against a prospective student at first enrolment on the grounds of religious belief or affiliation, or religious activity, if those criteria are in accordance with the institution's policy on admission.<sup>56</sup> The exception extends to the religious belief or affiliation, and religious activity, of the prospective student's parents or grandparents.<sup>57</sup> The legislation states that this exception does not permit discrimination on any grounds other than religious belief or affiliation, or religious activity.<sup>58</sup>

E.34 A separate general exception exists in relation to single-gender schools.<sup>59</sup>

### Staff

E.35 Under Tasmanian law, it is unlawful to discriminate against staff or prospective staff on the grounds of gender, sexual orientation, gender identity, marital status, relationship status, pregnancy, religious belief or affiliation, and religious activity (among others).<sup>60</sup>

E.36 An exception to the prohibition on discrimination allows religious educational institutions to discriminate against a staff member or prospective staff member on the grounds of religious belief or affiliation, or religious activity, 'if the discrimination is in order to enable, or better enable, the educational institution to be conducted in accordance with those tenets, beliefs, teachings, principles or practice'.<sup>61</sup>

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54 *Equal Opportunity Act 1984* (SA) s 85Z(5).

55 *Anti-Discrimination Act 1998* (Tas) ss 16, 22(1)(b).

56 *Ibid* ss 51A(1)–(2), (4).

57 *Ibid* s 51A(4).

58 *Ibid* s 51A(3).

59 *Ibid* s 27(1)(b).

60 *Ibid* ss 16, 22(1)(a).

61 *Ibid* s 51(2).

## Victoria

### Students

E.37 Under Victorian law, it is unlawful to discriminate against students or prospective students on the grounds of sex, sexual orientation, gender identity, marital status, pregnancy, and religious belief or activity (among others).<sup>62</sup>

E.38 Victorian law has two main exceptions relating to students and prospective students of religious educational institutions. The first exception provides that an educational institution wholly or mainly for students of a particular religious belief may exclude applicants who are not of the particular religious belief.<sup>63</sup>

E.39 The second exception permits religious educational institutions to discriminate on the ground of religious belief or activity where this is reasonable and proportionate in the circumstances and (a) conforms with the doctrines, beliefs, or principles of the religious educational institution, or (b) is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.<sup>64</sup> The legislation provides that this does not permit discrimination on the basis of any other attribute.<sup>65</sup>

E.40 A separate exception exists to allow single-sex schools to operate.<sup>66</sup>

### Staff

E.41 Under Victorian law, it is unlawful to discriminate against employees or prospective employees on the grounds of sex, sexual orientation, gender identity, marital status, pregnancy, and religious belief or activity (among others).<sup>67</sup>

E.42 An exception to the prohibition on discrimination on the ground of religious belief or activity exists for religious educational institutions. That exception provides that religious educational institutions may discriminate in relation to the religious belief or activity of an employee or prospective employee where:

- (a) conformity with the doctrines, beliefs or principles of the religion in accordance with which the educational institution is to be conducted 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.<sup>68</sup>

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62 *Equal Opportunity Act 2010* (Vic) ss 6, 38.

63 *Ibid* s 39. There is also a similar provision in relation to accommodation: *ibid* s 61.

64 *Ibid* s 83. This exception does not apply to employment.

65 *Ibid* s 83(3).

66 *Ibid* s 39.

67 *Ibid* ss 6, 16, 18.

68 *Ibid* s 83A(1).

E.43 The legislation provides that the

nature of the educational institution and the religious doctrines, beliefs or principles in accordance with which it is to be conducted must be taken into account in determining the inherent requirements of a position.<sup>69</sup>

E.44 It also clarifies that this does not permit discrimination on the basis of any other attribute.<sup>70</sup>

## Western Australia

### Students

E.45 Under WA law, it is unlawful to discriminate against students or prospective students on the grounds of sex, marital status, pregnancy, gender history, sexual orientation, and religious conviction (among others).<sup>71</sup>

E.46 An exception to the prohibition on discrimination provides that religious educational institutions may discriminate against students and prospective students on all protected grounds (other than race, impairment, or age) in connection with the provision of education and training where it is done in

good faith in favour of adherents of that religion or creed generally, but not in a manner that discriminates against a particular class or group of persons who are not adherents of that religion or creed.<sup>72</sup>

E.47 A separate exception exists that allows single-sex schools to operate.<sup>73</sup>

E.48 In 2022, the Law Reform Commission of Western Australia recommended reforming the law so that the exception in relation to students applies only in respect of religious conviction and only at the time of enrolment. Additionally, the Commission recommended that the exception should be limited to where discrimination conformed ‘to the doctrines, beliefs or principles of the religion’, was ‘reasonably necessary to avoid injury to the religious susceptibility of adherents of the religion’, and was ‘reasonable and proportionate in the circumstances’.<sup>74</sup>

### Staff

E.49 Under WA law, it is unlawful to discriminate against staff or prospective staff on the grounds of sex, marital status, pregnancy, gender history, sexual orientation, and religious conviction (among others).<sup>75</sup>

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69 Ibid s 83A(2).

70 Ibid s 83A(3).

71 *Equal Opportunity Act 1984* (WA) ss 18, 35AJ, 35W, 61.

72 Ibid s 73(3).

73 Ibid s 18(3).

74 Law Reform Commission of Western Australia, *Project 111: Review of the Equal Opportunity Act 1984* (WA) (Report, August 2022) rec 81.

75 *Equal Opportunity Act 1984* (WA) ss 11, 13, 35AC, 35P, 35R, 35W, 61.

E.50 An exception to the prohibition on discrimination applies so that religious educational institutions may discriminate against staff and prospective staff on all protected grounds (other than race, impairment, or age), where it is done 'in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed'.<sup>76</sup>

E.51 In July 2022, the Law Reform Commission of Western Australia recommended reforming this exception to make it similar to s 83A of the *Equal Opportunity Act 2010* (Vic). This exception is limited to where:

- conformity with the doctrines, beliefs, or principles of the religion is an inherent requirement of the job;
- the person cannot meet that inherent requirement because of their religious conviction; and
- the discrimination is reasonable and proportionate in the circumstances.<sup>77</sup>

E.52 A separate exception also exists allowing private schools to discriminate on the grounds of religious or political conviction if the duties of the employment or work are connected with the participation of the employee in any religious observance or practice.<sup>78</sup>

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76 Ibid ss 73(1), (2).

77 Law Reform Commission of Western Australia (n 74) rec 79.

78 *Equal Opportunity Act 1984* (WA) s 66(1).



# Appendix F

## Religious Bodies Exceptions under State and Territory Law

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### Discrimination Act 1991 (ACT)

#### 32. Religious bodies

- (1) Part 3 does not apply in relation to—
- (a) the ordination or appointment of priests, ministers of religion or members of any religious order; or
  - (b) the training or education of people seeking ordination or appointment as priests, ministers of religion or members of a religious order; or
  - (c) the selection or appointment of people to exercise functions for the purposes of, or in connection with, any religious observance or practice; or
  - (d) any other act or practice (other than a defined act) of a body established for religious purposes, if the act or practice conforms to the doctrines, tenets or beliefs of that religion and is necessary to avoid injury to the religious susceptibilities of adherents of that religion.
- (2) In this section:
- defined act**, by a religious body, means an act or practice in relation to—
- (a) the employment or contracting of a person by the body to work in an educational institution; or
  - (b) the admission, treatment or continued enrolment of a person as a student at an educational institution.

### Anti-Discrimination Act 1977 (NSW)

#### 56. Religious bodies

Nothing in this Act affects—

- (a) the ordination or appointment of priests, ministers of religion or members of any religious order,
- (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order,

- (c) the appointment of any other person in any capacity by a body established to propagate religion, or
- (d) any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

## **Anti-Discrimination Act 1992 (NT)**

### **51. Religious bodies**

This Act does not apply to or in relation to:

- (a) the ordination or appointment of priests, ministers of religion or members of a religious order; or
- (b) the training or education of people seeking ordination or appointment as priests, ministers of religion or members of a religious order; or
- (ba) the training or education of people seeking appointment as leaders in a religious organisation; or
- (c) the selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice; or
- (d) an act by a body established for religious purposes if the act is done as part of any religious observance or practice.

## **Anti-Discrimination Act 1991 (Qld)**

### **109. Religious bodies**

(1) The Act does not apply in relation to—

- (a) the ordination or appointment of priests, ministers of religion or members of a religious order; or
- (b) the training or education of people seeking ordination or appointment as priests, ministers of religion or members of a religious order; or
- (c) the selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice; or
- (d) unless section 90 (Accommodation with religious purposes) applies—an act by a body established for religious purposes if the act is—
  - (i) in accordance with the doctrine of the religion concerned; and
  - (ii) necessary to avoid offending the religious sensitivities of people of the religion.

(2) An exemption under subsection (1)(d) does not apply in the work or work-related area or in the education area.

## **Equal Opportunity Act 1984 (SA)**

### **50. Religious bodies**

- (1) This Part does not render unlawful discrimination in relation to—
  - (a) the ordination or appointment of priests, ministers of religion or members of a religious order; or
  - (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order; or
  - (ba) the administration of a body established for religious purposes in accordance with the precepts of that religion; or
  - (c) any other practice of a body established for religious purposes that conforms with the precepts of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

## **Equal Opportunity Act 2010 (Vic)**

### **82. Religious bodies**

- (1) Nothing in Part 4 applies to—
  - (a) the ordination or appointment of priests, ministers of religion or members of a religious order; or
  - (b) the training or education of people seeking ordination or appointment as priests, ministers of religion or members of a religious order; or
  - (c) the selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice.
- (2) Nothing in Part 4 applies to anything done (except in relation to employment or the provision of government funded goods or services) on the basis of a person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity by a religious body that is reasonable and proportionate in the circumstances, and—
  - (a) conforms with the doctrines, beliefs or principles of the religious body's religion; or
  - (b) is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religious body's religion.
- (3) Subsection (2) of this section has effect subject to sections 83 and 83A.

## **Equal Opportunity Act 1984 (WA)**

### **72. Religious bodies**

Nothing in this Act affects —

- (a) the ordination or appointment of priests, ministers of religion or members of any religious order; or
- (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order; or
- (c) the selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in any religious observance or practice; or
- (d) any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

# Appendix G

## Guidance on Transgender and Non-Binary Students

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<b>Government Guidance, Policies, and Procedures</b>
<b>New South Wales</b>
<b>Transgender Students in Schools</b> Department of Education, NSW Available at: <a href="https://education.nsw.gov.au/rights-and-accountability/legal-issues-bulletins/transgender-students-in-schools">https://education.nsw.gov.au/rights-and-accountability/legal-issues-bulletins/transgender-students-in-schools</a>
<b>Changing the Way a Student Name is Used and Recorded by Schools</b> Department of Education, NSW Available at: <a href="https://education.nsw.gov.au/rights-and-accountability/legal-issues-bulletins/changing-the-way-a-student-name-is-used-and-recorded-by-schools#Transgender_5">https://education.nsw.gov.au/rights-and-accountability/legal-issues-bulletins/changing-the-way-a-student-name-is-used-and-recorded-by-schools#Transgender_5</a>
<b>Queensland</b>
<b>Diversity in Queensland Schools: Information for Principals</b> Department of Education, Queensland Available at: <a href="https://education.qld.gov.au/student/Documents/diversity-information-for-principals.pdf">https://education.qld.gov.au/student/Documents/diversity-information-for-principals.pdf</a>
<b>Diversity in Queensland Schools: Policy Template</b> Department of Education, Queensland Available at: <a href="https://education.qld.gov.au/student/Documents/diversity-policy-template.pdf">https://education.qld.gov.au/student/Documents/diversity-policy-template.pdf</a>
<b>South Australia</b>
<b>Supporting Gender Diverse, Intersex and Sexually Diverse Children and Young People Policy</b> Department of Education, SA Available at: <a href="https://www.education.sa.gov.au/doc/supporting-gender-diverse-intersex-and-sexually-diverse-children-and-young-people">https://www.education.sa.gov.au/doc/supporting-gender-diverse-intersex-and-sexually-diverse-children-and-young-people</a>

### **Government Guidance, Policies, and Procedures (cont'd)**

#### **Gender Diverse and Intersex Children and Young People Support Procedure**

Department of Education, SA

Available at: <https://www.education.sa.gov.au/doc/gender-diverse-and-intersex-children-and-young-people-support-procedure>

### **Tasmania**

#### **Supporting Sexuality, Sex and Gender Diversity in Schools Policy**

Department for Education, Children and Young People, Tasmania

Available at: <https://publicdocumentcentre.education.tas.gov.au/library/Document%20Centre/Support-Sexuality-Sex-and-Gender-Diversity-in-Schools-Policy.pdf>

#### **Inclusive Language Guidelines**

Department for Education, Children and Young People, Tasmania

Available at: <https://publicdocumentcentre.education.tas.gov.au/library/Document%20Centre/Guidelines-for-Inclusive-Language.pdf>

### **Victoria**

#### **LGBTIQA+ Student Support Policy**

Department of Education, Victoria

Available at: <https://www2.education.vic.gov.au/pal/lgbtiq-student-support/policy>

#### **Schools – Diversity and Equity Guidance**

Victorian Government

Available at: <https://www.vic.gov.au/schools-diversity-equity-guidance>

#### **Equal Opportunity and Human Rights – Students Policy**

Department of Education, Victoria

Available at: <https://www2.education.vic.gov.au/pal/equal-opportunity-human-rights-students/policy>

**Guidance from Human Rights Commissions****Guidelines for Supporting Sexual and Gender Diversity in Schools**

Equal Opportunity Commission of WA

Available at: [https://www.wa.gov.au/system/files/2020-09/Sexual and Gender Diversity in Schools Guidelines.pdf](https://www.wa.gov.au/system/files/2020-09/Sexual_and_Gender_Diversity_in_Schools_Guidelines.pdf)

**Sexuality and Gender-Based Bullying in Schools – Fact Sheet for Staff**

Equal Opportunity Commission of WA

Available at: <https://www.wa.gov.au/government/publications/sexuality-and-gender-based-bullying-schools-fact-sheet-staff>

**Trans @ School: A Guide for Schools, Educators and Families of Trans and Gender Diverse Children and Young People**

Queensland Human Rights Commission

Available at: [https://www.qhrc.qld.gov.au/\\_\\_data/assets/pdf\\_file/0019/24535/QHRC\\_TransAtSchool\\_forschools.pdf](https://www.qhrc.qld.gov.au/__data/assets/pdf_file/0019/24535/QHRC_TransAtSchool_forschools.pdf)





# Appendix H

## Definitions of 'Associate'

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Legislation	Term/s Used	Definition	Coverage
<i>Disability Discrimination Act 1992 (Cth)</i>	<b>Associate</b>	<p><b>Associate</b>, in relation to a person, includes:</p> <ul style="list-style-type: none"> <li>a) a spouse of the person; and</li> <li>b) another person who is living with the person on a genuine domestic basis; and</li> <li>c) a relative of the person; and</li> <li>d) a carer of the person; and</li> <li>e) another person who is in a business, sporting or recreational relationship with the person.</li> </ul>	Direct and indirect discrimination
<i>Racial Discrimination Act 1975 (Cth)</i>	<b>Relative</b> or <b>associate</b>	<p><b>Relative</b>, in relation to a person, means a person who is related to the first-mentioned person by blood, marriage, affinity or adoption and includes a person who is wholly or mainly dependent on, or is a member of the household of, the first-mentioned person.</p> <p><i>No legislative definition of 'associate'.</i></p>	Direct and indirect discrimination

Legislation	Term/s Used	Definition	Coverage
<i>Discrimination Act 1991 (ACT)</i>	<b>Association</b> (whether as a <b>relative</b> or otherwise) with a person who is identified by reference to another protected attribute	<i>No legislative definition of 'association ... with'.</i>  <b>Relative</b> of a person means: a) a person who is related to the person by blood, marriage, civil union, civil partnership or any other domestic partnership or adoption; or b) a domestic partner of the person or of a person mentioned in paragraph (a).	Direct and indirect discrimination
<i>Anti-Discrimination Act 1977 (NSW)</i>	<b>Relative</b> or <b>associate</b>	<b>Relative</b> of a person means any person to whom the person is related by blood, marriage, affinity or adoption, or the de facto partner of the person.  <b>Associate</b> of a person means: a) any person with whom the person associates, whether socially or in business or commerce, or otherwise, and b) any person who is wholly or mainly dependent on, or a member of the household of, the person.	Direct and indirect discrimination
<i>Anti-Discrimination Act 1992 (NT)</i>	<b>Association</b> with a person who has, or is believed to have, an attribute referred to in [the section]	<i>No legislative definition of 'association with'.</i>	Direct and indirect discrimination

Legislation	Term/s Used	Definition	Coverage
<i>Anti-Discrimination Act 1991 (Qld)</i>	<b>Association with, or relation to,</b> a person identified on the basis of any of [the listed attributes]	<i>No legislative definition of 'association with' or 'relation to'.</i>	Direct and indirect discrimination
<i>Equal Opportunity Act 1984 (SA)</i>	<b>Relative or associate</b>	<i>No legislative definition of 'relative' or 'associate'.</i>  'Near relative' of a person is defined to mean the person's spouse, domestic partner, parent, child, grandparent, grandchild, brother, or sister. However, this term is used in different provisions than those referring to 'relative or associate', and is ostensibly narrower than the term 'relative'.	Direct and indirect discrimination
<i>Anti-Discrimination Act 1998 (Tas)</i>	<b>Association with</b> a person who has, or is believed to have, any of [the listed attributes]	<i>No legislative definition of 'association with'.</i>	Direct and indirect discrimination

Legislation	Term/s Used	Definition	Coverage
<i>Equal Opportunity Act 2010</i> (Vic)	<b>Personal association</b> (whether as a <b>relative</b> or otherwise) with a person who is identified by reference to any of [the listed attributes]	<p><i>No legislative definition of 'personal association ... with'.</i></p> <p><b>Relative</b>, in relation to a person, means:</p> <ul style="list-style-type: none"> <li>a) a spouse or domestic partner of that person; or</li> <li>b) a parent or grandparent of that person or of a spouse or domestic partner of that person; or</li> <li>c) a child or grandchild (whether or not under the age of 18 years) of that person or of a spouse or domestic partner of that person; or</li> <li>d) a brother or sister of that person or of a spouse or domestic partner of that person; or</li> <li>e) a child (whether or not under the age of 18 years) of a brother or sister of the person or of a spouse or domestic partner of that person; or</li> <li>f) a child (whether or not under the age of 18 years) of a brother or sister of a parent of that person or a brother or sister of a parent of that spouse or domestic partner of that person.</li> </ul>	Direct and indirect discrimination
<i>Equal Opportunity Act 1984</i> (WA)	<b>Relative or associate</b>	<p><b>Relative</b>, in relation to a person, means a person who is related to the first-mentioned person by blood, marriage, affinity or adoption and includes a person who is wholly or mainly dependent on, or is a member of the household of, the first-mentioned person.</p> <p><i>No legislative definition of 'associate'.</i></p>	Direct discrimination

# Appendix I

## Institutional Autonomy

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### The nature and scope of institutional autonomy

I.1 The importance of institutional autonomy over internal affairs is recognised in relation to the communal aspect of the right to manifest religion. As Special Rapporteur on freedom of religion or belief, Nazila Ghanea, has explained, this means that

religions or belief institutions should have the freedom to manage their own basic affairs, including the freedom to choose their religious leaders, priests and teachers or other representation, in line with their practices, convictions and autonomy. Self-definition is important, especially where there are intrareligious divergences of views about representation.<sup>1</sup>

### Autonomy regarding religious leadership

I.2 Institutional autonomy applies fully and clearly to questions regarding religious leadership and rules governing core religious functions.<sup>2</sup> The positions occupied by religious leaders can influence binding interpretations of religious doctrine, and states are prohibited ‘from imposing beliefs on individuals and communities’.<sup>3</sup> Interference with the selection of religious leaders (such as bishops, imams, preachers, priests, rabbis, or reverends) on equality grounds will impose a significant burden on the right to religious freedom by ‘significantly affect[ing] the religious self-understanding of a community’.<sup>4</sup> It is therefore recognised that it is important to respect generally the autonomy of religious institutions in this regard.<sup>5</sup> This understanding is reflected in jurisprudence from the ECtHR<sup>6</sup> and the IACtHR.<sup>7</sup>

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- 1 Nazila Ghanea, Special Rapporteur, *Landscape of Freedom of Religion or Belief*, 52nd sess, UN Doc A/HRC/52/38 (30 January 2023) [45] (citations omitted). This view suggests that intra-religious pluralism is no less significant than inter-religious pluralism, and that it is not a function of the state to determine the authority of one interpretation above another.
  - 2 Heiner Bielefeldt, Special Rapporteur, *Elimination of All Forms of Religious Intolerance*, 68th sess, UN Doc A/68/290 (7 August 2013) [57]; Ahmed Shaheed, Special Rapporteur, *Gender-Based Violence and Discrimination in the Name of Religion or Belief*, 43rd sess, UN Doc A/HRC/43/48 (24 August 2020) [66] (citations omitted).
  - 3 Ahmed Shaheed, Special Rapporteur, *Gender-Based Violence and Discrimination in the Name of Religion or Belief*, 43rd sess, UN Doc A/HRC/43/48 (24 August 2020) [48].
  - 4 Heiner Bielefeldt, Special Rapporteur, *Elimination of All Forms of Religious Intolerance*, 68th sess, UN Doc A/68/290 (7 August 2013) [59].
  - 5 Ibid. As an example of such a factual scenario, see *Hasan and Chaush v Bulgaria* (European Court of Human Rights, Application No 30985/96, 26 October 2000).
  - 6 *Hasan and Chaush v Bulgaria* (European Court of Human Rights, Application No 30985/96, 26 October 2000) [83], [86].
  - 7 *Pavez Pavez v Chile* (Inter-American Court of Human Rights, Series C No 449, 4 February 2022) [128].

## Autonomy in relation to the rights of individual adherents

I.3 Outside of core leadership positions that define religious identity, there is increasing recognition that the application of anti-discrimination laws in the context of religious organisations may be legitimate, although determining the scope of institutional autonomy in this context can be difficult and requires careful consideration.<sup>8</sup>

I.4 Traditionally, the response to individual adherents of religions who disagree with beliefs or practices within particular religions has been that they can leave the religion and, if they wish, form their own. However, former Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt, has emphasised that it is also important to consider the religious freedom of dissidents within a religion

to come up with alternative views, provide new readings of religious sources and try to exercise influence on a community's religious self-understanding, which may change over time. In situations in which internal dissidents or proponents of new religious understandings face coercion from within their religious communities, which sometimes happens, the State is obliged to provide protection.<sup>9</sup>

I.5 Former Special Rapporteur, Ahmed Shaheed, went further in his 2020 report, raising questions about how robust recognition of institutional autonomy in relation to anti-discrimination may undermine the rights of individual adherents.<sup>10</sup>

I.6 Former Special Rapporteur Shaheed noted that, during consultations undertaken for his 2020 report, some questioned the ability of adherents to leave a religion, in light of social and economic factors and the effects of leaving on other human rights (such as social and economic rights). This may be relevant to considering the extent to which deference should be given to institutional autonomy. Former Special Rapporteur Shaheed has questioned the idea that 'religion should be "all or nothing" — either you choose to take part in a religion and must accept its inequalities, or you must cease to belong to that religion'.<sup>11</sup> Ghanea and Professor An-Na'im have engaged with this question from the broader perspective of religion

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8 For discussion of this issue in relation to *Schüth v Germany* (European Court of Human Rights, Court (Fifth Section), Application No 1620/03, 23 December 2010) and *Obst v Germany* (European Court of Human Rights, Court (Fifth Section), Application No 425/03, 23 December 2010), see below at [I.11]–[I.12].

9 Heiner Bielefeldt, Special Rapporteur, *Elimination of All Forms of Religious Intolerance*, 68th sess, UN Doc A/68/290 (7 August 2013) [60]. See also Ahmed Shaheed, Special Rapporteur, *Gender-Based Violence and Discrimination in the Name of Religion or Belief*, 43rd sess, UN Doc A/HRC/43/48 (24 August 2020) [48]; Nazila Ghanea, Special Rapporteur, *Landscape of Freedom of Religion or Belief*, 52nd sess, UN Doc A/HRC/52/38 (30 January 2023) [45].

10 Ahmed Shaheed, Special Rapporteur, *Gender-Based Violence and Discrimination in the Name of Religion or Belief*, 43rd sess, UN Doc A/HRC/43/48 (24 August 2020).

11 *Ibid* [50]. See also Heiner Bielefeldt, Special Rapporteur, *Elimination of All Forms of Religious Intolerance*, 68th sess, UN Doc A/68/290 (7 August 2013) [35].

being 'open to free interpretation and thus renewal' by its members.<sup>12</sup> Former Special Rapporteur Shaheed's report noted that consultees had explained how

the ability of women, girls and LGBT+ persons to belong to a faith of their choice, or, more often, a faith into which they were born that comprises their social and cultural connections, without being discriminated against, was vital to realizing myriad human rights, including the right to freedom of religion or belief. ...

[W]omen and LGBT+ persons often have little influence over the rules of the community in which they lived. They noted that those who pursued gender equality, including gender equal beliefs, could risk violence, shunning and stigma from their religious communities.

These consequences are particularly stark for those who often cannot leave, or do not want to leave, their religious community due to economic reasons. Furthermore, the response, that one has the 'option to leave', they asserted, could fail to appreciate that many individuals are born into a religion and their religious community, and that membership of a religious community could become part of one's identity, family, social and economic structure before choice in beliefs was introduced and developed.<sup>13</sup>

I.7 With these considerations in mind, former Special Rapporteur Shaheed emphasised that the

overlap between freedom of religion or belief and the right to non-discrimination needs to be addressed not by trade-offs or a hierarchy, but by producing 'practical concordance' of all human rights involved, to the maximum degree possible, based on reasons accessible to all. ... Anchoring freedom of religion or belief in a principle that demands non-discrimination requires legal protection of the equality of opportunity in the enjoyment by all of this right, as well as all the other rights on which freedom of religion or belief depends. This means that the rights of individuals should be protected even within groups, by creating an enabling environment where dissenters are protected against incitement to violence, and are able to assert their agency through the exercise of their fundamental human rights, including freedom of expression, right to information, freedom of religion or belief, the right to education, the right to work, freedom from coercion and equality before the law, among others. Equal liberties and protections in society, such as the right to equality and non-discrimination or the right to physical integrity, can only be maintained if individuals are never deemed as having waived said rights and liberties, even by voluntarily joining an organization.<sup>14</sup>

12 Nazila Ghanea, 'Back to Basics in Evaluating Belief' (2022) 36 *Emory International Law Review* 661, 664–5, citing Abdullahi Ahmed An-Na'im, 'The Interdependence of Religion, Secularism, and Human Rights: Prospects of Islamic Societies' (2005) 11 *Human Rights Quarterly* 56, 65.

13 Ahmed Shaheed, Special Rapporteur, *Gender-Based Violence and Discrimination in the Name of Religion or Belief*, 43rd sess, UN Doc A/HRC/43/48 (24 August 2020) [50]–[51].

14 Ibid [52] (citations omitted).

I.8 As such, the protection of equality and non-discrimination rights is necessary to protect the right to freedom of religion or belief for all, not just those who are dominant within a particular religious group.

### **Autonomy regarding non-ecclesiastical employees**

I.9 The majority of cases that consider institutional autonomy in relation to non-ecclesiastical employees have been considered in a European setting, with two cases considered in South America. This part examines cases in both non-educational and educational settings.

I.10 In all of these cases, courts have held that institutional autonomy is not absolute, and that — where religious institutions impose religious requirements on their employees that may interfere with other rights — the purpose and effect of those requirements must be proportionate. Whether they are proportionate depends, to a significant extent, on the individual's particular role within an organisation. Relevant cases are discussed in turn below.

### ***Schüth v Germany***

I.11 In the case of *Schüth v Germany*, an organist, choirmaster, and musician at a Catholic parish was dismissed on the grounds that he had breached his duty of loyalty under art 5 of the Catholic Church's Basic Regulations by having an extramarital relationship with another woman who was expecting his child (after he had separated from his wife).<sup>15</sup> This was contrary to his employer's religious doctrine and a breach of the Ecclesiastical Employment and Remuneration Regulations which formed an integral part of his employment contract.<sup>16</sup> The ECtHR found a breach of his right to privacy and acknowledged that,

in signing his employment contract, the applicant accepted a duty of loyalty towards the Catholic Church, which limited his right to respect for his private life to a certain degree. Such contractual limitations are permissible under the [ECHR] where they are freely accepted ... The Court considers, however, that the applicant's signature on the contract cannot be interpreted as a personal unequivocal undertaking to live a life of abstinence in the event of separation or divorce. An interpretation of that kind would affect the very heart of the right to respect for the private life of the person concerned, particularly since, as the employment tribunals found, the applicant was not bound by heightened duties of loyalty.<sup>17</sup>

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15 *Schüth v Germany* (European Court of Human Rights, Court (Fifth Section), Application No 1620/03, 23 December 2010).

16 *Ibid* [8], [37].

17 *Ibid* [71] (citations omitted).



## **Obst v Germany**

I.12 In the case of *Obst v Germany*,<sup>18</sup> the director of public relations for Europe within the Mormon Church was dismissed without notice, for adultery. Drawing attention to the applicant's loyalty obligations to the Mormon Church and in balancing the other interests involved, the ECtHR found that it was not unreasonable that dismissal was deemed necessary to preserve the credibility of the Church, considering the nature of the position held by the applicant.<sup>19</sup> The Court also found that given the applicant had grown up in the Mormon Church and was aware of the importance of marriage fidelity — which was also stipulated in his employment contract — the obligations and increased duty of loyalty placed on the applicant were not unreasonable. For these reasons the Court found no violation of the right to privacy.<sup>20</sup>

### **In focus: European Employment Equality Directive**

The European Employment Equality Directive establishes a general framework for addressing discrimination in employment on the grounds of religion or belief and sexual orientation (among other grounds).<sup>21</sup> Under the Directive, religious institutions are subject to a broader exception to the prohibition on discrimination on the ground of religion or belief in relation to their staff, compared to other employers.<sup>22</sup> However, the exception:

- a. does not permit discrimination on another ground; and
- b. only permits difference of treatment based on a person's religion or belief where, by reason of the nature of the occupational activities concerned or the context in which they are carried out, this constitutes a 'genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos'.<sup>23</sup>

18 *Obst v Germany* (European Court of Human Rights, Court (Fifth Section), Application No 425/03, 23 December 2010).

19 *Ibid* [51].

20 *Ibid* [53].

21 *Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation* [2000] OJ L 303/16.

22 For this exception, the occupational requirement does not have to be a determining aspect of the job, allowing 'religious requirements to be imposed on all staff, even if their jobs are not inherently religious in nature (such as doctors in a religious hospital)': Lucy Vickers, 'Religious Ethos, Employers and Genuine Occupational Requirements Related to Religion: The Need for Proportionality' (2019) 5(1) *International Labor Rights Case Law Journal* 75, 76.

23 *Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation* [2000] OJ L 303/16 art 4(2).

Decisions by the Court of Justice of the European Union under this Directive have adopted a restrictive view of institutional autonomy, including in relation to the margin of appreciation for state intervention to prohibit discrimination on the ground of marital status.<sup>24</sup> Most relevantly, as summarised by Professor Vickers, in these cases the 'Court concluded that ... whether a religious requirement was justified must be subject to some external proportionality review'.<sup>25</sup>

### ***Delgado Páez v Colombia***

I.13 This case was considered by the Human Rights Committee in 1985 and involved an allegation of discrimination on the ground of religion (under the ICCPR) against a religion teacher in a public school. The teacher was prevented from teaching after complaints from ecclesiastical authorities that he taught 'liberation theology', contrary to their interpretation of doctrine.

I.14 The Human Rights Committee did not find any violation of the ICCPR on the ground of religious discrimination, finding that the state 'may, without violating [art 18], allow the Church authorities to decide who may teach religion and in what manner it should be taught'.<sup>26</sup> Since then, however, the Committee has reversed its position on whether a state can legitimately make the selection of religious instructors in public schools subject to the authorisation of religious authorities.<sup>27</sup>

24 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* (Court of Justice of the European Union, Grand Chamber, C-414/16, ECLI:EU:C:2018:257, 17 April 2018) [31], [50]–[51], [65]–[67], [69]; *IR v JQ* (Court of Justice of the European Union, Grand Chamber, C-68/17, ECLI:EU:C:2018:696, 11 September 2018) [50]–[53], [60]. The 'margin of appreciation' doctrine is applied in some regional human rights systems to manage overlapping rights, and enables regional human rights bodies to 'exercise deference to state authorities in [their interpretation of regional texts in] view of their better position with respect to facts, social forces, culture, and political traditions': Basak Cali, 'Regional Protection' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 4th ed, 2022) 429, 429–30, 440. The doctrine is not formally embraced by UN treaty bodies.

25 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* (Court of Justice of the European Union, Grand Chamber, C-414/16, ECLI:EU:C:2018:257, 17 April 2018) [53].

26 Human Rights Committee, *Views: Communication No 195/1985*, 39th sess, UN Doc CCPR/C/39/D/195/1985 (23 October 1990) ('*Delgado Páez v Colombia*') [5.7].

27 Human Rights Committee, *Comments: Costa Rica*, 50th sess, UN Doc CCPR/C/79/Add.31 (18 April 1994) [13]; Heiner Bielefeldt, Nazila Ghanea and Michael Wiener, *Freedom of Religion or Belief: An International Law Commentary* (Oxford University Press, 2016) 195–6. This different approach, emphasising the importance of an individual teacher's freedom of religion or belief, and acceptance of pluralism and diversity of religion or belief, is developed further in the *Toledo Guiding Principles on Teaching About Religions and Beliefs*, which state that '[a]n individual's personal religious (or non-religious) beliefs cannot be sufficient reason to exclude that person from teaching about religions and beliefs': Organization for Security and Co-operation in Europe, *Toledo Guiding Principles on Teaching about Religions and Beliefs in Public Schools* (2007) 59.

### ***Lombardi-Valluari v Italy***

I.15 This case concerned a professor whose 20-year employment as a teacher at a publicly funded Catholic university was terminated after Catholic authorities refused to give an approval that was required to renew the contract, without giving reasons or giving the professor an opportunity to defend himself. The refusal related to ‘unspecified concerns that some of Mr Lombardi Valluari’s positions were “clearly opposed to Catholic doctrine”’.<sup>28</sup> The professor challenged the decision in the Italian courts, which held that they did not have competence to consider a decision of church authorities.

I.16 Given that he had no opportunity to contest the decision, the ECtHR found that there had been a violation of his freedom of expression and effective access to a court.<sup>29</sup>

### ***Siebenhaar v Germany***

I.17 This case concerned a teacher at a German kindergarten run by a Protestant parish. In this case, the teacher was bound by her employment contract to a duty of loyalty to the Protestant Church and was not permitted to be a member of, or work for, an organisation whose views or activities were seen to contradict the Church’s mandate.<sup>30</sup> On becoming aware of the applicant’s membership of the Universal Church and her teaching within that community, the Protestant Church dismissed her without notice for violating her obligations of loyalty. The ECtHR, emphasising the state’s wide margin of appreciation in this area,<sup>31</sup> found that requiring the duty of loyalty (and associated dismissal) did not unacceptably interfere with her right to freedom of religion.<sup>32</sup> The Court noted that

religious communities traditionally and universally exist in the form of organized structures and that when the organization of these communities is concerned, Article 9 [the right to freedom of thought, consciousness, and religion] must be interpreted in light of Article 11 of the Convention which safeguards associative life against unjustified interference by the State. Indeed, the autonomy of such communities is indispensable for pluralism in a democratic society, and is at the heart of the protection afforded by Article 9. The Court further recalls that, except in very exceptional cases, the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State [to evaluate] the legitimacy of religious beliefs or the means of expression of these (*Hassan and Chaush v. Bulgaria* [GC], No. 30985/96, § § 62 and 78, ECHR2000-XI). Finally, when questions about the relationship between state and religion are at stake, and issues on

28 Carolyn Evans, ‘Religious Autonomy and Secular Employment Standards: Developments in the European Court of Human Rights’ (Conference Paper, Religion and Law Conference, October 2010) 2.

29 *Lombardi-Valluari v Italy* (European Court of Human Rights, Court (Second Section), Application No 39128/05, 20 October 2009) [39], [54]–[56], [72].

30 *Siebenhaar v Germany* (European Court of Human Rights, Court (Fifth Section), Application No 18136/02, 3 February 2011) [21].

31 *Ibid* [39].

32 *Ibid* [47]–[48].

which differences can reasonably exist in a democratic society it is necessary to give special emphasis to the role of the national decision (*Leyla Şahin v. Turkey* [GC], No.44774/98, § 109, ECHR 2005-XI).<sup>33</sup>

I.18 In making its decision, the ECtHR noted that the state had fulfilled its positive obligation by providing for a system of judicial review of the decision, and that the courts had carefully considered the competing interests involved.<sup>34</sup> In this instance, the relevant domestic courts found that the applicant's dismissal was necessary to preserve the credibility of the Protestant Church in respect of the public and parents of the children of the kindergarten, and the ECtHR found that this was not unreasonable.<sup>35</sup> In balancing a number of interests and taking into consideration the state's wide margin of appreciation in this area, the ECtHR found that the duty of loyalty owed by the applicant was acceptable, and that there was no violation of her right to freedom of religion.<sup>36</sup>

### ***Fernández Martínez v Spain and Travaš v Croatia***

I.19 *Fernández Martínez v Spain*<sup>37</sup> and *Travaš v Croatia*<sup>38</sup> were decided by the ECtHR in 2014 and 2016, respectively. The cases concerned male religion teachers in state-run schools who required endorsement by Catholic Church authorities to teach. Each teacher was disendorsed for different reasons. Fernández Martínez (who was still a priest) was disendorsed on the basis of his advocacy about religious rules on celibacy for priests. Travaš was disendorsed on the basis of re-marrying in a civil ceremony after divorce from a religious marriage. The ECtHR decided these cases with reference to potential interference with the right to private life. In both cases, discrimination issues were not considered separately to the right to privacy. The Court held, in both instances, that the interference with private life was justified, given that religious education teachers can be expected to owe a heightened degree of loyalty to religious ethos because they can be regarded as representatives of a church or religious community, and in light of the state's margin of appreciation in this area.<sup>39</sup>

33 Strasbourg Consortium, 'Siebenhaar v Germany - Chamber Judgment (Unofficial English Translation)' <[www.strasbourgconsortium.org/common/document.view.php?docId=5201](http://www.strasbourgconsortium.org/common/document.view.php?docId=5201)>, citing *Siebenhaar v Germany* (European Court of Human Rights, Court (Fifth Section), Application No 18136/02, 3 February 2011) [41].

34 *Siebenhaar v Germany* (European Court of Human Rights, Court (Fifth Section), Application No 18136/02, 3 February 2011) [45].

35 Ibid [46].

36 Ibid [46]–[47]. A complaint of discrimination was found inadmissible for failure to exhaust domestic remedies.

37 *Fernández Martínez v Spain* (European Court of Human Rights, Grand Chamber, Application No 56030/07, 12 June 2014).

38 *Travaš v Croatia* (European Court of Human Rights, Court (Second Section), Application No 75581/13, 30 January 2017).

39 *Fernández Martínez v Spain* (European Court of Human Rights, Grand Chamber, Application No 56030/07, 12 June 2014) [131], [137], [152]–[153] (noting that the decision of the Grand Chamber was split nine to eight); *Travaš v Croatia* (European Court of Human Rights, Court (Second Section), Application No 75581/13, 30 January 2017) [98], [113]–[115].

1.20 In *Fernández Martínez v Spain*, the ECtHR concluded that the interaction between ‘private life’ and ‘professional life’ was particularly significant in that case, given the facts of the case. Prior to coming to this conclusion, the court summarised its jurisprudence on this interaction, stating:

According to the Court's case-law there is no reason of principle why the notion of ‘private life’ should be taken to exclude professional activities. Restrictions on an individual's professional life may fall within Article 8 [the right to respect for private and family life, home and correspondence] where they have repercussions on the manner in which he or she constructs his or her social identity by developing relationships with others. In addition, professional life is often intricately linked to private life, especially if factors relating to private life, in the strict sense of the term, are regarded as qualifying criteria for a given profession. Professional life is therefore part of the zone of interaction between a person and others which, even in a public context, may fall within the scope of ‘private life’.<sup>40</sup>

1.21 In *Travaš v Croatia*, the ECtHR reiterated that

‘private life’ [as provided in art 8 of the ECHR] is a broad term that is not susceptible to an exhaustive definition. It would be too restrictive to limit the notion of ‘private life’ to an ‘inner circle’ in which the individual may live his own personal life as he chooses, and to exclude therefrom entirely the outside world not encompassed within that circle.<sup>41</sup>

### ***Pavez Pavez v Chile***

1.22 *Pavez Pavez v Chile* was decided by the IACtHR in 2022.<sup>42</sup> The IACtHR was the first court to directly consider institutional autonomy and alleged discrimination on the ground of sexual orientation in the context of education. The case concerned disqualification of a teacher from teaching Catholic religion in a state school when it became publicly known that she was living with her same-sex partner.<sup>43</sup>

40 *Fernández Martínez v Spain* (European Court of Human Rights, Grand Chamber, Application No 56030/07, 12 June 2014) [110] (citations omitted).

41 *Travaš v Croatia* (European Court of Human Rights, Court (Second Section), Application No 75581/13, 30 January 2017) [52] (citations omitted). The ECtHR also restated the jurisprudence applied in *Fernández Martínez v Spain*: at [53].

42 *Pavez Pavez v Chile* (Inter-American Court of Human Rights, Series C No 449, 4 February 2022).

43 The teacher, who taught in a public school, had her certificate of suitability revoked by the Office of the Vicar for Education of the Diocese of San Bernardo. This certificate was a requirement of the Ministry for Education for teachers to be able to work as Catholic religion teachers in public schools.

I.23 In contrast to the approach adopted by the ECtHR, the IACtHR took a less restrictive approach to identifying, and managing the intersections of, the relevant rights involved.<sup>44</sup> The Court unanimously found that the teacher's rights to equality and non-discrimination, privacy, and work (amongst other rights) had been violated by the disqualification.<sup>45</sup>

### In focus: *Pavez Pavez v Chile*

The following excerpt from the judgment of the IACtHR in *Pavez Pavez v Chile* recounts how the disqualification came about:

23. In 2007, through anonymous phone calls to the school and to the Diocese of San Bernardo, the rumor 'spread' that the alleged victim was a lesbian. On several occasions, the Vicar for Education allegedly urged Ms. Pavez to end her 'homosexual life' and told her that, in order to continue in her position, she must undergo psychiatric treatment.

24. On July 25, 2007, the Vicar issued a written communication addressed to Sandra Pavez Pavez informing her of the decision to revoke her certificate of suitability, thus preventing her from teaching Catholic religion classes in schools located in the Diocese of San Bernardo. The aforementioned communication stated that the decision was taken in accordance with the norms of canon law and that, after a review of the situation, the matter had been discussed with Ms. Pavez. It also indicated that the Mayor of San Bernardo and the Director of the Municipal Education and Health Corporation had been informed of the withdrawal of Sandra Pavez Pavez's certificate of suitability.

25. In the same communication, the Vicar for Education also pointed out the following: 'as you know, as a priest and vicar of this diocese, I have tried to do everything possible to avoid reaching this difficult decision, noting that the spiritual and medical assistance offered was turned down by you, which I deeply regret.'

26. ...[I]n a letter [to the school, the Vicariate] indicated that the suitability of a religious education teacher 'implies three aspects that are closely related: professional suitability[,] doctrinal suitability and moral suitability.' With respect to moral suitability, the letter stated that:

44 Some legal commentators discuss, critically, the reasoning of the *Pavez* case, including in light of its different interpretation of religious institutional autonomy as compared to how this concept has been interpreted by the ECtHR: see, eg, Fernando Arlettaz, 'Sexual Orientation Discrimination and Autonomy of Religious Groups in the Inter-American Case Law' (2023) 20 *The Age of Human Rights Journal* 1; Ligia Castaldi and Tomas Henriques, 'Pavez v Chile: Freedom of Religion in Public Education' <<https://ohrh.law.ox.ac.uk/pavez-v-chile-freedom-of-religion-in-public-education/>>; María-José Valero-Estarellas, 'Freedom of Religion, Religious Employment, and Conflicts of Rights: Europe at a Crossroads' (2022) 10(1) *Journal of Law, Religion and State* 27; Diana V Thompson and Kayla A Toney, 'Sacred Spheres: Religious Autonomy as an International Human Right' (2023) 72(2) *Catholic University Education Review* 151.

45 *Pavez Pavez v Chile* (Inter-American Court of Human Rights, Series C No 449, 4 February 2022) [145]–[146].

[from] every religious belief there follows a personal or moral behavior derived from that belief. The teacher must adhere to the conduct required of members of that religion. It is the responsibility of the religious authority of each denomination to ensure not only that an upright doctrine is taught, but also that the teacher is consistent in this regard, at least on the most crucial points of morality; morality is not only taught by word, but above all by example and testimony. A person who lives in public contradiction with essential aspects of the Catholic doctrine and morals that he or she is required to teach, is not qualified to transmit these teachings to the students. ...

In the case at hand, such an inconsistency has occurred. Indeed, although Professor Pavez holds a legitimately awarded diploma, and her knowledge of the contents of the Catholic doctrine may be sufficiently well known to her, her moral suitability has suffered a serious alteration by living publicly as a lesbian, in open contradiction with the contents and teachings of the Catholic doctrine that she was called upon to teach.<sup>46</sup>

In place of her role as religion teacher, Ms Pavez was offered the higher position of acting inspector-general, and received a higher salary, but was barred from teaching Catholic religion classes in any national educational institution.

I.24 The IACtHR acknowledged that the appointment of teachers of a particular religion by a religious community may include a certain margin of autonomy, consistent with the right to religious freedom, but it found that this autonomy cannot be absolute.<sup>47</sup> This was because

Catholic religion classes, which are part of a public education program in public schools, financed with public funds, are not within the scope of religious freedom that should be free from any interference by the State, since they are not specifically related to religious beliefs or to the organizational life of the communities.<sup>48</sup>

I.25 In relation to institutional autonomy (and the related concept of a 'ministerial exception' adapted from US law), the IACtHR understood that it

operates in matters related to the functioning of religious communities, such as the determination of the membership of the church, its ministers and its hierarchies. However, when this ministerial exception is applied in other areas, it becomes weaker and less robust, particularly in the field of education in public establishments, where the principles and values of tolerance, full respect for

46 Ibid [23]–[26] (citations omitted).

47 Ibid [129]. Note that under the American Convention on Human Rights, institutional autonomy is afforded explicit protection.

48 Ibid.

human rights, fundamental freedoms and non-discrimination are mandatory for the State.<sup>49</sup>

I.26 In these circumstances, the Court stated that the broad autonomy held by Chilean religious authorities ‘must be adapted to the other rights and obligations in force in the area of equality and non-discrimination’.<sup>50</sup>

I.27 The IACtHR found that

the costs of the restrictive measure to the detriment of Sandra Pavez Pavez do not outweigh the advantages obtained in terms of protecting religious freedom and the right of parents to choose their children’s education. Indeed, at no time was there any consideration of the effects that this measure would have on Sandra Pavez Pavez’s personal life or on her teaching vocation. Nor is it clear that there is an actual or potential infringement of the autonomy of the religious community, or of the right to religion, or the right of parents or guardians to have their children or wards receive the religious education that is in accordance with their beliefs. On the contrary, the alleged victim stated — without this being challenged by the State — that she received support in the form of 700 signatures ‘from students and their parents, who were even authorized to speak to the Bishop on my behalf so that I could continue teaching, and from all the teachers who were there at the time this happened in 2007.’ Finally, regarding the State’s argument related to the coherence between the content of the religion classes and the conformity of the lifestyle of the person who teaches those classes with the religious creed, this Court considers that it cannot operate in such a way as to justify or legitimize different treatment that is discriminatory based on the categories protected by Article 1(1) of the Convention, in the area of public education.<sup>51</sup>

## Further consideration by UN treaty bodies

I.28 A number of UN treaty bodies have given indications that they would not consider institutional autonomy to permit specific exceptions to prohibitions on discrimination in relation to students or staff in faith-based educational institutions (whether public or private) on grounds contained in the *Sex Discrimination Act*.

## Committee on Economic, Social and Cultural Rights

I.29 In relation to Australia, the Committee on Economic, Social and Cultural Rights has expressly identified discrimination in employment in the field of education as a matter of concern. In its most recent List of Issues Prior to Reporting (a document

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49 Ibid [128].

50 Ibid [130]. The Court stated that the interference with Ms Pavez’s sexual life through the actions of the Vicariate for Education — which included urging her to end her relationship and making her employment as a Catholic religion teacher conditional upon her undergoing medical or psychiatric therapy — were ‘totally unacceptable from a perspective of a State governed by the rule of law, where human rights must be respected’: at [135].

51 Ibid [144].



that identifies particular issues the Committee would like a state party to report on for its periodic review under the treaty), the Committee asked Australia to

provide information on any steps taken to reform anti-discrimination legislation at the federal and the state levels with a view to addressing the protection gaps in the existing legislation. In particular, please also indicate any steps taken to address the discriminatory effect of section 38 of the Sex Discrimination Act against lesbian, gay, bisexual, transgender and intersex teachers and students in religious educational institutions.<sup>52</sup>

I.30 Similarly, in its periodic review of Germany's compliance with the ICESCR in 2018, the Committee expressed its concern at

the 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 (arts. 2 (2) and 6).<sup>53</sup>

I.31 The Committee recommended that Germany review its *General Act on Equal Treatment* (2006), 'to ensure that no discrimination is permitted against non-ecclesiastical employees on grounds of religious belief, sexual orientation or gender identity'.<sup>54</sup>

## Human Rights Committee

I.32 Similarly, in its periodic reviews of Ireland's compliance with the ICCPR (in 2014 and 2023), the Human Rights Committee reiterated its previous concerns that

under section 37(1) of the Employment Equality Act, institutions under the direction or control of a body established for religious purposes, including in the fields of education and health, can discriminate against employees or prospective employees to protect the religious ethos of the institution (arts. 2, 18 and 26).<sup>55</sup>

I.33 The Committee recommended that Ireland ensure that further amendment of s 37(1) of the *Employment Equality Act 1998* (Ireland) prohibits all forms of discrimination in employment in the fields of education and health.<sup>56</sup>

52 Committee on Economic, Social and Cultural Rights, *List of Issues Prior to Submission of the Sixth Periodic Report of Australia*, 70th sess, UN Doc E/C.12/AUS/QPR/6 (7 April 2022) [9].

53 Committee on Economic, Social and Cultural Rights, *Concluding Observations on the Sixth Periodic Report of Germany*, 64th sess UN Doc E/C.12/DEU/CO/6 (27 November 2018) [22].

54 Ibid [23].

55 Human Rights Committee, *Concluding Observations on the Fifth Periodic Report of Ireland*, 135th sess, UN Doc CCPR/C/IRL/CO/5 (26 January 2023) [41].

56 Ibid [42].



# Appendix J

## Key Legislative Provisions

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### Sex Discrimination Act 1984 (Cth)

#### 5 Sex discrimination

- (1) For the purposes of this Act, a person (in this subsection referred to as the **discriminator**) discriminates against another person (in this subsection referred to as the **aggrieved person**) on the ground of the sex of the aggrieved person if, by reason of:

- (a) the sex of the aggrieved person;
- (b) a characteristic that appertains generally to persons of the sex of the aggrieved person; or
- (c) a characteristic that is generally imputed to persons of the sex of the aggrieved person;

the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of a different sex.

- (2) For the purposes of this Act, a person (the **discriminator**) discriminates against another person (the **aggrieved person**) on the ground of the sex of the aggrieved person if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of the same sex as the aggrieved person.
- (3) This section has effect subject to sections 7B and 7D.

#### 5A Discrimination on the ground of sexual orientation

- (1) For the purposes of this Act, a person (the **discriminator**) discriminates against another person (the **aggrieved person**) on the ground of the aggrieved person's sexual orientation if, by reason of:

- (a) the aggrieved person's sexual orientation; or
- (b) a characteristic that appertains generally to persons who have the same sexual orientation as the aggrieved person; or
- (c) a characteristic that is generally imputed to persons who have the same sexual orientation as the aggrieved person;

the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person who has a different sexual orientation.

- (2) For the purposes of this Act, a person (the **discriminator**) discriminates against another person (the **aggrieved person**) on the ground of the aggrieved person's sexual orientation if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons who have the same sexual orientation as the aggrieved person.
- (3) This section has effect subject to sections 7B and 7D.

### **5B Discrimination on the ground of gender identity**

- (1) For the purposes of this Act, a person (the **discriminator**) discriminates against another person (the **aggrieved person**) on the ground of the aggrieved person's gender identity if, by reason of:
- (a) the aggrieved person's gender identity; or
  - (b) a characteristic that appertains generally to persons who have the same gender identity as the aggrieved person; or
  - (c) a characteristic that is generally imputed to persons who have the same gender identity as the aggrieved person;
- the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person who has a different gender identity.
- (2) For the purposes of this Act, a person (the **discriminator**) discriminates against another person (the **aggrieved person**) on the ground of the aggrieved person's gender identity if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons who have the same gender identity as the aggrieved person.
- (3) This section has effect subject to sections 7B and 7D.

### **5C Discrimination on the ground of intersex status**

- (1) For the purposes of this Act, a person (the **discriminator**) discriminates against another person (the **aggrieved person**) on the ground of the aggrieved person's intersex status if, by reason of:
- (a) the aggrieved person's intersex status; or
  - (b) a characteristic that appertains generally to persons of intersex status; or
  - (c) a characteristic that is generally imputed to persons of intersex status;
- the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person who is not of intersex status.

- (2) For the purposes of this Act, a person (the **discriminator**) discriminates against another person (the **aggrieved person**) on the ground of the aggrieved person's intersex status if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of intersex status.
- (3) This section has effect subject to sections 7B and 7D.

## 6 Discrimination on the ground of marital or relationship status

- (1) For the purposes of this Act, a person (in this subsection referred to as the **discriminator**) discriminates against another person (in this subsection referred to as the **aggrieved person**) on the ground of the marital or relationship status of the aggrieved person if, by reason of:
  - (a) the marital or relationship status of the aggrieved person; or
  - (b) a characteristic that appertains generally to persons of the marital or relationship status of the aggrieved person; or
  - (c) a characteristic that is generally imputed to persons of the marital or relationship status of the aggrieved person;the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of a different marital or relationship status.
- (2) For the purposes of this Act, a person (the **discriminator**) discriminates against another person (the **aggrieved person**) on the ground of the marital or relationship status of the aggrieved person if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of the same marital or relationship status as the aggrieved person.
- (3) This section has effect subject to sections 7B and 7D.

## 7 Discrimination on the ground of pregnancy or potential pregnancy

- (1) For the purposes of this Act, a person (the **discriminator**) discriminates against a woman (the **aggrieved woman**) on the ground of the aggrieved woman's pregnancy or potential pregnancy if, because of:
  - (a) the aggrieved woman's pregnancy or potential pregnancy; or
  - (b) a characteristic that appertains generally to women who are pregnant or potentially pregnant; or
  - (c) a characteristic that is generally imputed to women who are pregnant or potentially pregnant;

the discriminator treats the aggrieved woman less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat someone who is not pregnant or potentially pregnant.

- (2) For the purposes of this Act, a person (the **discriminator**) discriminates against a woman (the **aggrieved woman**) on the ground of the aggrieved woman's pregnancy or potential pregnancy if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging women who are pregnant or potentially pregnant.
- (3) This section has effect subject to sections 7B and 7D.

### **7AA Discrimination on the ground of breastfeeding**

- (1) For the purposes of this Act, a person (the **discriminator**) discriminates against a woman (the **aggrieved woman**) on the ground of the aggrieved woman's breastfeeding if, by reason of:
  - (a) the aggrieved woman's breastfeeding; or
  - (b) a characteristic that appertains generally to women who are breastfeeding; or
  - (c) a characteristic that is generally imputed to women who are breastfeeding;

the discriminator treats the aggrieved woman less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat someone who is not breastfeeding.

- (2) For the purposes of this Act, a person (the **discriminator**) discriminates against a woman (the **aggrieved woman**) on the ground of the aggrieved woman's breastfeeding if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging women who are breastfeeding.
- (3) To avoid doubt, a reference in this Act to **breastfeeding** includes the act of expressing milk.
- (4) To avoid doubt, a reference in this Act to **breastfeeding** includes:
  - (a) an act of breastfeeding; and
  - (b) breastfeeding over a period of time.
- (5) This section has effect subject to sections 7B and 7D.

## **7A Discrimination on the ground of family responsibilities**

For the purposes of this Act, an employer discriminates against an employee on the ground of the employee's family responsibilities if:

- (a) the employer treats the employee less favourably than the employer treats, or would treat, a person without family responsibilities in circumstances that are the same or not materially different; and
- (b) the less favourable treatment is by reason of:
  - (i) the family responsibilities of the employee; or
  - (ii) a characteristic that appertains generally to persons with family responsibilities; or
  - (iii) a characteristic that is generally imputed to persons with family responsibilities.

## **7B Indirect discrimination: reasonableness test**

- (1) A person does not discriminate against another person by imposing, or proposing to impose, a condition, requirement or practice that has, or is likely to have, the disadvantaging effect mentioned in subsection 5(2), 5A(2), 5B(2), 5C(2), 6(2), 7(2) or 7AA(2) if the condition, requirement or practice is reasonable in the circumstances.
- (2) The matters to be taken into account in deciding whether a condition, requirement or practice is reasonable in the circumstances include:
  - (a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; and
  - (b) the feasibility of overcoming or mitigating the disadvantage; and
  - (c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice.

...

## Part II—Prohibition of discrimination etc.

### Division 1—Discrimination in work

#### 14 Discrimination in employment or in superannuation

- (1) It is unlawful for an employer to discriminate against a person on the ground of the person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities:
  - (a) in the arrangements made for the purpose of determining who should be offered employment;
  - (b) in determining who should be offered employment; or
  - (c) in the terms or conditions on which employment is offered.
- (2) It is unlawful for an employer to discriminate against an employee on the ground of the employee's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities:
  - (a) in the terms or conditions of employment that the employer affords the employee;
  - (b) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment;
  - (c) by dismissing the employee; or
  - (d) by subjecting the employee to any other detriment.
- (3) Nothing in paragraph (1)(a) or (b) renders it unlawful for a person to discriminate against another person, on the ground of the other person's sex, in connection with employment to perform domestic duties on the premises on which the first-mentioned person resides.
- (4) Where a person exercises a discretion in relation to the payment of a superannuation benefit to or in respect of a member of a superannuation fund, it is unlawful for the person to discriminate, in the exercise of the discretion, against the member or another person on the ground, in either case, of the sex, sexual orientation or marital or relationship status of the member or that other person.
- (5) Subsection (4) does not apply if section 41B applies to that member in respect of that fund.
- (6) In this section:  
**member**, in relation to a superannuation fund, includes a person who has been a member of the fund at any time.

...



## **16 Discrimination against contract workers**

It is unlawful for a principal to discriminate against a contract worker on the ground of the contract worker's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities:

- (a) in the terms or conditions on which the principal allows the contract worker to work;
- (b) by not allowing the contract worker to work or continue to work;
- (c) by denying the contract worker access, or limiting the contract worker's access, to any benefit associated with the work in respect of which the contract with the employer is made; or
- (d) by subjecting the contract worker to any other detriment.

## **Division 2—Discrimination in other areas**

### **21 Education**

- (1) It is unlawful for an educational authority to discriminate against a person on the ground of the person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding:
  - (a) by refusing or failing to accept the person's application for admission as a student; or
  - (b) in the terms or conditions on which it is prepared to admit the person as a student.
- (2) It is unlawful for an educational authority to discriminate against a student on the ground of the student's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding:
  - (a) by denying the student access, or limiting the student's access, to any benefit provided by the educational authority;
  - (b) by expelling the student; or
  - (c) by subjecting the student to any other detriment.
- (3) Nothing in this section applies to or in respect of a refusal or failure to accept a person's application for admission as a student at an educational institution where:
  - (a) the educational institution is conducted solely for students of a different sex from the sex of the applicant; or
  - (b) except in the case of an institution of tertiary education—education

or training at the level at which the applicant is seeking education or training is provided by the educational institution only or mainly for students of a different sex from the sex of the applicant.

...

## **23 Accommodation**

- (1) It is unlawful for a person, whether as principal or agent, to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding:
  - (a) by refusing the other person's application for accommodation;
  - (b) in the terms or conditions on which accommodation is offered to the other person; or
  - (c) by deferring the other person's application for accommodation or according to the other person a lower order of precedence in any list of applicants for that accommodation.
- (2) It is unlawful for a person, whether as principal or agent, to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding:
  - (a) by denying the other person access, or limiting the other person's access, to any benefit associated with accommodation occupied by the other person;
  - (b) by evicting the other person from accommodation occupied by the other person; or
  - (c) by subjecting the other person to any other detriment in relation to accommodation occupied by the other person.
- (3) Nothing in this section applies to or in respect of:
  - (a) the provision of accommodation in premises if:
    - (i) the person who provides or proposes to provide the accommodation or a near relative of that person resides, and intends to continue to reside, on those premises; and
    - (ii) the accommodation provided in those premises is for no more than 3 persons other than a person referred to in subparagraph (i) or near relatives of such a person; or
  - (b) accommodation provided by a religious body; or
  - (c) accommodation provided by:

- (i) an entity registered under the *Australian Charities and Notforprofits Commission Act 2012*; or
  - (ii) a not-for-profit entity that is not an ACNC type of entity; solely for persons of one sex or solely for persons of one or more particular marital or relationship statuses.
- (3A) Paragraph (3)(b) does not apply to accommodation provided by a religious body in connection with the provision, by the body, of Commonwealth-funded aged care.

## **Division 4—Exemptions**

### **37 Religious bodies**

- (1) Nothing in Division 1 or 2 affects:
- (a) the ordination or appointment of priests, ministers of religion or members of any religious order;
  - (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order;
  - (c) the selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice; or
  - (d) any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.
- (2) Paragraph (1)(d) does not apply to an act or practice of a body established for religious purposes if:
- (a) the act or practice is connected with the provision, by the body, of Commonwealth-funded aged care; and
  - (b) the act or practice is not connected with the employment of persons to provide that aged care.

### **38 Educational institutions established for religious purposes**

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

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

## Fair Work Act 2009 (Cth)

### Part 1-2—Definitions

#### 12 The Dictionary

In this Act:

...

**objectionable term** means a term that:

- (a) requires, has the effect of requiring, or purports to require or have the effect of requiring; or
- (b) permits, has the effect of permitting, or purports to permit or have the effect of permitting;

either of the following:

- (c) a contravention of Part 3-1 (which deals with general protections);
- (d) the payment of a bargaining services fee.

## Part 2–3—Modern awards

### 153 Terms that are discriminatory

*Discriminatory terms must not be included*

- (1) A modern award must not include terms that discriminate against an employee because of, or for reasons including, the 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.

*Certain terms are not discriminatory*

- (2) A term of a modern award does not discriminate against an employee:
- (a) if the reason for the discrimination is the inherent requirements of the particular position held by the employee; or
  - (b) merely because it discriminates, in relation to employment of the employee as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed:
    - (i) in good faith; and
    - (ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.
- (3) A term of a modern award does not discriminate against an employee merely because it provides for minimum wages for:
- (a) all junior employees, or a class of junior employees; or
  - (b) all employees with a disability, or a class of employees with a disability; or
  - (c) all employees to whom training arrangements apply, or a class of employees to whom training arrangements apply.

## Part 2-4—Enterprise agreements

### 195 Meaning of discriminatory term

#### *Discriminatory term*

- (1) A term of an enterprise agreement is a **discriminatory term** to the extent that it discriminates against an employee covered by the agreement because of, or for reasons including, the 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.

#### *Certain terms are not discriminatory terms*

- (2) A term of an enterprise agreement does not discriminate against an employee:
- (a) if the reason for the discrimination is the inherent requirements of the particular position concerned; or
  - (b) merely because it discriminates, in relation to employment of the employee as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed:
    - (i) in good faith; and
    - (ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.
  - (c) If the term is a special measure to achieve equality—to the extent that action may be taken because of the term is not unlawful under any anti-discrimination law in force in place where the action may occur.
- (3) A term of an enterprise agreement does not discriminate against an employee merely because it provides for wages for:
- (a) all junior employees, or a class of junior employees; or
  - (b) all employees with a disability, or a class of employees with a disability; or
  - (c) all employees to whom training arrangements apply, or a class of employees to whom training arrangements apply.

#### *Special measures to achieve equality*

- (4) A term of an enterprise agreement is a **special measure to achieve equality** if:
- (a) the term has the purpose of achieving substantive equality for employees or prospective employees who have a particular attribute or a particular kind of attribute (as the case may be) mentioned in subsection (1), or a particular combination of these; and

Note: For example, a term that has the purpose of achieving substantive equality for employees who are female and have a physical or mental disability.

- (b) a reasonable person would consider that the term is necessary in order to achieve substantive equality.
- (5) A term of an enterprise agreement is to be treated as having the purpose referred to in paragraph (4)(a) if it is:
  - (a) solely for that purpose; or
  - (b) for that purpose as well as other purposes, whether or not that purpose is the dominant or substantial one.
- (6) However, a term of an enterprise agreement ceases to be a **special measure to achieve equality** after substantive equality for the employees referred to in paragraph (4)(a) has been achieved.



## Part 3-1—General protections

### 351 Discrimination

- (1) An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual orientation, 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.

Note: This subsection is a civil remedy provision (see Part 4-1).

- (2) However, subsection (1) does not apply to action that is:
- (a) not unlawful under any anti-discrimination law in force in the place where the action is taken; or
  - (b) taken because of the inherent requirements of the particular position concerned; or
  - (c) if the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed—taken:
    - (i) in good faith; and
    - (ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.
- (3) Each of the following is an **anti-discrimination law**:
- (aa) the *Age Discrimination Act 2004*;
  - (ab) the *Disability Discrimination Act 1992*;
  - (ac) the *Racial Discrimination Act 1975*;
  - (ad) the *Sex Discrimination Act 1984*;
  - (a) the *Anti-Discrimination Act 1977* of New South Wales;
  - (b) the *Equal Opportunity Act 2010* of Victoria;
  - (c) the *Anti-Discrimination Act 1991* of Queensland;
  - (d) the *Equal Opportunity Act 1984* of Western Australia;
  - (e) the *Equal Opportunity Act 1984* of South Australia;
  - (f) the *Anti-Discrimination Act 1998* of Tasmania;
  - (g) the *Discrimination Act 1991* of the Australian Capital Territory;
  - (h) the *Anti-Discrimination Act 1992* (NT).

## **Part 6-4—Additional provisions relating to termination of employment**

### **772 Employment not to be terminated on certain grounds**

- (1) An employer must not terminate an employee's employment for one or more of the following reasons, or for reasons including one or more of the following reasons:
- (a) temporary absence from work because of illness or injury of a kind prescribed by the regulations;
  - (b) trade union membership or participation in trade union activities outside working hours or, with the employer's consent, during working hours;
  - (c) non-membership of a trade union;
  - (d) seeking office as, or acting or having acted in the capacity of, a representative of employees;
  - (e) the filing of a complaint, or the participation in proceedings, against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;
  - (f) 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;
  - (g) absence from work during parental leave;
  - (h) temporary absence from work for the purpose of engaging in a voluntary emergency management activity, where the absence is reasonable having regard to all the circumstances.
- Note: This subsection is a civil remedy provision (see Part 4-1).
- (2) However, subsection (1) does not prevent a matter referred to in paragraph (1)(f) from being a reason for terminating a person's employment if:
- (a) the reason is based on the inherent requirements of the particular position concerned; or
  - (b) if the person is a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed—the employment is terminated:
    - (i) in good faith; and
    - (ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.

- 
- (3) To avoid doubt, if:
- (a) an employer terminates an employee's employment; and
  - (b) the reason, or a reason, for the termination is that the position held by the employee no longer exists, or will no longer exist; and
  - (c) the reason, or a reason, that the position held by the employee no longer exists, or will no longer exist, is the employee's absence, or proposed or probable absence, during parental leave;
- the employee's employment is taken, for the purposes of paragraph (1)(g), to have been terminated for the reason, or for reasons including the reason, of absence from work during parental leave.
- (4) For the purposes of subsection (1), subsection 109(2) (which deals with the meaning of **voluntary emergency management activity**) has effect as if the word employee had its ordinary meaning.

