



Australian Government

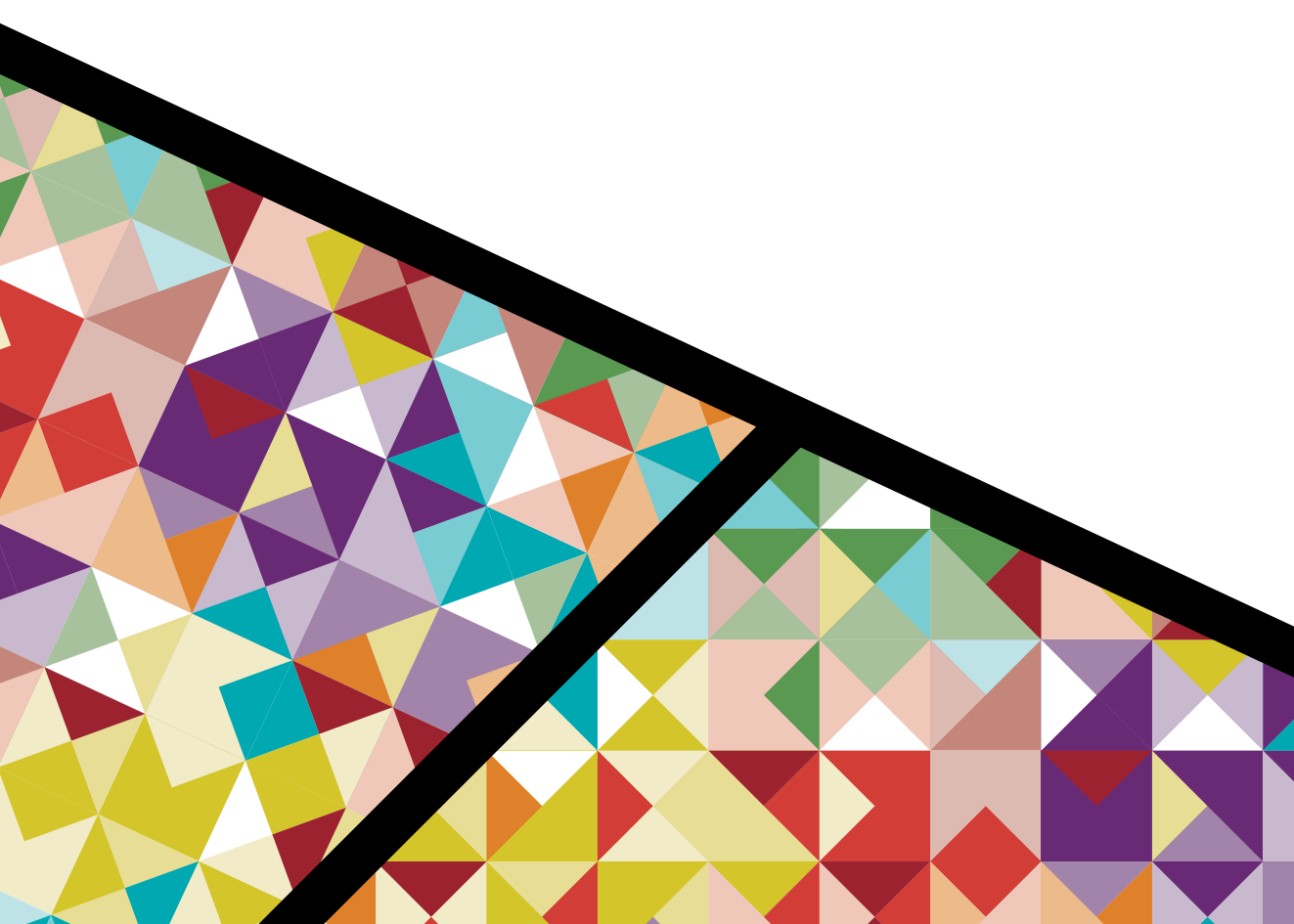
Australian Law Reform Commission

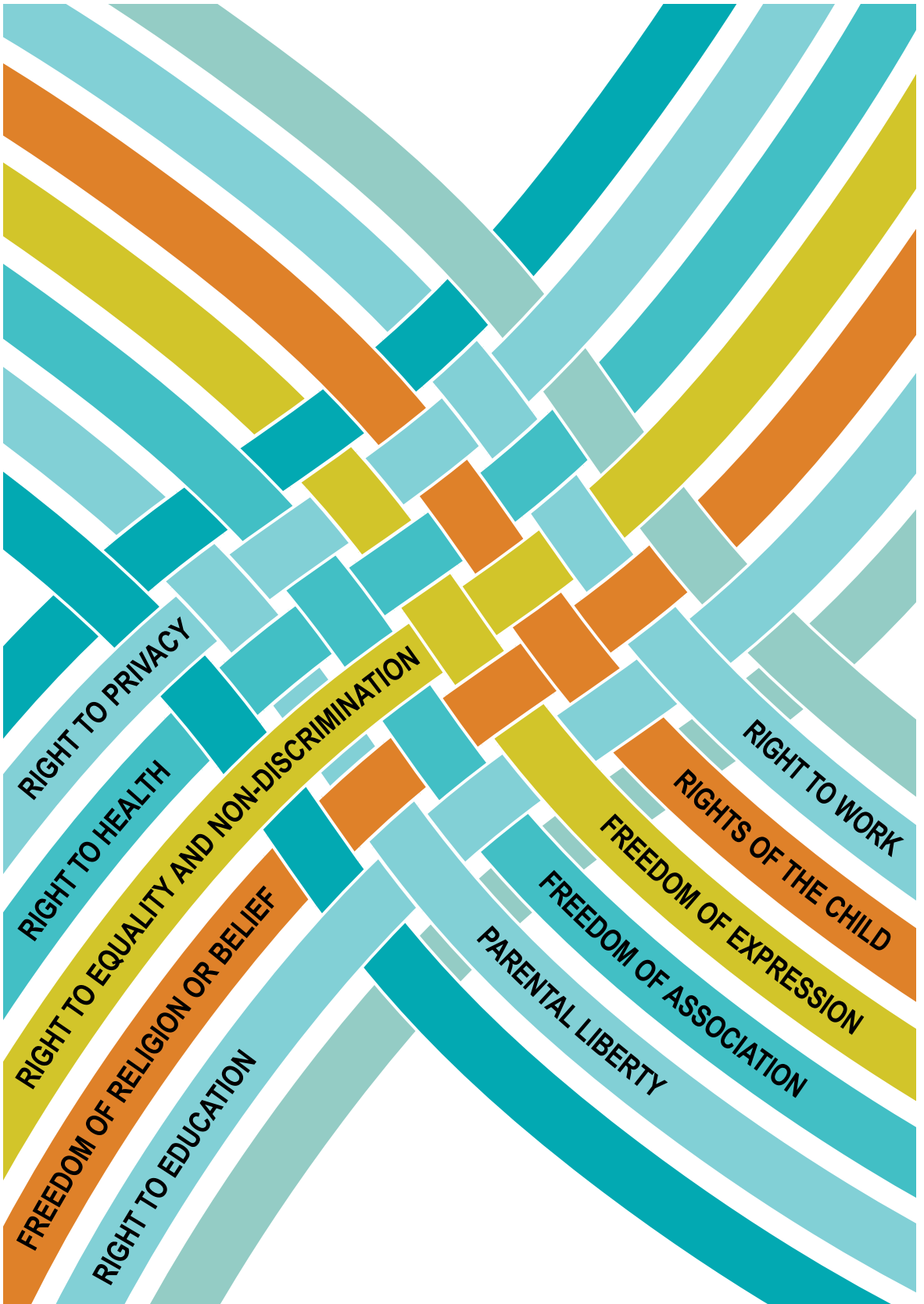
SUMMARY REPORT

**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.

CONTENTS

Overview	2
What is the Inquiry about?	3
What is the task of the ALRC?	3
What has the ALRC concluded?	4
What has the ALRC recommended?	4
Analysis	6
Context	7
The ALRC's task	8
Relevant rights and principles	9
Key recommendations	14
Summary of other recommendations	19
Inquiry Process	22
Navigating the Report	26
Terms of Reference	30
Recommendations	34

OVERVIEW



What is the Inquiry about?

1. This Inquiry concerns religious educational institutions (including schools, tertiary institutions, theological colleges, and other educational institutions) and the extent to which they should be excepted from obligations generally imposed on all persons:

- by the *Sex Discrimination Act 1984* (Cth) (*'Sex Discrimination Act'*) (and, to some extent, the *Fair Work Act 2009* (Cth) (*'Fair Work Act'*)) not to discriminate against another person on the grounds of that person's sex, sexual orientation, gender identity, marital or relationship status, or pregnancy ('SDA grounds'); and
- by the *Fair Work Act* not to discriminate in the employment or the prospective employment of another person, on the ground of religion.

What is the task of the ALRC?

2. Religious educational institutions are currently the subject of broad-based legislative exceptions to obligations not to discriminate against students and staff on SDA grounds and on the ground of religion. The Australian Government has made a commitment to amend the *Sex Discrimination Act* and other Commonwealth anti-discrimination laws (as necessary), including the *Fair Work Act*, to ensure 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;
- 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.

3. The Terms of Reference require the ALRC to recommend the legislative reforms necessary to ensure, to the extent practicable, that Commonwealth anti-discrimination laws reflect the Government's commitment (as set out above) in a manner that is consistent with Australia's international legal obligations.

What has the ALRC concluded?

4. The ALRC has concluded that the Australian Government's policy commitments can be implemented in a manner that is consistent with Australia's international legal obligations, through amendments to the *Sex Discrimination Act*, the *Fair Work Act*, and the *Australian Human Rights Commission Act 1986* (Cth) ('*Australian Human Rights Commission Act*'), as specified in the recommendations made by the ALRC. The recommended reforms would maximise the realisation of human rights overall and, where the reforms may restrict the realisation of some rights to some extent, the reforms would do so in a way that is justifiable under international law. Furthermore, broadly stated, the reforms would result in greater consistency between Commonwealth law and state and territory laws, as well as the law in comparable overseas jurisdictions.

What has the ALRC recommended?

5. The key recommendations made by the ALRC are Recommendation 1, which addresses reforms to the *Sex Discrimination Act*; and Recommendation 7, which addresses reforms to the *Fair Work Act* and the provisions of any future Religious Discrimination Act. The other recommendations are largely related to, or consequential upon, Recommendations 1 and 7.

6. The overall effect of Recommendation 1 would be to narrow the circumstances in which it would be lawful to discriminate against students or staff at religious educational institutions on SDA grounds.

7. The overall effect of Recommendation 7 would be to narrow the circumstances in which it would be lawful to treat staff (particularly existing employees) at religious educational institutions differently on the ground of religion; to ensure that differential treatment on the basis of religion does not allow for discrimination on SDA grounds; and to allow religious educational institutions to give preference to persons of the same religion in selecting employees, in order to build and maintain a community of faith.

Figure 1: Key statistics relating to the Inquiry

Key Inquiry Statistics



ANALYSIS



ANALYSIS

8. This part provides a brief summary of the analysis that underpins the ALRC's recommendations contained in the Final Report. A full list of the ALRC's recommendations appears later in this Summary Report.

Context

9. 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 by law.

10. The particular focus of this Inquiry is the application of anti-discrimination laws to religious educational institutions. Religious educational institutions include schools, tertiary institutions, theological colleges, and other educational institutions. Chapter 3 of the Final Report sets out statistics relating to religious educational institutions in Australia, including the statistics in **Figure 2** relating to schools in particular.

Figure 2: Key statistics relating to religiously affiliated schools

Students

36% of students attend non-government schools.

The proportion of students in non-government schools is higher in secondary schools (over 40%) than in primary schools.

School growth

14 percentage point increase in students enrolling in non-government schools since 1974.

In 1974, the percentage of students enrolled in non-government schools was 22%.

Staff

38% of school staff work in non-government schools.

212,755 teachers, specialist support, and other staff work in non-government schools.

School affiliations

More than 90% of non-government schools are affiliated with a religion.

Most non-government schools are affiliated with Christianity (broadly defined).

11. The key question for this Inquiry is the extent to which religious educational institutions should be excepted from prohibitions that are generally imposed on all persons in relation to discrimination on the grounds of sex, sexual orientation, gender identity, marital or relationship status, pregnancy, and (in the context of employment only) religion.

12. The *Sex Discrimination Act* prohibits discrimination on the basis of a number of personal attributes. Several exceptions in that Act are relevant to religious educational institutions such that discrimination in certain circumstances is not unlawful. In particular, s 38 of that Act contains exceptions specifically directed to religious educational institutions in relation to aspects of discrimination in the context of education and work. These include exceptions to prohibitions on discrimination on the basis of sex, sexual orientation, gender identity, marital or relationship status, and pregnancy when 'in good faith in order to avoid injury to the religious susceptibilities of adherents of [the relevant] religion or creed'.

13. The *Fair Work Act* contains four separate provisions that have the effect of prohibiting discrimination in the following aspects of employment: modern awards, enterprise agreements, adverse action, and termination. These provisions prohibit discrimination on the basis of attributes protected under the *Sex Discrimination Act*, and on the basis of religion, subject to various exceptions. Each of those provisions contains an exception specifically directed to religious institutions that is in equivalent terms to the exception in s 38 of the *Sex Discrimination Act*, as well as an exception relating to the 'inherent requirements' of the particular role. The adverse action provision contains an additional exception, such that the prohibition on discriminatory adverse action does not apply to action that is not unlawful under an applicable Commonwealth, state, or territory anti-discrimination law in the place where the action is taken. A provision dealing with enterprise agreements also contains an additional exception relating to 'special measures to achieve equality'.

The ALRC's task

14. The Terms of Reference request the ALRC to recommend reforms to ensure, to the extent practicable, that Commonwealth anti-discrimination laws reflect specified policy commitments of the Australian Government in a manner consistent with the rights and freedoms recognised in the international agreements to which Australia is a party. The Australian Government's policy commitments (as specified in the Terms of Reference) are 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; 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.

15. In response to the task set out in the Terms of Reference, the ALRC has made 11 recommendations outlining how these policy commitments can be implemented in accordance with Australia’s international legal obligations. Recommendations 1 and 7 respond specifically to core aspects of the Terms of Reference and are integral parts to this Inquiry. Other recommendations deal with related and consequential issues. Implementing the full suite of recommendations would require amendments to the *Sex Discrimination Act*, the *Fair Work Act*, and the *Australian Human Rights Commission Act*.

Relevant rights and principles

16. The ALRC’s focus during this Inquiry has been on Australia’s international legal obligations. The ALRC has sought to identify how relevant Australian anti-discrimination laws might best reflect and comply with those obligations. This focus on international legal obligations arises out of the Terms of Reference, and also out of the requirements of the *Australian Law Reform Commission Act 1996* (Cth).

17. In addition, the ALRC has adopted the five Guiding Principles set out in [Figure 3](#) below in developing its recommendations.

Figure 3: Guiding Principles

Principle 1:	Human dignity is central to the expression and protection of all human rights.
Principle 2:	All human rights engaged by this Inquiry are 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.
Principle 4:	Education performs a key role in maintaining a pluralist and socially cohesive society.
Principle 5:	Students are at the centre of this Inquiry.

18. Furthermore, the ALRC has considered how the Australian Government's policy commitments set out in the Terms of Reference might be appropriately reflected in legislation in light of related laws in Australian states and territories, comparable approaches in overseas jurisdictions, and the provisions of the *Australian Constitution*.

19. In terms of Australia's international legal obligations, the most relevant treaties that are binding on Australia include the:

- *International Covenant on Civil and Political Rights*;¹
- *International Covenant on Economic, Social and Cultural Rights*;²
- *Convention on the Elimination of All Forms of Discrimination Against Women*;³
- *Convention on the Rights of the Child*;⁴
- *Convention against Discrimination in Education*;⁵ and
- *Discrimination (Employment and Occupation) Convention*.⁶

20. In relation to all human rights, the obligations on all states — including Australia — include obligations to respect, protect, and fulfill human rights, as illustrated in **Figure 4** below.

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

2 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976) ('ICESCR').

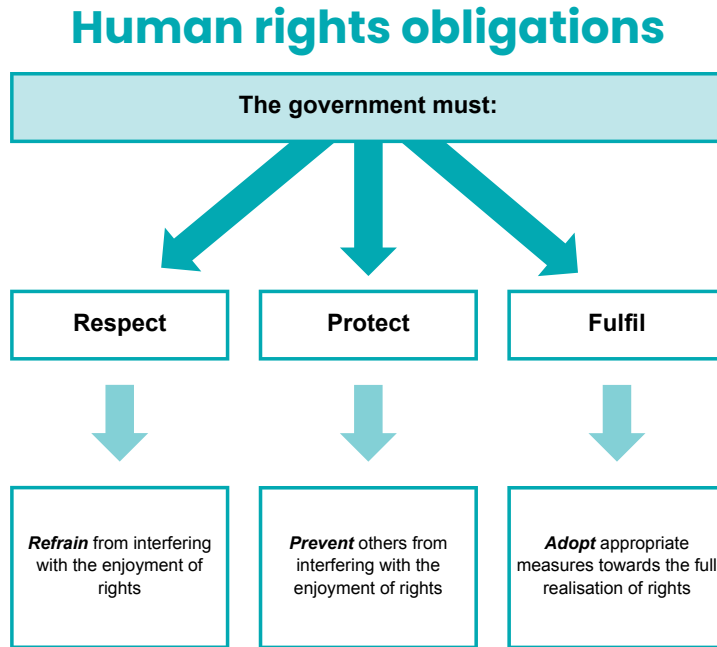
3 *Convention on the Elimination of all Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) ('CEDAW').

4 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('CRC').

5 *Convention against Discrimination in Education*, opened for signature 14 December 1960, 429 UNTS 93 (entered into force 22 May 1962) ('CADE').

6 *Discrimination (Employment and Occupation) Convention*, opened for signature 25 June 1958, ILO No 111 (entered into force 15 June 1960) ('ILO 111').

Figure 4: The nature of human rights obligations



21. The key human rights arising out of the relevant treaties that the ALRC has identified as being relevant in some way to the issues under consideration in the Inquiry are:

- 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, including any aspect that arises from freedom of association);
- 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.

22. 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’.⁷ Human rights must be considered in parallel with each other and in a mutually enriching manner. Only a small number of human rights are absolute. Most rights can be limited, strictly, to promote other objectives, including other human rights.

23. The ALRC has approached the development of its recommendations 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.

24. International law has developed mechanisms to guide the application of multiple intersecting rights.⁸ The ALRC has drawn on these mechanisms of international law 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. For example, the concept of ‘proportionality’ plays an important role under international law, seeking to maximise the realisation of all relevant rights where they conflict.

25. 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 ALRC’s recommended reforms. The evidence available to the ALRC suggests that any detriment to religious educational institutions under the recommended reforms would be minor, and would be less significant than detriments experienced by students and staff in religious educational institutions under existing legislative exceptions.

26. 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 has been necessary for the ALRC to assess to some extent the 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 Government’s policy position (reading together the three policy commitments set out in the Terms of Reference) is within the range of approaches that are permissible under international law.

7 *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).

8 See Chapter 10 of the Final Report at [10.12]–[10.23].



All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.

UN Vienna Declaration and Programme of Action



Key recommendations

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.

27. **Recommendation 1** outlines legislative amendments that would remove general exceptions, and disapply some other exceptions, to prohibitions on discrimination that are applicable to religious educational institutions. The overall effect of implementing Recommendation 1 would be to narrow the circumstances in which it would be lawful to discriminate against students or staff at religious educational institutions on the basis of attributes protected under the *Sex Discrimination Act*.

28. 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 prohibited under the *Sex Discrimination Act* would be permissible if the condition, requirement, or practice were reasonable in the circumstances (under s 7B) and did not constitute direct discrimination.

29. In analysing whether the Australian Government's policy commitments are consistent with Australia's obligations under international law, the ALRC has addressed 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?

30. 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 parental liberty to 'ensure the religious and moral education of their children in conformity with their own convictions'.⁹ 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.

31. An additional effect of implementing 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 parental liberty to 'ensure the religious and moral education of their children in conformity with their own convictions',¹⁰ would also be promoted for some people. Religious educational institutions would, in any event, remain able to build a community of faith through the selection of staff pursuant to Recommendation 7 (discussed below).

32. 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 international legal obligations.

9 ICCPR arts 18(1), 18(4).

10 Ibid.

33. 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*. Anti-discrimination laws in most states and territories already prohibit discrimination against staff and students of religious educational institutions on grounds equivalent to those contained in the *Sex Discrimination Act*.

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.

34. 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 any Religious Discrimination Act).¹¹ There are, however, prohibitions on religious discrimination in the *Fair Work Act* that apply to employment and prospective employment. Those prohibitions are subject to exceptions for religious institutions that are broader than the exception contemplated by the Terms of Reference. For example, the *Fair Work Act* contains exceptions for religious institutions in relation to conduct taken in good faith to ‘avoid injury to the religious susceptibilities’ of adherents of the relevant religion or creed.¹²

35. Recommended amendments to the *Fair Work Act* under **Recommendation 7** comprise:

- excluding religious educational institutions from the scope of the exceptions for religious institutions relating to the ‘religious susceptibilities’ of adherents, and from the exception to the prohibition on adverse action relating to action that is not unlawful under an applicable anti-discrimination law; and
- inserting new exceptions to provide that it is not contrary to the relevant provisions for religious educational institutions to give preference in the selection of staff, 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, and does not amount to conduct that is unlawful under the *Sex Discrimination Act*.

36. An exception that is equivalent to the recommended new exception in Recommendation 7 should also be included in a future Religious Discrimination Act. The ‘inherent requirements’ exceptions in the *Fair Work Act*, and the ‘special measures’ exception relating to terms in enterprise agreements, would continue to apply in relation to both prospective staff and existing staff at religious educational institutions.

37. The overall effect of implementing Recommendation 7 would be to narrow the circumstances in which it would be lawful to treat staff (particularly existing employees) at religious educational institutions differently on the basis of religion; to ensure that differential treatment on the basis of religion does not allow for discrimination under the *Sex Discrimination Act* (and so to ensure that Recommendation 1 is not

11 In contrast to many states and territories: see Chapter 12 and Appendix E of the Final Report. Under Commonwealth law, discrimination against some religious groups (such as Jews) has been held to be prohibited under the *Racial Discrimination Act 1975* (Cth) on the basis that they are a group with an ‘ethnic origin’ for the purposes of that Act: see, eg, *Jones v Scully* (2002) 120 FCR 243, 244.

12 See Chapter 13 of the Final Report.

undermined in that way); and to allow religious educational institutions to build a community of faith.

38. 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 because of religion. However, a new exception specifically for religious educational institutions would be available in relation to the selection of staff for employment 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*.

39. 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.

40. If Recommendation 7 were implemented, several human 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, rights to health and life, children's rights, and the right to education. However, as is the case under existing law, some of these rights would remain limited to some extent for some people, but that limitation would be permissible under international law. The rights that may remain limited 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 parental liberty to 'ensure the religious and moral education of their children in conformity with their own convictions',¹³ would be limited to some extent for some people, but, if they were, the limitations would be permissible under international law.

13 ICCPR arts 18(1), 18(4).

41. 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 in ways that are justified in accordance with applicable criteria under international law.

Summary of other recommendations

42. Recommendations 2–6 build on Recommendation 1 in particular. **Recommendation 2** relates to the training of certain religious leaders. The existing exception in s 37(1)(b) the *Sex Discrimination Act* refers to 'the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order'. The ALRC recommends that the exception be retained but amended to incorporate language that encompasses the diversity of descriptions of religious leaders across the broad range of religions, without effecting any substantive change regarding the nature of the positions covered.

43. **Recommendation 3** would extend protection from discrimination under the *Sex Discrimination Act* to all 'workers' at religious educational institutions, including pre-service teachers and volunteers. Currently, protection under the *Sex Discrimination Act* applies only to those classified as employees or 'contract workers'.

44. **Recommendation 4** would extend protection from discrimination under the *Sex Discrimination Act* to people who associate with, or are believed to associate with, another person who has or is believed to have a particular protected attribute. This recommendation is particularly relevant in the context of educational institutions because of the potential for students to be affected by discrimination based on the attributes of family members.

45. Recommendations 5 and 6 are more technical in nature, and seek to address differences between the *Sex Discrimination Act* and the *Fair Work Act* as well as 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 that would be indirectly discriminatory under the *Sex Discrimination Act* in relation to the personal beliefs or private life of employees. Under Recommendation 6, such terms would be defined as 'objectionable terms', such that they would be unlawful under the *Fair Work Act* and would not have the effect of overriding protections under the *Sex Discrimination Act*.

46. **Recommendation 8** builds on Recommendation 7. 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*.

47. **Recommendations 9 and 10** relate to clarifications and guidance materials regarding the law. These recommendations aim 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.



INQUIRY PROCESSES



INQUIRY PROCESS

48. 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 provisions of 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 *International Covenant on Civil and Political Rights*.

49. 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 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 Review were withdrawn by the Attorney-General on 3 November 2022.

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

51. 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 questions submitted to a public webinar.

52. The ALRC spoke with 131 individuals and organisations in consultation sessions between November 2022 and September 2023 (see Appendix A of the Final Report for a list of all consultees). Consultations were held in-person in Brisbane, Sydney, Canberra, and Melbourne, and online. Consultees were located across all Australian states and territories as well as the United Kingdom, Canada, Germany, and New Zealand.

53. The ALRC received 428 formal submissions in response to the *Consultation Paper*, which was released in January 2023. Of those 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.¹⁴

14 Australian Law Reform Commission, 'Submissions', *Religious Educational Institutions and Anti-Discrimination Laws* <www.alrc.gov.au/inquiry/anti-discrimination-laws/submissions/>.

54. In January 2023, 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. The survey was not designed to reflect a representative sample of the population. For this reason, sampling was not undertaken and quantitative data have not been generated from survey responses.

55. The ALRC's analysis of consultations, submissions, and survey responses reveals several values and concerns that were shared by a large majority of stakeholders. This 'common ground' is represented in **Figure 5** below.

Figure 5: Shared values and concerns of stakeholders



56. 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.

57. The ALRC recognises the time and effort invested by organisations and individuals in contributing to this Inquiry. 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.

58. 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 extended the reporting deadline to 31 December 2023. This extension came after the ALRC received 428 submissions and 41,057 survey responses.



NAVIGATING THE REPORT



NAVIGATING THE REPORT

59. The Final Report is divided into four parts. Each part is summarised below.

60. **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.

61. Chapter 1 provides an introduction to the Final Report.

62. Chapter 2 briefly outlines fundamental issues underpinning the 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.

63. 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; reported experiences of religious communities; and reported experiences of people likely affected by existing legislative exceptions.

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

65. 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 commitments 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.

66. 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.

67. Chapter 6 contains three recommendations on issues that relate to the scope of protection from discrimination provided under the *Sex Discrimination Act*

(Recommendations 2–4). The aim of these recommendations is to ensure that the provisions of the *Sex Discrimination Act* apply in relation to an appropriate 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’ at 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 particular protected attribute.

68. Chapter 7 contains two technical recommendations to address differences between the *Sex Discrimination Act* and the *Fair Work Act* (Recommendations 5 and 6). 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 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.

69. Chapter 8 contains two recommendations relating to differential treatment in employment on the basis of religion (Recommendations 7 and 8). 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*.

70. 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 Commonwealth 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 for this Inquiry.

71. **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.

72. 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.

73. 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.

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

TERMS OF REFERENCE



TERMS OF REFERENCE

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.



RECOMMENDATIONS



Exceptions in Anti-Discrimination Law – Sex Discrimination Act Grounds



Chapter 4

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.

Scope of Protection

Chapter 6



Recommendation	2	Further to Recommendation 1, existing exceptions in s 37(1)(b) of the <i>Sex Discrimination Act 1984</i> (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 <i>Sex Discrimination Act 1984</i> (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 <i>Sex Discrimination Act 1984</i> (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: <ul style="list-style-type: none">• 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.

Consequential Amendments

Chapter 7



Recommendation	5	Further to Recommendation 1, s 153, s 195, s 351, and s 772 of the <i>Fair Work Act 2009</i> (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 <i>Sex Discrimination Act 1984</i> (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 <i>Fair Work Act 2009</i> (Cth) should be amended such that, in relation to a religious educational institution, it incorporates reference to a contravention of Part II of the <i>Sex Discrimination Act 1984</i> (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.

Exceptions in Anti-Discrimination Law – Religious Grounds



Chapter 8

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 <i>Fair Work Act 2009</i> (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 <i>Australian Human Rights Commission Act 1986</i> (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.

Further Reforms

Chapter 9



Recommendation	9	The Australian Human Rights Commission should review its 'Commission Guidelines' for 'Temporary exemptions under the <i>Sex Discrimination Act 1984</i> (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: <ul style="list-style-type: none">• educational institution administrators to understand and comply with the <i>Sex Discrimination Act 1984</i> (Cth) and anti-discrimination provisions in the <i>Fair Work Act 2009</i> (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.

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

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

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ISBN: 978-0-6453501-7-3

Commission Reference: ALRC Report 142, 2023

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Printed by Finline Print & Copy Service, NSW.

Typeset by Post Pre-press Group, Queensland.

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.

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