



Freedom from discrimination in religious schools

Submission to the Senate Legal and Constitutional Affairs
Committee on the inquiry into *Legislative exemptions that allow
faith-based educational institutions to discriminate against
students, teachers and staff*

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Human Rights Law Centre

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1. Introduction

We welcome the opportunity to provide this submission to the Senate Legal and Constitutional Affairs Committee (**Committee**) in its inquiry into *Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff* (**Senate inquiry**). The Human Rights Law Centre (**HRLC**) has long advocated for the protection of both the right to freedom from discrimination, and the right to freedom of thought, conscience, religion or belief.¹

Strong discrimination laws promote equality and foster happy, healthy and safe societies. Permanent legislative exemptions which allow faith-based educational institutions to discriminate in education and employment effectively override the rights of lesbian, gay, bisexual, transgender and intersex (**LGBTI**) people, and their families, to be free from discrimination. These exemptions are inherently unfair, discriminatory and out of step with modern community expectations. They act as a barrier to vulnerable people accessing employment and education, and contribute to worse health outcomes for marginalised communities which bear the brunt of this discrimination.

Children in schools should be focusing on classes, homework and building friendships, not living in fear of mistreatment because of who they or their families are. Teachers should be assessed in relation to teaching standards and their ability to support students to learn, not because of who they are or who they love.

We support the removal of legislative exemptions which allow faith-based educational institutions to discriminate against students, teachers and staff, including on the basis of sexual orientation and gender identity and other attributes covered by the *Sex Discrimination Act 1984* (Cth) (**SDA**).

However, we oppose the proposed amendments in the *Sex Discrimination Amendment (Protecting students) Bill 2018* (Cth) (**proposed Government amendments**) published in the media on 25 October 2018 which would introduce additional levels of uncertainty and leave the door open for potential indirect discrimination against LGBT students. Instead, we recommend straightforward amendments to the SDA to remove legislative exemptions which allow discrimination against students, teachers and staff in faith-based educational institutions, except in narrow situations consistent with international human rights law.

We also consider broader reforms required to remove discrimination against all LGBT teachers and staff in religious schools. For example, complementary amendments should be made to the *Fair Work Act 2009* (Cth) (**FWA**) to fulfil the policy intent of removing the ability of religious organisations to discriminate against employees and contract workers on the basis of their sexual orientation.

¹ See e.g., Human Rights Law Centre, *Rights and freedoms in Australia: Response to the Australia Law Reform Commission interim report of its inquiry into traditional rights and freedoms* (2009) https://www.alrc.gov.au/sites/default/files/subs/148._org_human_rights_law_centre_submission_.pdf; Human Rights Law Centre, *Striking the right balance: Submission to the inquiry into the status of the human right to freedom of religion or belief* (2017) <https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/593735f8be659441f726306b/1496790524658/FORB+submission+-+Final.pdf>; Human Rights Law Centre, *Protecting fundamental rights and freedoms in Australia: Submission to the Expert Panel on the Religious Freedom Review* (14 February 2017) <https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/5a837e94c830259ddc66ad53/1518567068245/Religious+Freedom+Review+Submission+-+HRLC.pdf>.

2. Summary of recommendations

General recommendations

1. & 2. The Federal Government should remove outdated and discriminatory exemptions from the *Sex Discrimination Act 1984* (Cth) which allow faith-based educational institutions to lawfully discriminate against students in education, and against teachers and staff.

Specific recommendations

3. The Federal Government should:
 - (a) remove section 38 of the *Sex Discrimination Act 1984* (Cth) (SDA); and
 - (b) insert an exception to the broad religious exemption in subsection 37(1)(d) the *Sex Discrimination Act 1984* (Cth) prohibiting discrimination in relation to education and employment in education, similar to subsection 109(2) of the *Anti-Discrimination Act 1991* (Qld).

Broader recommendations

4. In the alternative, a general limitations clause could replace permanent religious exemptions and allow for the limitation of rights where there is a legitimate aim, and where reasonable, necessary and proportionate.
5. If religious exemptions are not removed, religious organisations receiving government funds to deliver services (including education) to the public should not be permitted to rely on religious exemptions from anti-discrimination laws.
6. If religious exemptions are not removed, religious organisations seeking to rely on the exemptions should be required to make this clear in job advertisements and publicly available policies.
7. The Federal Government should amend the *Sex Discrimination Act 1984* (Cth) to prohibit discrimination on the basis of “personal association” with someone who has a protected attribute.
8. The Federal Government should repeal subsections 153(2)(b), 195(2)(b), 351(2)(c) and 772(2)(b) of the *Fair Work Act 2009* (Cth) in relation to all protected attributes except religion. In relation to discrimination based on religion, the Federal Government should replace the word “or” after subsection 351(2)(b) of the *Fair Work Act 2009* (Cth) and other similar provisions containing religious exemptions with “and”.
9. The Federal Government should introduce “gender identity or expression” and “sex characteristics” as additional protected attributes under relevant provisions of the *Fair Work Act 2009* (Cth).
10. Australia should consolidate and modernise its anti-discrimination laws and add the additional ground of ‘religious belief’ (including non-religious beliefs).
11. The Federal Government should enact a Charter of Human Rights that provides equal protections for human rights under international human rights law.

3. International human rights principles

3.1 Right to equality and freedom from discrimination

Every person has the right to be free from discrimination and to equality under the law. These constitute basic and general principles relating to the protection of all human rights.² These obligations arise under the Universal Declaration of Human Rights (**UDHR**),³ the International Covenant on Civil and Political Rights (**ICCPR**),⁴ the International Covenant on Economic Social & Cultural Rights (**ICESCR**),⁵ with its two Optional Protocols, the Convention on the Rights of the Child, and other relevant treaties.

International human rights law protects the rights of people to be free from discrimination on the basis of sexual orientation or gender identity.⁶ Article 26 of the ICCPR is a free-standing non-discrimination clause that prohibits discrimination and provides that all people are equal before the law – in fact or in law – in all aspects of public life.

The rights to non-discrimination and substantive equality have also been confirmed time and time again by a wide range of UN Treaty Bodies,⁷ and international jurisprudence.⁸ Australia is obliged to ensure full and effective legislative protection of the rights to non-discrimination and equality,⁹ and has done so through a wide range of national laws.¹⁰

3.2 Right to freedom of thought, conscience, religion and belief

Article 18(1) of the ICCPR states that:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in

² UN HRC, *General Comment No 18: Non-discrimination* (1989) UN Doc HRI/GEN/1/Rev.6, 146 (**UN HRC General Comment No 18**).

³ While the UDHR is not a treaty and is not legally binding on States, it is an expression of the fundamental values which are shared by all members of the international community and has had a profound influence on the development of international human rights law.

⁴ UN General Assembly, *International Covenant on Civil and Political Rights* (16 December 1966) UN Treaty Series 999, 171.

⁵ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights* (16 December 1966) UN Treaty Series 993, 3.

⁶ See, e.g. UN Economic and Social Council, Report of the High Commissioner for Human Rights on implementation of economic, social and cultural rights, UN Doc E/2009/90 (2009) [19].

⁷ See, e.g., UN HRC, *General Comment No 28: Equality of Rights between Men and Women* (2000) UN Doc CCPR/C/21/Rev.1/Add.10; UN HRC General Comment No 18; UN Committee on Economic, Social and Cultural Rights (**CESCR**), *General Comment No 16: The Equal Rights of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights* (2005) UN Doc E/C.12/2005/4; CESCR, *General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights* (2009) UN Doc E/C.12/GC/20; UN Committee on the Elimination of Discrimination against Women, *General Recommendation No 25* (2004) UN Doc A/59/38.

⁸ See, e.g., *D.H. v The Czech Republic*, Appl. No. 57325/00 (2007); *Nachova v Bulgaria*, Appl. Nos. 43577/98 & 43579/98 (2005); *Morales de Sierra v Guatemala*, Case 11.625, Inter-Am. C.H.R., Report No. 4/01, OEA/Ser.L/V/II.111, doc. 20 rev (2001); *Schuler-Zgraggen v Switzerland*, Ser. A No. 263 (1993).

⁹ See, e.g., ICCPR arts 2, 3, 26; ICESCR; CEDAW; CERD; CRPD art 5.

¹⁰ See, e.g., *Sex Discrimination Act 1984* (Cth); *Racial Discrimination Act 1975* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth).

community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.¹¹

Every human being has an absolute right to believe whatever they choose to believe. The ICCPR also requires countries to have respect for the liberty of parents or legal guardians to “ensure the religious and moral education of their children in conformity with their own convictions.”¹²

While the freedom to hold religious beliefs is **absolute**,¹³ manifesting a religious belief in worship, observance, practice or teaching can be **limited** where those limitations are “prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”¹⁴

Article 18(1) of the ICCPR states that the manifestation element of this right applies to ‘worship, observance, practice and teaching’, which encompasses a broad range of acts.¹⁵ “Teaching” includes acts integral to the conduct by religious groups of their basic affairs (e.g. freedom to choose their religious leaders, priests and teachers, freedom to establish seminaries or religious schools, and freedom to prepare and distribute religious texts or publications).¹⁶ International law provides further guidance that an act must be “intimately linked” to the religious belief and there must exist “a sufficiently close and direct nexus between the act and the underlying belief”.¹⁷

3.3 Limiting the right to freedom of religion or belief

According to Nowak, the limitations contained in Article 18 of the ICCPR exercise an important corrective function due to the potential for far-reaching freedom of religion to lead to suppression not

¹¹ The General Assembly *Declaration on the Elimination of All Forms of Intolerance and Discrimination based on Religion or Belief* (GA Res. 36/55 of 25 November 1981) has normative value in the interpretation of this provision. The right to freedom of religion or belief is also guaranteed in article 18 of the UDHR, article 9(1) of the European Convention of Human Rights (**ECHR**), article 14 of the Convention on the Rights of the Child (**CRC**) and article 12 of the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families. Further, a number of special studies from UN organs are taken into consideration in interpreting article 18 of the ICCPR. See Krishnaswami, *Study of Discrimination in the Matter of Religious Rights and Practices*, UN Sales No.60.XIV.2. See also Odio Benito, *Study of the current dimensions of the problems of intolerance and of discrimination on grounds of religion or belief*, UN Sales No E.89.XIV.3 (1989); Eide/Mubanga-Chipaya, *Conscientious Objection to Military Service*, UN Sales No. E.85.XIV.1 (1985); reports of the Special Rapporteurs on freedom of religion or belief (for example, the report E/CN.4.2004/63). These individual and collective manifestations of a religion or belief are also found in article 18 of the UDHR (teaching is mentioned first), article 9(1) of the ECHR and article 1(1) of the 1981 UN Declaration on Religious Intolerance. International human rights documents are interpreted within contemporary social understandings of human rights (e.g. it applies equally to all people regardless of their gender).

¹² ICCPR art 18(4).

¹³ UN HRC, *General Comment No. 22: Freedom of Thought, Conscience or Religion*, UN Doc CCPR/C/21/Rev.1/Add.4 (1993) [8] (**UN HRC General Comment No 22**). Paragraph 3 of UN HRC General Comment No 22 on article 18 states: “Article 18 distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. It does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one’s choice...” (available at: <http://www.unhchr.ch/tbs/doc.nsf/0/9a30112c27d1167cc12563ed004d8f15>). Limitations on freedom of religion are also similarly expressed in article 14(3) or the CRC, article 12(3) of the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, and article 9 of the ECHR.

¹⁴ ICCPR art 18(3).

¹⁵ UN HRC General Comment No 22, above n 13.

¹⁶ *Ibid* [4].

¹⁷ *Eweida & Ors v The United Kingdom* [2013] ECHR 37 [82]. See also *Ladele v London Borough of Islington* [2009] EWCA Civ 1357 [52].

merely of freedom of religion of others but to other rights as well.¹⁸ This is because of the inherently controversial character of freedom of religion – the fact that most religious faiths believe their faith to represent the “absolute truth” and thus reject the faiths or beliefs of others. It is the interplay between the principle of freedom of religion and its restrictions that truly determines the actual scope of the individual's right.¹⁹

Drawing a line as to which religious practices can be accommodated in a plural society that fairly respects the rights of diverse groups is not a simple exercise. It is properly a subject for discussion and debate and each country has a ‘margin of appreciation’ to decide where that line is to be drawn in its national circumstances.

International law provides a structured process for drawing this line.²⁰ In order for a limitation on a fundamental right to be justified, the limitation must be necessary, pursue a legitimate aim, and be proportionate to that aim (which can be referred to as the proportionality test).²¹ These requirements are reflected in national human rights instruments, both constitutional and legislative, as well as applied by the federal Parliamentary Joint Committee on Human Rights. The presumption is always in favour of human rights, which places the burden of proof on those who would limit the right.

The proportionality test is an effective means of arbitrating between justified and unjustified limitations. Each limb of this test is designed to guard against potential misuse of the limitation provision to deprive individuals of their rights unnecessarily: it seeks to ensure that a measure does not limit a right more than is reasonably necessary to accomplish the measure's legitimate aims.

The ‘Limitations Criteria’ provided in the Guide to Human Rights published by the Parliamentary Joint Committee on Human Rights provides further explanation of these key concepts.²² The Guide states that “any measure that limits a human right must comply with the following criteria (the limitation criteria):

- be prescribed by law;
- be in pursuit of a legitimate objective;
- be rationally connected to its stated objective; and

¹⁸ Ibid 408.

¹⁹ Ibid 409.

²⁰ See e.g. ICCPR art 18(3); UN HRC, *General Comment No. 22: Freedom of Thought, Conscience or Religion*, UN Doc CCPR/C/21/Rev.1/Add.4 (1993) [8].

²¹ UN Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (1985). These principles are also reflected in the limitation provisions of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2), and the *Human Rights Act 2004* (ACT) s 28 (which are almost identical). See further *S.A.S v France* (European Court of Human Rights, Grand Chamber (1 July 2014) Application No 43835/11 (1 July 2014); *Bull (And Another) v Hall (And Another)* [2013] UKSC 73 (27 November 2013); *Trinity Western University v The Law Society of Upper Canada* [2016] ONCA 518; *Achbita v G4S Secure Solutions NV* (European Court of Justice, C-157/15, 14 March 2017) and *Bougnaoui v Micropole SA* (European Court of Justice, C-188/15, 14 March 2017); *Ladele v London Borough of Islington* [2009] EWCA Civ 1357; *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880; *Royal Devon & Exeter Hospitals NHS Foundation Trust* [2010] ET 1702886/2009; *Eweida v British Airways* [2010] EWCA Civ 80. See also, Australian Government Attorney-General's Department, *Permissible limitations*, <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Permissiblelimitations.aspx>.

²² Parliamentary Joint Committee, *Guide to Human Rights* (June 2015) https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources

- be a proportionate way to achieve that objective.”²³

4. Discrimination against students

4.1 Federal exemptions for faith-based educational institutions in education

Religious schools make up a substantial portion of educational service providers in Australia and receive large amounts of government funding. More than 1 in 3 school students in Australia attends a religious school.²⁴ Existing religious exemptions allow religious schools to refuse admission, discipline, suspend, expel or cause any other detriment to a student on the basis of their sex, sexual orientation, gender identity, marital or relationship status or pregnancy, provided it is in accordance with religious doctrines, tenets, beliefs or teachings or the discrimination is in good faith to avoid injury to the religious susceptibilities of adherents of that religion.²⁵

State and territory anti-discrimination laws contain different religious exemptions in education. As raised during the public hearing, discrimination against students by religious schools in Tasmania is limited to discrimination on the basis of religious belief or affiliation or religious activity, and only in relation to admission (i.e. not discrimination against an existing student, such as disciplinary measures, suspension or expulsion, or on the basis of sexual orientation or gender identity).

We have briefly summarised the differences between federal, state and territory specific religious schools exemptions from anti-discrimination laws in Appendix 1 below. We have also summarised the scope and tests of broad religious exemptions from discrimination laws under different federal, state and territory anti-discrimination laws in Appendix 2 below.

4.2 Experiences of same-sex attracted and gender questioning young people in religious communities

A national Australian study has found that same-sex attracted and gender questioning young Australians with a religious background were more likely than their non-religious peers to:

- report self-harm and suicidal ideation;
- feel negatively about their same sex attraction;
- have experienced social exclusion;
- have been subjected to homophobic language from friends;
- report homophobic abuse and feeling unsafe at home;
- be unsupported by their parents, siblings and teachers when disclosing their sexual orientation or gender identity; and

²³ Ibid.

²⁴ Carolyn Evans and Beth Gaze, ‘Discrimination by Religious Schools: Views from the Coal Face’ (2010) 34 *Melbourne University Law Review* 392, 393.

²⁵ *Sex Discrimination Act 1984* (Cth) s 38.

- attend schools with no policies or supports protecting them from bullying because of their sexual orientation or gender identity.²⁶

Seventeen year old Thalia described her experiences in a religious boarding school as a teenager:²⁷

Case study: Disciplinary punishments at a religious boarding school

“Due to my mother’s homophobia I was sent to a strict Catholic boarding school where I was forced to scrub floors and walls on my hands and knees and pray multiple times a day. I am not religious and it was an extremely homophobic environment. Within a month I was on anti-depressant[s] and expelled after attempting suicide because ‘Suicide is a sin and so it was not acceptable to take part in the school’”

In contrast, Charlie described his experience of moving to a religious school which supported his gender identity:

Case study: Religious school supports transgender boy to transition

“When I came from my all-girls school to the small co-ed Christian school that I am at now, the first thing I said straight up was ‘I am trans and I want to be able to use the male bathroom’. They just said ‘Sure, that’s fine. Use whichever one you are comfortable with’. It’s such a great school, with a high proportion of staff to students and it’s for anyone who does not fit into regular school. And 100 per cent it has made a big difference. They use my preferred pronoun and my name. They treat me like any other boy.”

All schools have a duty of care to protect students from harm, including bullying on the basis of their physical sex characteristics. As part of the 2012 inquiry into the federal Human Rights and Anti-Discrimination Bill, OII Australia included the following case study:²⁸

Case study: Bullying of intersex teenager at a religious school

“T is a 15 year old child, with male sex of rearing, who has just been diagnosed with 47,XXY when his doctor ran some tests as a result of significant breast development and other physical changes. T has been shunned by other pupils at school and has experienced bullying due to his physical differences. These include allegations that this makes him partly a woman, or gay. His religious school has recently banned a gay couple from a school formal. T should be protected from harassment at any school.”

²⁶ Lynne Hillier et al, ‘Writing Themselves in 3: The Third National Study on the Sexual Health and Wellbeing of Same Sex Attracted and Gender Questioning Young People’, *Australian Research Centre in Sex, Health and Society* (La Trobe University: 2010) <http://www.latrobe.edu.au/arcshs/downloads/arcshs-research-publications/WTi3.pdf> 91.

²⁷ Ibid 52.

²⁸ OII Australia, *Submission on the proposed federal Human Rights and Anti-Discrimination Bill* (9 December 2012) 20.

Same-sex attracted young people with religious backgrounds have also shared the impact of them growing up surrounded by religious beliefs which were directly hostile to their sexual orientation:

I kept on telling myself that homosexuality was immoral and wrong, and I prayed and told myself that I liked people of the opposite sex. This caused me a great deal of depression and alienation from my peers... Being a Christian made me hate myself and who I was, and I really believed that God could change me. (Oscar, 14 years)²⁹

4.3 Comparison of legislative exemptions in international jurisdictions

The Human Rights Law Centre has conducted comparative research in New Zealand, the United Kingdom, Ireland and Canada. In relation to discrimination against students, Australia is a clear outlier in allowing discrimination against students on the basis of their sexual orientation or gender identity.

New Zealand, the UK, Ireland and Canada do not have explicit exemptions which allow schools to discriminate against students on the basis of their sexual orientation or gender identity. There are other exemptions which allow discrimination on the basis of religion or sex, but these are significantly narrower than legislative exemptions under the SDA.

New Zealand

The *Human Rights Act 1993* (NZ) does provide the following exemptions:

- educational establishments maintained wholly or principally for students of one sex can refuse to admit students of a different sex; and
- educational establishments maintained wholly or principally for students of one religious belief can refuse to admit students of a different religious belief.

These are narrow exemptions related to admission of students. We note that the operation of these religious exemptions and the impact on education is very different in New Zealand, as the majority (approximately 85 per cent) of school students in New Zealand attend secular state schools.

United Kingdom

The *Equality Act 2010* (UK) does contain a specific religious schools exception which allow schools with a religious character or ethos to discriminate in the provision of education and access to a benefit, facility or service on the grounds of religion or belief.³⁰ However, the exception does not allow schools to discriminate on religious grounds in other respects, such as excluding a pupil or subjecting them to any other detriment. It also does not permit them to discriminate in relation to other protected characteristics, for example a school with a religious character would be acting unlawfully if it refused to admit a child because they or their parents were gay. The *Equality Act 2010* (UK) applies to all schools. The exception applies to the specific types of schools listed in the legislation. In England, this includes state-funded schools designated as having a religious character and independent schools registered as having a religious ethos. State-funded schools may only rely on the exception when the school is oversubscribed.³¹

²⁹ Ibid 92.

³⁰ *Equality Act 2010* (UK) Sch 11, Pt 2 [5] & [6].

³¹ *School Admissions Code 2014* (UK) [1.36].

In addition, single sex schools are permitted to discriminate against pupils because of their sex in relation to admission to the school.³² This is a narrow exception and is only relevant with respect to discrimination on the basis of sex.

Ireland

The *Equal Status Act 2000* (IRE) prohibits discrimination on a number of grounds, including gender and sexual orientation. Primary and secondary schools can refuse to admit students based on their religion, if they can prove that this is essential to keep the religious ethos of the school. This specific exception allows primary and secondary schools with an objective of providing education in an environment which promotes certain religious values to refuse to admit a student who is not of that religion. In addition, single sex schools may admit students of one gender only and refuse to admit as a student a person who is not of that gender without breaching anti-discrimination laws. These exemptions do not extend to allowing discrimination on the grounds of gender identity or sexual orientation.

Canada

Canadian laws differ by province. While there are some general exceptions which may be interpreted broadly to allow religious organisations (including schools) to discriminate in the provision of services (including education) according to the beliefs espoused by that organisation in some provinces,³³ other provinces do not allow for exemptions in education.³⁴

4.4 Best interests of the child as the primary consideration

International law requires respect for the liberty of parents and legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.³⁵ However, it is reasonable and necessary to limit this right to religious teaching to protect fundamental rights and freedoms of others. For example, where necessary to ensure the best interests of the child or the right of the child to an education appropriate to their needs.³⁶

Article 2 of the Convention on the Rights of the Child provides that governments must take all appropriate measures to ensure that children are 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.” In addition, article 3 requires that in all actions concerning children, “the best interests of the child shall be a primary consideration”.

All schools – whether religious or non-religious – have a duty of care to their students to provide an environment that is safe and welcoming, including LGBT students attending a school in accordance with their parents' wishes rather than through choice.

Recommendation 1: The Federal Government should remove outdated and discriminatory exemptions from the *Sex Discrimination Act 1984* (Cth) which allow faith-based educational institutions to lawfully discriminate against students in education.

³² *Equality Act 2010* (UK) Sch 11, Pt 1 [1] (so far as relates to sex discrimination).

³³ See e.g., *Human Rights Code 1990* (Ontario); *Human Rights Code 1996* (British Columbia).

³⁴ See e.g. *Alberta Human Rights Act 2000* (Alberta).

³⁵ UN HRC General Comment No 22, above n 13 [6].

³⁶ CRC arts 3, 28, 29.

5. Discrimination against teachers and staff

5.1 Federal exemptions for faith-based educational institutions in employment

The SDA allows educational institutions established for religious purposes to lawfully discriminate against current and prospective employees and contract workers on the basis of the person's sex, sexual orientation, gender identity, marital or relationship status or pregnancy in connection with a position that involves work of the educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, or if the discrimination is in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.³⁷

5.2 Experiences of LGBT teachers and staff in religious schools

Sally Beattie explained her experience of working at the Catholic Education Office knowing she could lose her job because of her sexual orientation to *The Age*:

The whole thing really ground me down, actually. It's hard to go to work and not be able to talk about your partner, or what you're doing on the weekends ... In the end I left, because I really didn't want to keep facing that every day.³⁸

In the same article, Rebecca Smith described her job at a Christian welfare organisation connected to her local church ending when her manager suspected she was in a same-sex relationship:

I was told that if I didn't resign I would be fired ... The fallout was devastating. I lost everything – my vocation, faith, community – and had to rebuild myself from a very broken place.³⁹

Thirty nine per cent of LGBT people surveyed hide their sexuality or gender identity at work.⁴⁰ Hiding an essential part of who you are prevents you from making full and active contributions in the workplace, affecting overall workplace culture, staff retention and satisfaction rates.

Experiencing discrimination also has a significant impact on the mental health of LGBTI people, who are disproportionately represented in statistics of mental health issues, self-harm and suicidal ideation.⁴¹ For example, more than 1 in 3 transgender adults and 1 in 5 intersex adults surveyed had attempted suicide.⁴² More than 1 in 2 bisexual women surveyed had been diagnosed or treated with a mental disorder in the last 3 years.⁴³

Unfortunately, many of the people who face potential discrimination from religious organisations already face high levels of unemployment, underemployment and discrimination.⁴⁴ For example, transgender and gender diverse people face particularly high rates of unemployment.⁴⁵

³⁷ *Sex Discrimination Act 1984* (Cth) s 38(1)&(2).

³⁸ Farrah Tomazin, 'Religious discrimination law: Paying the price of faith-based hiring', *The Age* (24 September 2016) <http://www.theage.com.au/victoria/religious-discrimination-laws-paying-the-price-of-faithbased-hiring-20160924-grnmyx.html>.

³⁹ *Ibid.*

⁴⁰ Above n 23, 45-46.

⁴¹ National LGBTI Health Alliance, *The Statistics at a Glance: The Mental Health of Lesbian, Gay, Bisexual, Transgender and Intersex People in Australia* (2016) <https://lgbtihealth.org.au/statistics/>.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ Above n 23, 45-46.

⁴⁵ School of Public Health, Curtin University, *The First Australian National Trans Mental Health Study* (2014).

5.3 Comparison of legislative exemptions in international jurisdictions

The survey of comparative jurisdictions is more nuanced when it comes to employment. While there are additional exemptions which allow differential treatment in employment, these exemptions are based on a person's ability to fulfil the requirements of particular role, rather than the person's sexual orientation or gender identity.

New Zealand

The *Human Rights Act 1993* (NZ) (**NZ HRA**) prohibits discrimination on the basis of any of the prohibited grounds, including sexual orientation and gender identity, in the context of employment.⁴⁶ There are religious exemptions which allow for discrimination on the grounds of ethical or religious belief or sex, but these are significantly narrower than religious exemptions under the SDA.

There are limited exemptions for:

- teachers in a private school on the grounds of religious or ethical belief, where the sole or principal duties of the position are (or are substantially the same as) those of a member of the clergy, official, or teacher among adherents of that belief, or 'otherwise involve propagation of that belief';⁴⁷
- religious instruction in state-integrated schools on the grounds of religious or ethical belief⁴⁸ for particular leadership and religious positions⁴⁹ where religious instruction forms part of the state integrated school's special character on the basis of employees' 'willingness and... ability to take part in religious instruction appropriate to that school [which] is a condition of appointment';⁵⁰
- genuine occupational qualifications on the grounds of sex, where being of a particular sex is a 'genuine occupational qualification' for the position or employment;⁵¹ and
- reasonable standards of privacy on the grounds of sex, where the position needs to be held by one sex to preserve 'reasonable standards of privacy', or where the nature and location of the employment make it impracticable for the employee to live elsewhere than in premises provided by the employer, and it is not reasonable for the employer to provide separate accommodation for the sexes.⁵²

These exemptions do not explicitly allow for discrimination on other grounds, such as sexual orientation or gender identity.

United Kingdom

The *Equality Act 2010* (UK) prohibits an employer from discriminating against a person:

- in the arrangements the employer makes for deciding to whom it will offer employment, the terms of such offer, or not offering employment; and

⁴⁶ *Human Rights Act 1993* (NZ) s 22.

⁴⁷ *Human Rights Act 1993* (NZ) s 28(2)(b).

⁴⁸ *Human Rights Act 1993* (NZ) s 28(2)(a) and *Education Act 1989* (NZ) s 464.

⁴⁹ Principal, director of religious studies, deputy or assistant principal or a primary school, or any other teaching positions provided for in the integration agreement as positions of importance carrying a responsibility for religious instruction.

⁵⁰ *Education Act 1989* (NZ) s 464.

⁵¹ *Human Rights Act 1993* (NZ) s 27(1).

⁵² *Human Rights Act 1993* (NZ) s 27(3).

- as to the terms of a person's employment, opportunities for promotion, transfer training or other benefits, dismissing a person or subjecting a person to any other detriment;⁵³

including on the basis of the person's sexual orientation or gender identity.

There is an exemption for schools with a religious character to reserve some or up to all of its teaching posts (depending on the type of school) for teachers selected for their fitness and competence to give religious education who are specifically appointed to do so.⁵⁴ However, in *O'Neill v Governors of St Thomas More RCVA Upper School*, it was held to be unlawful sex discrimination to dismiss a religious studies teacher at a Catholic school who had become pregnant by a priest. The argument that she had been dismissed only because she had breached religious precepts was rejected on the basis that her pregnancy was an important factor in the dismissal and this was therefore unlawful.

The *Equality Act 2010* (UK) provides that discrimination in employment is permitted where it involves the application of a requirement to have a particular protected characteristic, where, having regard to the nature and context of the work:

- it is an occupational requirement;
- the application of the requirement is a proportionate means of achieving a legitimate aim; and
- the person in question does not meet the requirement.⁵⁵

It is also permitted to require a person to be of a particular religion or belief, where the person discriminating also has an ethos based on that religion or belief.⁵⁶

The UK does, however, permit discrimination including in relation to sexual orientation or gender identity where the employment is 'for the purposes of an organised religion' and the requirement imposed on the applicant for the position is required so as to comply with the doctrines of the religion, or is applied so as to avoid conflicting with the 'strongly held religious convictions of a significant number of the religion's followers'.⁵⁷ However, this is not intended to enable discrimination by schools of a religious character. Moreover, if it did apply, it would be limited to positions for teachers whose positions 'exist to promote and represent religion' – such as religious education teachers – rather than those merely working in a school with a religious character.⁵⁸

Ireland

In Ireland, a religious school under the direction or control of a body established for religious purposes can give more favourable treatment to an employee or a prospective employee on the ground of religion, where it is reasonable to do so in order to maintain the religious ethos of the institution. Religious schools can also take action which is reasonably necessary to prevent an employee or a prospective employee from undermining the religious ethos of the institution.⁵⁹ Importantly, religious schools can only take adverse action against a current or prospective employee where the person is

⁵³ *Equality Act 2010* (UK) s 39.

⁵⁴ *School Standards and Framework Act 1998* (UK) s 58.

⁵⁵ *Equality Act 2010* (UK) Sch 9 [1].

⁵⁶ *Equality Act 2010* (UK) Sch 9 [3].

⁵⁷ *Equality Act 2010* (UK) Sch 9 [2].

⁵⁸ *Equality Act 2010* (UK) Sch 9 [2].

⁵⁹ *Employment Equality Act 1998* (IRE) s 37(1).

actively undermining the religious beliefs of the school and, not on the basis of their sexual orientation or gender identity.

Section 37 of the *Employment Equality Act 1998* (IRE) also provides that educational institutions partially or wholly funded by the Irish Government may only discriminate in limited situations where the action is:

- (a) rationally and strictly related to the institution's religious ethos;
- (b) a response to conduct of the employee or prospective employee undermining the religious ethos of the institution rather than a response to that employee's, or prospective employee's protected attributes; and
- (c) proportionate to the conduct of the employee or prospective employee, as the case may be, having regard to:
 - (i) any other action the employer may take in the circumstances;
 - (ii) the consequences of that action for that employee or prospective employee;
 - (iii) the employee's or prospective employee's right to privacy; and
 - (iv) the actual damage caused to the religious ethos of the institution by the conduct of that employee or prospective employee.

In Ireland, the Catholic Church runs more than 90 per cent of schools, and receives government funding to do so.

Canada

Canadian laws differ across provinces. There are some provinces which allow for exemptions for the equivalent of 'special measures' or affirmative action. For example, the *Human Rights Code 1990* (Ontario) provides that the right to equal treatment with respect to employment is not infringed where discrimination is on the basis of a reasonable and bona fide qualification:

a religious, philanthropic, educational, fraternal or social institution or organisation that is primarily engaged in serving the interests of persons identified by their race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital status or disability employs only, or gives preference in employment to, persons similarly identified if the qualification is a reasonable and bona fide qualification because of the nature of the employment...⁶⁰

At a national level, the leading case on a 'bona fide qualification' is the Supreme Court of Canada's *Meiorin* case.⁶¹ The Court held that the relevant standard will be deemed acceptable where:

- the employer adopted it for a purpose rationally connected to the performance of the job;
- it was adopted in an honest and good faith belief that it was necessary for the fulfilment of the legitimate purpose; and
- the standard was reasonably necessary to the accomplishment of the legitimate purpose.⁶²

⁶⁰ *Human Rights Code 1990* (Ontario) s 24(1).

⁶¹ *British Columbia (Public Service Employee Relations Commission) v British Columbia Government Service Employees' Union* [1999] 3 SCR 3.

⁶² *Ibid.*

5.4 Removing legislative exemptions for religious educational institutions in employment

Religious organisations in receipt of government funding are a source of hundreds of thousands of jobs across Australia across a range of industries.⁶³ Currently, the exemptions in discrimination law mean that LGBTI people, single parents, pregnant women and de facto couples have limited access to these employment opportunities and live with the threat of demotion or termination if details of their family or personal life become known to their employer.

LGBTI people face higher rates of discrimination and experience higher rates of poverty and unemployment.⁶⁴ Ensuring that all employers, including religious organisations, have the same obligations to recruit and treat staff fairly will work to alleviate this disadvantage and allow for equal opportunity in employment.

Specialised roles within religious organisations may be more closely linked to worship, observance, practice or teaching, where an exemption is arguably more justified. Existing religious exemptions allow for lawful discrimination in the appointment and training of ministers of religion in accordance with religious beliefs on the basis of family responsibilities, pregnancy, sex, breastfeeding, sexual orientation, gender identity, intersex status, marital or relationship status.⁶⁵ These narrower religious exemptions are less controversial (but not entirely uncontroversial⁶⁶) due to the closer and more direct nexus between the position of a religious minister and their central role in engaging in worship, practice, observance and teaching.

In our view, subsections 37(1)(a)(b) and (c) allow sufficient scope for religious schools and other religious organisations to select appropriate candidates for roles closely connected with religious worship, observance and teaching. Subsection 37(1)(d) is not necessary or appropriate.

Inherent requirements test

State and territory governments have previously introduced an “inherent requirements” test for religious exemptions in employment, and “inherent requirements” has been used in other contexts in employment and discrimination law.

We do not recommend that this model replace the existing religious exemptions in the SDA. Nevertheless, it is an improvement on the current broad religious exemption and is useful to examine the merits of such a proposal in this inquiry.

Such a test would limit permissible discrimination to the inherent requirements – or essential duties – of a particular role. The Australian Human Rights Commission has described these in the disability context as:

- the ability to perform tasks which are essential to perform a job productively and to the required quality;
- the ability to work effectively in a team or other organisation; and

⁶³ We use the terms teachers and staff to refer to both employees and contract workers under the SDA.

⁶⁴ Above n 125; Australian Human Rights Commission, *Face the Facts: Lesbian, Gay, Bisexual, Trans and Intersex People* (2014) https://www.humanrights.gov.au/sites/default/files/7_FTF_2014_LGBTI.pdf.

⁶⁵ See Appendix 2.

⁶⁶ In 1992, the Chief Justice of the Supreme Court uncharacteristically voiced his personal views on whether the Anglican Church could prevent a Bishop from lawfully ordaining a woman as a priest: *Laurence Alan Scandrett v Right Reverend Owen Dowling* (1992) NSWSC 1170.

- the ability to work safely.⁶⁷

One benefit of such an approach is transparency. Employers would be expected to clearly spell out the essential duties of the position being advertised and what type of work the employee is expected to do.

In the context of a faith-based organisation, the inherent requirements of a particular role may include the ability to carry out a religious service or provide appropriate pastoral care in keeping with religious doctrines, tenets and beliefs. In contrast, the inherent requirements of a role, such as a gardener or mathematics teacher, is less likely to include deep knowledge and understanding of religious doctrine. The level of compliance with religious values required of any role will depend on the nature of the organisation and require case by case analysis.

The inherent requirements test comes closer to balancing the competing rights at play than the current broad exemption in s 37(1)(d), by directing focus to the particular skills, values, or personal attributes required in a role. However, if such an exemption is being considered in the context of religious exemptions, it should be narrowed further.

Discrimination on the basis of religion

Currently, there are no federal anti-discrimination laws which protect against discrimination on the basis of religion or religious belief. However, the FWA does provide protections against adverse action in employment and other discrimination (e.g. discriminatory terms in modern awards) on the basis of religion. The HRLC has previously recommended that people of faith should be protected from discrimination on the basis of their religious beliefs (or non-religious beliefs).⁶⁸

Under the FWA, religious exemptions in employment should only permit discrimination on the basis of religious (or non-religious) belief for roles closely connected with religious worship, observance, practice or teaching:

- (a) if the reason for the discrimination is the inherent requirements of the particular position held by the employee or contract worker (**inherent requirements test**); **and**
- (b) because it discriminates, in relation to an employee or contract worker of a body established for religious purposes under the SDA (or an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed under the FWA):
 - (i) in good faith; and
 - (ii) to avoid injury to the religious susceptibilities of adherents of that religion under the SDA (or 'religion or creed' under the FWA) (**religious doctrine test**).⁶⁹

Currently, religious exemptions under the FWA allow for discrimination where either the inherent requirements test or the religious doctrine test applies.

Employment in accordance with religious ethos

Employers can already recruit and manage staff to maintain or preserve a particular culture or ethos within a workplace. This is because employers can require employees to comply with reasonable and

⁶⁷ Australian Human Rights Commission, *Inherent Requirements* (<https://www.humanrights.gov.au/quick-guide/12052>)

⁶⁸ Above n 1.

⁶⁹ See e.g. *Fair Work Act 2009* (Cth) s 351(2).

lawful directions and employment contracts and policies can require employees to abide by standards of behavior or conduct. Employees are generally not permitted to act in a manner that undermines their employer, whether this is a large corporate or a religious school or other organisation.

If the exemptions from the SDA which currently allow discrimination against teachers and staff in religious schools are removed, employers will not be able to refuse to hire a person, or terminate their contract, solely on the basis of their sexual orientation, gender identity, relationship or marital status or pregnancy. However, religious schools would be able to refuse to hire a teacher on the basis of their religion (e.g. a Jewish school could lawfully refuse to hire a Catholic teacher to teach religious education) and would be able to terminate an employee's contract of employment for failing to comply with reasonable and lawful directions (e.g. a direction that teachers teach content in class consistent with school policies) unless the exemption under the FWA applies.

Recommendation 2: The Federal Government should remove outdated and discriminatory exemptions from the *Sex Discrimination Act 1984* (Cth) which allow faith-based educational institutions to lawfully discriminate against teachers and staff.

6. Broad religious exemptions

6.1 Comparison of federal, state and territory religious exemptions

Currently, all federal, state and territory anti-discrimination laws contain permanent religious exemptions⁷⁰ that allow otherwise unlawful discrimination for religious bodies.⁷¹

We have briefly summarised the differences between the scope and tests of federal, state and territory religious exemptions from discrimination laws in Appendix 2 below. Importantly, these religious exemptions apply at the same time as specific exemptions in relation to religious schools (unless otherwise stated) and apply for a much broader range of protected attributes.

6.2 Consideration of broad religious exemptions by courts and tribunals

There is limited case law providing guidance on the application of religious exemptions in practice.⁷² There is further complexity as most of the cases considered the definition of religious body under different state statutes, with variations in drafting.

In *Pamas Foundation*, the Federal Court held that: “there is no principle of law that every body established for religious purposes is a religious institution.”⁷³

In *Walsh v St Vincent de Paul Society (No 2)*, the Queensland Anti-Discrimination Tribunal found that St Vincent de Paul was not a religious body under Queensland law for the purposes of requiring a long-serving volunteer local branch President to be Catholic.⁷⁴ The volunteer identified as Christian

⁷⁰ Exemptions are also called ‘exceptions’ - the terminology varies across statutes.

⁷¹ See Appendix 2.

⁷² See e.g. *Laurence Alan Scandrett v Right Reverend Owen Dowling* 1992) NSWCA 1170. See also *Christ Circle Oriona Community Inc v Deputy Commissioner of Taxation* (1995) 95 ATC 2040; *Young Men’s Christian Association of Melbourne v Federal Commissioner of Taxation* (1926) 37 CLR 351.

⁷³ *Pamas Foundation (Inc) v Deputy Commissioner of Taxation* (1992) 106 ALR 229.

⁷⁴ *Walsh v St Vincent de Paul Society (No 2)* [2008] QADT 32.

and had volunteered for 7 years without incident before being told that a leadership position could only be held by a Catholic. The Tribunal reviewed the constitution documents and found that St Vincent de Paul was a society of lay faithful closely associated with the Catholic Church, but not a religious body for the purposes of the exemption available for "the selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice".⁷⁵ The Tribunal held that the functions of the local branch presidents performed some functions where religious observances and practices were said to be relevant (e.g. leading prayers), but the majority of the duties did not properly involve "religious observance or practice".⁷⁶

The definition of religious body under federal anti-discrimination law differs from the definition for religious bodies in s 109 of the *Anti-Discrimination Act 1991* (Qld) in relation to the selection or appointment of people to perform functions in relation to religious observance or practice. The Queensland test would not apply to any challenge to St Vincent de Paul under federal anti-discrimination law. In contrast, in the case of the *OW & OV v Members of the Board of the Wesley Mission Council*, the NSW Administrative Decisions Tribunal held that Wesley Mission was a body established for religious purposes and could lawfully refuse to allow a same-sex couple to foster children.⁷⁷ The Tribunal referred to but did not reach a finding on "whether it was appropriate in 2003 for Wesley Mission to accept public funds for providing a service which it provided in a discriminatory fashion contrary to the terms of its contractual obligations to the relevant State instrumentality".⁷⁸

In determining whether a body is established for religious purposes under Victorian law, the Victorian Court of Appeal found in favour of a group of young same-sex attracted people in their dispute with Christian Youth Camps (**CYC**).⁷⁹ The Court found that CYC's purposes were not "directly and immediately religious" as they offered facilities and services as a secular accommodation business to the public without any indication of association with the Christian Brethren Church.⁸⁰ President Maxwell relevantly stated that:

In all relevant respects, CYC's activities are indistinguishable from those of the other participants in that market. In those circumstances, the fact that CYC was a religious body could not justify its being exempt from the prohibitions on discrimination to which all other such accommodation providers are subject. That step — of moving from the field of religious activity to the field of secular activity — has the consequence, in my opinion, that in relation to decisions made in the course of the secular undertaking, questions of doctrinal conformity and offence to religious sensitivities simply do not arise.⁸¹

The Court examined CYC's website, brochures and other materials and took into account the absence of reference to the Christian Brethren religion or any overtly religious purposes of the resort.⁸² The role that the "invisibility" of the religious origins of CYC and its similarity to other secular camp providers played in Court's reasoning highlights the underlying unfairness to consumers if religious motives are

⁷⁵ *Anti-Discrimination Act 1991* (Qld) s 109.

⁷⁶ *Walsh v St Vincent de Paul Society (No 2)* [2008] QADT 32.

⁷⁷ *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293 (10 December 2010) [30]. The use of "body established for religious purposes" in NSW mirrors the wording in the SDA.

⁷⁸ *Ibid* [35].

⁷⁹ *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75 (16 April 2014).

⁸⁰ *Ibid*.

⁸¹ *Ibid* [269].

⁸² *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75 (16 April 2014) [211].

not transparent. Religious businesses should not be able to selectively invoke religious beliefs in defence of discrimination claims when the business is not conducted in accordance with those beliefs in practice.

Where a religious body or organisation provides facilities, goods and services in the public sphere as part of a commercial enterprise, the justification for a broad religious exemption materially lessens.⁸³ Courts have largely been unwilling to find an interference with the right to religion or belief in the secular, commercial marketplace or for people of faith employed to perform a civil function on behalf of the state.⁸⁴

In determining whether a purpose was religious, Dixon J relevantly stated in *Roman Catholic Archbishop of Melbourne v Lawlor* that:

[I]t is not enough that an activity or pursuit itself secular is actuated or inspired by a religious motive or injunction: the purpose must involve the spread or strengthening of spiritual teaching within a wide sense, the maintenance of the doctrines upon which it rests, the observances that promote and manifest it ... But, whether defined widely or narrowly, the purposes must be directly and immediately religious. It is not enough that they arise out of or have a connection with a faith, a church, or a denomination, or that they are considered to have a tendency beneficial to religion, or to a particular form of religion.⁸⁵

In summary, there has been very little judicial consideration of the scope of religious exemptions, particularly 'religious susceptibilities'. Different state and territory tests make comparisons between jurisdictions particularly problematic. However, the consideration of the Court of Appeal of the Victorian Supreme Court in the *Cobaw* case provides the most helpful guidance to date and underlines the importance of religious organisations operating transparently and consistently in accordance with religious beliefs if their conduct is to be exempt from the operation of discrimination laws.

6.2 Impact of blanket religious exemptions on freedom from discrimination

Permanent exemptions to anti-discrimination laws across a range of areas of public life have a substantial impact on marginalised and disadvantaged groups, such as LGBTI people.⁸⁶ The lack of knowledge and transparency surrounding the operation of religious exemptions means that many Australians do not know whether they will face discrimination and can be unaware of the risk of discrimination when seeking out services, going to school or applying for a job. The existence of such

⁸³ *Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors* [2014] VSCA 75 (16 April 2014) [269].

⁸⁴ *R (SB) v Governors of Denbigh High School* [2006] UKHL 15; *Islington London Borough Council v Ladele (Liberty Intervening)* [2009] EWCA Civ 1357; *Eweida and Ors v The United Kingdom* (2013) 57 EHRR 8 [102]–[106]; *Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors* [2014] VSCA 75 (16 April 2014); *Ontario Human Rights Commission v Brockie* [2002] 222 DLR (4th) [51]; *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880 (29 April 2010) [22].

⁸⁵ *Roman Catholic Archbishop of Melbourne v Lawlor* (1934) 51 CLR 1.

⁸⁶ See e.g., Australian Research Centre in Sex, Health and Society, La Trobe University, *Private Lives 2, the second national survey of the health and wellbeing of GLBT Australians* (2012) 46 <https://www.glhv.org.au/report/private-lives-2-report>; OII Australia (2016) *Intersex: Stories and Statistics from Australia*, <https://oii.org.au/30313/intersex-stories-statistics-australia/> Australian Research Centre in Sex, Health and Society, La Trobe University, *Writing Themselves in 3: The third national study on the sexual health and wellbeing of same sex attracted and gender questioning young people* (2010) 39 <http://www.latrobe.edu.au/arcschs/downloads/arcschs-research-publications/WTi3.pdf>.

exemptions operate as a barrier to those who fear discrimination accessing services from faith-based service providers.

6.3 Comparison of legislative exemptions in international jurisdictions

International jurisdictions such as the United Kingdom, Ireland, Canada and New Zealand have some forms of express exemption in federal anti-discrimination legislation for religious organisations and, in some instances, individuals, but generally speaking these are not as extensive as the exemptions in Australia. In general, these exemptions are limited to particular aspects of public life or example, such as employment, education, the provision of facilities, goods and services, or training of religious ministers.

New Zealand

For example, under the *Human Rights Act 1993* (NZ), religious organisations can discriminate on the basis of sex “where the position is for the purposes of an organised religion and is limited to one sex so as to comply with the doctrines or rules or established customs of the religion.”⁸⁷ Same sex accommodation providers, including religious institutions, also have an exemption to discriminate in the provision of accommodation on the basis of sex, marital status, religious or ethical belief, disability or age.⁸⁸

United Kingdom

In the UK, the *Equality Act 2010* (UK) protects individuals from discrimination in the workplace and wider society. In addition to the express employment exemptions described above,⁸⁹ limited religious exemptions also exist in the provision of goods and services, disposal of property, and membership and guests of associations on the grounds of religion or belief or sexual orientation.⁹⁰

All religious bodies are required to show that their services are restricted because of the organisation’s purpose or to avoid causing offence to their religious followers on the grounds of their religion or belief. Religious bodies are also permitted to specify that service users are of a particular sexual orientation where necessary to comply with the religious organisation’s doctrine, religious or belief or to avoid conflict with the strongly held convictions of a significant number of a religion or belief’s followers. However, religious organisations carrying out a public function (i.e. receiving government funding to provide a public service) do not have a religious exemption to discriminate.⁹¹ Public authorities are also required to have due regard to the need to eliminate unlawful discrimination, harassment and victimisation, and advance equal opportunity across a range of other functions, such as procuring goods, works and services from other organisations.⁹²

Ireland

⁸⁷ *Human Rights Act 1993* (NZ) s 28(1).

⁸⁸ *Human Rights Act 1993* (NZ) s 55.

⁸⁹ *Equality Act 2010* (UK) Schedule 9.

⁹⁰ *Equality Act 2010* (UK) Schedule 23.

⁹¹ Government Equalities Office (UK), *Equality Act 2010: What Do I Need to Know? A Quick Start Guide on Religion or Belief Discrimination in Service Provision for Voluntary and Community Organisations* (2010) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/85027/vcs-religion-belief.pdf.

⁹² Equality and Human Rights Commission (UK), *Buying Better Outcomes: Mainstreaming Equality Considerations in Procurement: A Guide for Public Authorities in England* (March 2013) https://www.equalityhumanrights.com/sites/default/files/buying_better_outcomes_final.pdf.

In Ireland, broad religious exemptions also exist from discrimination laws in limited situations.⁹³ Following the successful marriage equality referendum in 2015, the Irish Parliament narrowed the exemption for religious organisations.⁹⁴ Previously, religious run schools and hospitals could take action against an employee or prospective employee “in order to uphold their ethos”, which could be applied broadly. Employment exemptions have now been significantly narrowed for publicly funded organisations.

Canada

Canada also has three relevant federal anti-discrimination laws: the *Canadian Charter of Rights and Freedoms* (Canadian Charter), *Human Rights Act 1977* (CAN) and the *Employment Equity Act 1995* (CAN). None of these Canadian laws contain express religious exemptions. The Charter includes a general balancing clause, whereby the right to non-discrimination prevails over any inconsistent state or federal statute, except in so far as they impose “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. Where religious freedoms conflict with other rights, Canadian courts have considered whether the claimant has a “practice or belief having a nexus with religion” calling for “a particular line of conduct”.⁹⁵ The belief must be sincerely held, the interference complained of should not be ‘trivial or insubstantial’, and religious freedom can be overruled where it could cause harm to others based on ‘overriding societal concerns’.⁹⁶

7. Proposals for amendments to current legislation

7.1 Religious Freedom Review recommendations

In October 2018, sections of the Religious Freedom Review report were published by The Sydney Morning Herald.⁹⁷ The published recommendations indicate that the report recommends that schools should retain the ability to discriminate against LGBT students. The Religious Freedom Review report recommended that religious schools who seek to discriminate against LGBT staff must set out their position in a publicly available policy which is provided to current and prospective employees. However, the report recommended that religious schools who seek to discriminate against LGBT students must set out their position in a publicly available policy which is provided to current and prospective students and their parents.

The full report is not available, but the wording of the recommendations and public comments made by the Religious Freedom Review’s Chair former Attorney-General Phillip Ruddock indicate that this

⁹³ *Equal Status Acts 2000–2012* (IRE); *Employment Equality Acts 1998–2011* (IRE).

⁹⁴ Nick Duffy, ‘Ireland passes bill removing religious exemptions from LGBT equality law’, *Pink News* (3 December 2015) www.pinknews.co.uk/2015/12/03/ireland-passes-bill-removing-religious-exemptions-from-lgbt-equality-law/.

⁹⁵ *Syndicat Northcrest v Amselem* [2004] 2 SCR 551, 583; Anthony Gray, ‘The Reconciliation of Freedom of Religion with Anti-Discrimination Rights’ (2016) *Monash University Law Review* 42(1) 88.

⁹⁶ *Ibid.*

⁹⁷ The Sydney Morning Herald, ‘Read the full 20 recommendations from the religious freedom review’ (12 October 2018) <https://www.smh.com.au/politics/federal/read-the-full-20-recommendations-from-the-religious-freedom-review-20181011-p50918.html>.

recommendation was intended to increase transparency to ensure that students and parents were aware of any policies which would seek to discriminate against LGBT students.

The lack of transparency surrounding the operation of religious exemptions means that those interacting with religious organisations and schools may be unaware of the potential for discrimination. The HRLC has previously advocated that if the exemptions are to be maintained, this information must be communicated to potential employees, customers, students and others on the receiving end of discriminatory conduct (e.g. publicly available information on websites, service points and phone lines).⁹⁸ Religious organisations could also lodge a notice with the AHRC specifying their policy or practice which relies on an exemption.

The HRLC supports the recommendations to remove legislative exemptions which currently allow discrimination against intersex people in education or employment under state and territory anti-discrimination laws.⁹⁹ However, the HRLC does not support the recommendations to continue to allow faith-based educational institutions to lawfully discriminate against students in education, or against current or prospective contract workers or employees in employment.¹⁰⁰ Accordingly, we do not support the recommendations from the Religious Freedom Review report.

7.2 Sex Discrimination Amendment (Protecting students) Bill 2018 (Cth)

We support the repeal of subsection 38(3). However, we do not support, and strongly counsel against, the proposed new subsection 7B(2)(d), which we understand is as follows

if the condition, requirement or practice is imposed, or proposed to be imposed, in relation to a student by an educational institution that is a primary school or a secondary school and that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed: (i) whether the condition, requirement or practice is imposed, or proposed to be imposed, in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed; and (ii) whether, in imposing, or proposing to impose, the condition, requirement or practice, the educational institution has regard to the best interests of the student.

We oppose the amendment for a number of reasons:

- removing the existing exception in s 38(3) without also amending s 37(1)(d) will still allow discrimination against LGBT students, teachers and staff to continue under the broad religious exemption;
- the existing exemption in s 38(3) is limited to discrimination on the ground of a person's sexual orientation, gender identity, marital or relationship status or pregnancy, but the proposed amendment would introduce a religious consideration in respect of all attributes (i.e. sex, intersex status and potential pregnancy);
- the addition of further factors to the test of reasonableness adds unnecessary complexity to defining indirect discrimination and will distort the existing test for reasonableness, and will fail to adequately protect LGBT students, teachers and staff from discrimination; and

⁹⁸ Above n 1.

⁹⁹ Above n 94, recommendations 6 and 8.

¹⁰⁰ Above n 94, recommendations 5 and 7.

- the current test for reasonableness in the SDA is inclusive, and requires consideration of objective criteria, whereas the proposed amendment inserts two subjective criteria, distorting and undermining the objective inquiry required by the definition and the emphasis it places on proportionality.

The current law allows for schools to impose reasonable conditions on students to promote the school's values, through the existing definition of indirect discrimination in the Act. Under the law as it stands, a religious school is able to impose a reasonable condition, requirement or practice that has, or is likely to have, the effect of disadvantaging LGBT students.

The HRLC opposes the amendments contained in the proposed Government amendments, as published by the media on 25 October 2018.

7.3 Discrimination Free Schools Bill 2018 (Cth)

On 17 October 2018, Senator Richard di Natale, Leader of the Australians Greens, tabled the Discrimination Free Schools Bill 2018 (Cth) (**Greens Bill**) in the Senate to remove exemptions for religious schools to discriminate against staff members on the basis of their sex, sexual orientation, gender identity, relationship status or pregnancy under the SDA. The Bill also contains amendments to remove discrimination by religious educational institutions under the FWA on the basis of sexual orientation (the Fair Work Act does not currently prohibit employment related discrimination based on gender identity or sex characteristics).

We support the proposed amendments to the SDA in the Greens Bill in principle. However, we consider that further consideration may be required around whether there are any unintended consequences in removing the relevant provisions to the FWA, and the need to amend the FWA to prohibit discrimination on the basis of gender identity or sex characteristics.

8. Recommended amendments

8.1 Amendments to remove legislative exemptions in education and employment under the SDA

The HRLC considers that Australia's current permanent religious exemptions are unacceptably broad and fail to adequately protect the right to freedom from discrimination. The exemptions perpetuate a false and unjustified hierarchy of rights, entrench systemic discrimination and generally restrain society's pursuit of equality.

We support limited exemptions for religious bodies to organise and conduct affairs closely connected to religious worship, observance, practice and teaching, but not blanket religious exemptions across a range of areas of public life regardless of the impact on real people's lives. The purpose of article 18 of the ICCPR is not to allow 'religious freedom' to stand in as a justification for discriminatory behaviour by extending any act or practice of a religious person to be exempt purely because it is based on a religious belief.

In consultations undertaken by the AHRC in 2015, LGBTI organisations generally argued that publicly funded services should not enjoy religious exemptions under anti-discrimination laws in employment

or treatment of clients.¹⁰¹ They argued that prioritising physical and mental health, safety and welfare of all people – particularly children and vulnerable people – is paramount in balancing competing rights.¹⁰²

In contrast, religious organisations have argued that employers of religious organisations need the freedom to choose employees consistent with the values of their faith.¹⁰³ They also argued that legally compelling them to accommodate LGBTI clients can undermine the operation of a distinct religious community and educating others about same-sex relationships and diverse gender identity can be inconsistent with faith-based practices.¹⁰⁴

In cases of conflict, neither right should automatically prevail. Competing interests should be considered and balanced on a case-by-case basis. Rather than allowing a nuanced balancing of rights, these permanent exceptions are arbitrary, inflexible, broad, and unreasonable. This regime is incompatible with Australia's obligations under international human rights law, including the ICCPR, ICESCR and the Siracusa Principles.

Recommendation 3:

The Federal Government should:

- remove section 38 of the *Sex Discrimination Act 1984* (Cth) (SDA); and
- insert an exception to the broad religious exemption in subsection 37(1)(d) the *Sex Discrimination Act 1984* (Cth) prohibiting discrimination in relation to education and employment in education, similar to subsection 109(2) of the *Anti-Discrimination Act 1991* (Qld).

9. Broader recommendations for reform

9.1 Replacing permanent religious exemptions with a general limitations clause

The large number of permanent statutory exemptions in federal anti-discrimination laws are inconsistent, confusing and undermine the intended purpose of anti-discrimination legislation to eliminate discrimination and promote equality.

Instead, the HRLC recommends that a general defence of justification in discrimination law in place of these permanent statutory exemptions, including religious exemptions. Such a defence must properly enshrine the principles of necessity, reasonableness, and proportionality.¹⁰⁵

¹⁰¹ Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity & Intersex Rights: National Consultation Report* (2015) Table A https://www.humanrights.gov.au/sites/default/files/document/publication/SOGII%20Rights%20Report%202015_Web_Version.pdf.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ See e.g., Human Rights Law Centre, "A simpler, fairer law for all: Submission on the *Human Rights and Anti-Discrimination Bill 2012* (December 2012) 45 <http://www.equalitylaw.org.au/elrp/submissions/>.

A general limitations clause is a simple and nuanced solution to a range of permanent, and inflexible exemptions which require ongoing legislative amendment over time as social attitudes change. The limitations provision should be supplemented with guidelines and codes of practice produced by the AHRC.

Currently, organisations can apply to the AHRC for a temporary 5 year exemption from discrimination laws where necessary. We recommend that temporary exemptions remain available, but the limitations provision proposed above should also be adopted for temporary exemptions.

Recommendation 4: In the alternative, a general limitations clause could replace permanent religious exemptions and allow for the limitation of rights where there is a legitimate aim, and where reasonable, necessary and proportionate.

9.2 Government funded religious organisations should not be exempt

Faith-based educational institutions receive significant government funding to provide educational services to members of the Australian community. Approximately 1 in 3 students in Australia attend a religious school. In October 2018, the Equality Campaign has received online submissions from hundreds of LGBT people the discrimination they experienced in schools.

Despite being controlled by a private body, the majority of so-called “private” or “non-state” schools nonetheless receive substantial government funding to provide education services to members of the public, and should be required to uphold federal anti-discrimination laws without exception. We note that a number of religious organisations have stated that they do not want to use these ‘exemptions’ and are committed to providing inclusive and non-discriminatory services to all clients.¹⁰⁶

Recommendation 5: If religious exemptions are not removed, religious organisations receiving government funds to deliver services (including education) to the public should not be permitted to rely on religious exemptions from anti-discrimination laws.

9.3 Transparency in reliance on religious exemptions by private religious organisations

Religious exemptions which allow discrimination against students, teachers or staff are clearly out of step with modern community standards, as evident by the public backlash to published recommendations to the Religious Freedom Review in October 2018.¹⁰⁷ However, if religious exemptions are not removed, the recommendations from the Religious Freedom Review to increase transparency through requiring religious organisations (including schools) seeking to rely on exemptions to make these policies publicly available, will provide greater certainty than is currently available under existing religious exemptions.

¹⁰⁶ See e.g. Human Rights Law Centre, *Religious family violence services pledge not to discriminate* (30 August 2018) <https://www.hrlc.org.au/news/2018/8/30/religious-family-violence-services-pledge-not-to-discriminate>.

¹⁰⁷ David Crowe, ‘Fairfax-Ipsos poll: Huge majority of Australians oppose laws banning gay students and teachers’, *The Sydney Morning Herald* (14 October 2018) <https://www.smh.com.au/politics/federal/fairfax-ipsos-poll-huge-majority-of-australians-oppose-laws-banning-gay-students-and-teachers-20181014-p509kv.html>.

Recommendation 6: If religious exemptions are not removed, religious organisations seeking to rely on the exemptions should be required to make this clear in job advertisements and publicly available policies.

9.4 Protections from discrimination on the basis of personal association

The SDA does not contain protections on the basis of personal association with another person on the basis of their attributes. In contrast, s 6(q) of the *Equal Opportunity Act 2010* (Vic) contains as a separate protected attribute: “personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the above attributes.” Accordingly, the SDA does not protect children from being discriminated against because of the sexual orientation or gender identity of their family members, such as their parents being in a same-sex marriage, or their sibling being transgender.

Recommendation 7: The *Sex Discrimination Act 1984* (Cth) should be amended to prohibit discrimination on the basis of “personal association” with someone who has a protected attribute.

9.3 Amendments to exemptions from discrimination in employment under the *Fair Work Act 2009* (Cth)

There are provisions under the FWA which would also require amendment to avoid inconsistency in federal protections against discrimination, and to ensure that similar exemptions do not remain under employment law.

For example, prohibitions against discrimination under s 351(1) of the FWA prohibit adverse action on the basis of a person’s protected attributes. Currently, s 351(2) allow discrimination provided that it is not unlawful under anti-discrimination protections, taken because of the inherent requirements of the position, or based on religious exemptions. We recommend that the inherent requirements requirement and the religious exemption be considered as a single test, not as alternatives.

Religious exemptions in employment should only permit discrimination on the basis of religious (or non-religious) belief for roles closely connected with religious worship, observance, practice or teaching should satisfy both the inherent requirements test and the religious doctrine test (discussed above).

Recommendation 8: The Federal Government should repeal s 153(2)(b), 195(2)(b), 351(2)(c) and 772(2)(b) of the *Fair Work Act 2009* (Cth) in relation to all protected attributes except religion.

In relation to discrimination based on religion, the Federal Government should replace the word “or” after s 351(2)(b) of the *Fair Work Act 2009* (Cth) and other similar provisions containing religious exemptions with “and”.

9.4 Protections from discrimination on the basis of gender identity and sex characteristics under the *Fair Work Act 2009* (Cth)

The FWA does not contain protections on the basis of gender identity and sex characteristics in employment. In contrast, the SDA does provide protections against discrimination on the basis of gender identity and intersex status. This inconsistency between the primary legislation which prohibits discrimination in Australia creates uncertainty and fundamental gaps in access to justice. In general, the FWA is intended to provide a prompt dispute resolution process for employment disputes, in a no-costs jurisdiction where individuals can be self-represented and enforce their rights. The Australian Government has committed to enshrining protections against discrimination under domestic law, which requires amendments to the FWA to reflect modern community expectations that no LGBTI people should face discrimination in employment.

Recommendation 9: The Federal Government should introduce “gender identity or expression” and “sex characteristics” as additional protected attributes under relevant provisions of the *Fair Work Act 2009* (Cth).

9.5 Consolidation and modernisation of anti-discrimination laws

Federal anti-discrimination laws currently provide inconsistent and piecemeal protections and rely on a fault-based system of individual complaints rather than incorporating measures to promote substantive equality and tackle systemic discrimination. In 2013, following a number of inquiries and consultations, the former Commonwealth Government proposed a *Human Rights and Anti-Discrimination Bill 2013* (Cth) (**HRAD Bill**). The HRAD Bill would have consolidated and modernised the five separate Commonwealth anti-discrimination laws to ensure justice is not denied because of complex technicalities of our current laws.

Australia should continue the process of modernising and consolidating federal anti-discrimination laws to bring them federal anti-discrimination law in line with our international human rights obligations.

Recommendation 10: Australia should consolidate and modernise its anti-discrimination laws and add the additional ground of ‘religious belief’ (including non-religious beliefs).

9.6 A Charter of Human Rights for Australia

A fundamental principle of human rights law is that human rights are indivisible, as they relate to the inherent dignity of every human right. All human rights have equal status, and cannot be positioned in a hierarchical order. As human rights are interrelated and interdependent, denying one right invariably impedes the enjoyment of other right. It is important that human rights are not protected in isolation, or that one right is automatically privileged over other rights.

Australia is the only Western liberal democratic nation without comprehensive statutory or constitutional protection of human rights. Australia has agreed to be bound by the major international human rights treaties, but individuals cannot enforce these protections directly under Australian law.

In 2009-2010, the National Human Rights Consultation found that the adoption of a Charter of Human Rights was supported by over 87% of a record 35,000 public submissions and was a key

recommendation of the National Human Rights Consultation Committee.¹⁰⁸ The Australian Government decided not to introduce a Charter of Human Rights on the basis that ‘the enhancement of human rights should be done in a way that, as far as possible, unites rather than divides us’.

Piecemeal protections for human rights provide insufficient safeguards against human rights abuses in Australia (e.g. federal anti-discrimination laws, common law protections for procedural fairness in criminal justice, state and territory charters). These gaps in legal protection leave Australians - and in particular vulnerable groups - vulnerable to having their human rights violated.

Protecting human rights in law under a Charter of Human Rights will help maintain the health of our democracy and ensure that when governments or corporations overstep and infringe our human rights, any human being can enforce their fundamental human rights and freedoms.

Recommendation 11: The Federal Government should enact a Charter of Human Rights that provides equal protections for human rights under international human rights law.

¹⁰⁸ National Human Rights Consultation Committee, *National Human Rights Consultation: Report* (2009).

Appendix 1: Summary comparison of exemptions for religious schools under federal, state and territory anti-discrimination laws

Jurisdiction	Legislation	Definition of religious school / body	Can religious schools discriminate in employment decisions on the basis of sexual orientation or gender identity (e.g. recruitment, termination)?	Can religious schools discriminate on the basis of sexual orientation or gender identity against students in education (e.g. admission, suspension, expulsion)?
Commonwealth	<i>Sex Discrimination Act 1984 (Cth)</i> s 38, 37(1)(d).	Educational institutions established for religious purposes	<p>Specific religious schools exemption</p> <p>Yes, provided the discrimination is “in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed” and “in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed” (s 38(1) & (2)).</p> <p>and broad religious exemption (See Appendix 2 below).</p> <p>Yes, for any act or practice that conforms to doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion (s 37(1)(d)). See Appendix 2 below for scope of exemption.</p>	<p>Specific religious schools exemption</p> <p>Yes, provided it is “in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed” and “in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.”</p> <p>This includes:</p> <ul style="list-style-type: none"> • Refusing admission • The terms or conditions on which it is prepared to admit a student • Denying or limiting the student access to any benefit • Expelling the student, or • Subjecting the student to any other detriment (s 38(3)). <p>and broad religious exemption (See Appendix 2 below).</p>
Australian Capital Territory	<i>Discrimination Act 1991 (ACT)</i> s 33, 46, 23(d). <i>Note: see also s 32(d).</i>	33 Educational institutions conducted for religious purposes 46 Religious educational institutions	<p>Specific religious schools exemption</p> <p>Yes, provided “the institution is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed” and “in good faith to avoid injury to the religious susceptibilities of adherents of that religion or creed.”</p> <p>and broad religious exemption (See Appendix 2 below).</p>	<p>Specific religious schools exemption</p> <p>Yes, provided it is “in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed” and “in good faith to avoid injury to the religious susceptibilities of adherents of that religion or creed.”</p> <p>and broad religious exemption (See Appendix 2 below).</p>
New South Wales	<i>Anti-Discrimination Act 1977 (NSW)</i> s 49ZO, 49ZH, 49ZJ, 38C, 38K, 38E	Private educational authority <i>Note: These apply only on homosexual and</i>	<p>Specific private schools exemption</p> <p>Yes, in employment by a “private educational authority”.</p> <p>This includes:</p> <ul style="list-style-type: none"> • Decisions about hiring / recruitment • Terms on which employment is offered 	<p>Specific private schools exemption</p> <p>Yes, in relation to discrimination in respect of a “private educational authority”.</p> <p>This includes:</p> <ul style="list-style-type: none"> • Refusing or failing to accept the person's application for admission as a student, or

	<i>Note: see also s 56(d).</i>	<i>transgender grounds, rather than sexual orientation or gender identity.</i>	<ul style="list-style-type: none"> Denying the employee's access to opportunities for promotion, transfer or training, or any other benefits associated with employment Dismissing the employee, or Subjecting the employee to any other detriment. and broad religious exemption (See Appendix 2 below).	<ul style="list-style-type: none"> The terms on which it is prepared to admit the person as a student. and broad religious exemption (See Appendix 2 below).
Northern Territory	<i>Anti-Discrimination Act 1996 (NT) s 37A, 51(d)</i>	Religious educational institutions	Specific religious schools exemption in employment Yes, on the basis of sexuality where the discrimination is by "[a]n educational authority that operates or proposes to operate an educational institution in accordance with the doctrine of a particular religion" and "in good faith to avoid offending the religious sensitivities of people of the particular religion." Note: These only apply in relation to sexuality as the NT Act does not protect against discrimination on the basis of gender identity. and broad religious exemption (See Appendix 2 below).	No specific religious schools exemption, but broad religious exemption likely covers religious schools Maybe for same-sex attracted students, but only in a limited way. The exemption is only allowed for "an act by a body established for religious purposes if the act is done as part of any religious observance or practice ". For example, this may apply to not allowing a student to participate in a religious practice (e.g. denying access to a church service) but is unlikely to apply to admission, although we are not aware of this having been tested in court. Yes – against trans and gender diverse students (who are not protected from discrimination in education in the NT).
Queensland	<i>Anti-Discrimination Act 1991 (Qld) s 41, 25</i> <i>Note: These areas are specifically excluded by the broad religious exemption in s 109 (2).</i>	In employment: Educational institution under the direction or control of a body established for religious purposes In education: Body established for religious purposes	Specific religious schools exemption in employment – with an inherent requirements test Yes, but only where the discrimination is "in a way that is not unreasonable" if "the person openly acts in a way that the person knows or ought reasonably to know is contrary to the employer's religious beliefs" either during a selection process, in the course of the person's work, or in doing something connected with the person's work, and "it is a genuine occupational requirement of the employer that the person, in the course of, or in connection with, the person's work, act in a way consistent with the employer's religious beliefs". Note: There are also restrictions on the school seeking information on the person's personal lives (i.e. a "don't ask, don't tell" type approach).	Specific religious schools exemption for students only for sex or religion, and broad religious exemption does not cover education No, there is a specific religious schools exemption but it only applies for sex or religion (not sexual orientation or gender identity). There is a broad religious exemption for religious bodies, but there is a further exception which states that this does not apply in the education area".
South Australia	<i>Equal Opportunity Act 1984 (SA) s, 34, 50</i>	In employment: Educational institution In education:	Specific religious schools exemption in employment – with disclosure of policy requirements Yes, provided that: <ul style="list-style-type: none"> the educational institution is "administered in accordance with the precepts of a particular religion 	No specific religious schools exemption, but broad religious exemption likely covers religious schools Probably, for "any other practice of a body established for religious purposes that conforms with the precepts of that

		Body established for religious purposes	<p>and the discrimination is founded on the precepts of that religion”</p> <ul style="list-style-type: none"> • the educational authority administering the institution has a “written policy stating its position in relation to the matter” • a copy of the policy is given to a person who interviews for or is offered employment with the authority or a teacher who is to be offered engagement as a contractor by the authority, and • a copy of the policy is provided on request, free of charge, to current and prospective, employees, contractors, students, parents and guardians of students, and other members of the public. <p>and broad exemptions in employment – with a genuine occupational requirement test</p> <p>The SA Act also allows employers to discriminate against LGBT people in employment where “it is a genuine occupational requirement that a person be a person of a particular sex, sexual orientation, gender identity or intersex status.”</p> <p>and specific gender identity exemption in employment – with a reasonable standards of appearance and dress test</p> <p>The SA Act also allows employees to discriminate based on gender identity “if the discrimination is for the purposes of enforcing standards of appearance and dress reasonably required for the employment or engagement”.</p>	religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.”
Tasmania	<i>Anti-Discrimination Act 1998</i> (Tas) s 51, 51A	Employment based on religion s 51 Admission of person as student based on religion s 51A <i>Note: See also s 52.</i>	<p>Specific religious schools exemptions from employment only on the ground of religious belief, affiliation or activity (not sexual orientation or gender identity) – with a genuine occupational qualification or requirement test</p> <p>No, it is unlawful to discriminate on the grounds of sexual orientation or gender identity in employment, including in religious schools.</p> <p>However, it is lawful for a person to discriminate on the ground of religious belief, affiliation or activity in employment in “an educational institution that is or is to be conducted in accordance with the tenets, beliefs, teachings, principles or practices of a particular religion if the discrimination is in order to enable, or better enable, the educational institution to be conducted in</p>	<p>Specific religious schools exemption only on the ground of religious belief, affiliation or activity</p> <p>No, it is unlawful to discriminate against students on any grounds, including sexual orientation or gender identity. However, it is lawful for a person to discriminate another person on the ground of religious belief, affiliation or activity in relation to admission only (i.e. not in relation to disciplinary measures, suspension or expulsion) to “an educational institution that is or is to be conducted in accordance with the tenets, beliefs, teachings, principles or practices of a particular religion”, unless that person is already enrolled as a student. This also applies to discrimination in admission “if the educational institution's</p>

			accordance with those tenets, beliefs, teachings, principles or practices.”	policy for the admission of students demonstrates that the criteria for admission relates to the religious belief or affiliation, or religious activity, of the other person, the other person’s parents or the other person’s grandparents.”
			The broad religious exemption only applies on the ground of religious belief, affiliation or activity (See Appendix 2 below).	
Victoria	<i>Equal Opportunity Act 2010</i> (Vic) s 83	Religious schools <i>Note: See also s 82(2) & 84.</i>	Broad religious schools exemption which covers employment and schools Probably, for “anything done” on the basis of a person’s sexual orientation or gender identity by a person or body “in the course of establishing, directing, controlling or administering the educational institution”, provided it either “conforms with the doctrines, beliefs or principles of the religion” or “is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.” Decisions about admission, suspension and expulsion are likely part of ‘administering’ an educational institution. and broad religious exemption (See Appendix 2 below).	
Western Australia	<i>Equal Opportunity Act 1984</i> (WA) s 73	Educational institutions established for religious purposes <i>Note: See also 72(d).</i>	Specific religious schools exemption Yes, by “an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed” and “in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed”. and broad religious exemption (See Appendix 2 below).	Specific religious schools exemption Maybe. Discrimination is allowed “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”, provided that the discrimination 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.” For example, if the religious school discriminates against members of the LGBT community as “a particular class or group of persons” then this may not be allowed. We are not aware of this having been tested in court. and broad religious exemption (See Appendix 2 below).

Appendix 2: Summary comparison of the scope and tests of broad religious exemptions under federal, state and territory anti-discrimination laws

Jurisdiction	Legislation	Individual or organisation	Protected attributes covered by exemption	Test for exemption
Commonwealth	<i>Sex Discrimination Act 1984 (Cth)</i> s 37(1)(d)	Body established for religious purposes	Family responsibilities, pregnancy or potential pregnancy, sex, breastfeeding, <u>sexual orientation</u> , <u>gender identity</u> , <u>intersex status</u> , marital or relationship status	An act or practice that conforms to doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion
Australian Capital Territory	<i>Discrimination Act 1991 (ACT)</i> s 32(d)	Body established for religious purposes	Accommodation status, age, breastfeeding, disability, employment status, <u>gender identity</u> , genetic information, immigration status, industrial activity, <u>intersex status</u> , irrelevant criminal record, family or carer responsibilities, physical features, political conviction, pregnancy, profession / trade / occupation / calling, race, relationship status, religious conviction, sex, <u>sexuality</u> , subjection to domestic or family violence, association with a person with one of these attributes	Any other act or practice that conforms to the doctrines, tenets or beliefs of that religion <u>and</u> is necessary to avoid injury to the religious susceptibilities of adherents of that religion
New South Wales	<i>Anti-Discrimination Act 1977 (NSW)</i> s 56(d)	Body established to propagate religion	Race, sexual harassment, sex, <u>transgender grounds</u> , marital or domestic status, disability, carer responsibilities, <u>homosexuality</u> , age, HIV/AIDS vilification	Any other act or practice that conforms to doctrines or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion
Northern Territory	<i>Anti-Discrimination Act 1996 (NT)</i> s 51(d)	Body established for religious purposes	Race, sex, <u>sexuality</u> , age, marital status, pregnancy, parenthood, breastfeeding, impairment, trade union or employer association activity, religious belief or activity, political opinion / affiliation / activity, irrelevant medial record, irrelevant criminal record, association with a person believed to have one of these attributes. <i>Note: "Gender identity" is not a protected attribute under the NT Act.</i>	If the act is done as part of any religious observance or practice There are also specific exemptions for religious schools at s 30(2), 37A, 40(2A) & 40(3)
Queensland	<i>Anti-Discrimination Act 1991 (Qld)</i> s 109(d)	Body established for religious purposes	Sex, relationship status, pregnancy, parental status, breastfeeding, age, race, impairment, religious belief or religious activity, political belief or activity, trade union activity, lawful sexual activity, <u>gender identity</u> , <u>sexuality</u> , family responsibilities, association with a person with one of these attributes	Act in accordance with the doctrine of the religion concerned <u>and</u> is necessary to avoid offending religious sensitivities of people of the religion
South Australia	<i>Equal Opportunity Act 1984 (SA)</i> s 34, 50	Body established for religious purposes	Sex, <u>sexual orientation</u> , <u>gender identity</u> , <u>intersex status</u>	Any other practice that conforms with the precepts of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion

Tasmania	<i>Anti-Discrimination Act 1998</i> (Tas) s 52	Person or organisation	Religious belief or affiliation or religious activity	Any other act that is carried out in accordance with the doctrine of a particular religion <u>and</u> is necessary to avoid offending the religious sensitivities of any person of that religion
Victoria	<i>Equal Opportunity Act 2010</i> (Vic) s 82(2)	Body established for a religious purpose ¹⁰⁹	Religious belief or activity, sex, <u>sexual orientation</u> , lawful sexual activity, marital status, parental status, <u>gender identity</u>	Anything done that conforms to doctrines, beliefs or principles or is necessary to avoid injury to the religious sensitivities of adherents of the religion
	<i>Equal Opportunity Act 2010</i> (Vic) s 84	Person		If the discrimination is reasonably necessary for the first person to comply with the doctrines, beliefs or principles of their religion
Western Australia	<i>Equal Opportunity Act 1984</i> (WA) s 72(d)	Body established for religious purposes	Sex, marital status, pregnancy, breastfeeding, <u>gender history</u> , family responsibility or family status, <u>sexual orientation</u> , race, religious or political conviction, impairment, age	Act or practice that conforms to doctrines, tenets or beliefs or is necessary to avoid injury to the religious susceptibilities of adherents of that religion

¹⁰⁹ The definition of religious body includes a body established for a religious purpose or an entity that establishes, or directs, controls or administers, an educational or other charitable entity that is intended to be, and is, conducted in accordance with religious doctrines, beliefs or principles.