The Senate

Legal and Constitutional Affairs
References Committee

Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff

November 2018
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Recommendations

Recommendation 1

2.126 The committee recommends that the government reject recommendations 5 and 7 of the Religious Freedom Review, which permit faith-based educational institutions to single out certain groups for discrimination on the basis of sexual orientation, gender identity or relationship status, in particular circumstances.

Recommendation 2

2.127 The committee recommends that the government immediately release to the public the full report and findings of the Religious Freedom Review.

Recommendation 3

2.131 The committee recommends the Australian Government amend section 37 and remove subsection 38(3) of the Sex Discrimination Act 1984, and amend any other relevant legislative provisions, to prohibit discrimination against students on the grounds of the protected attributes in the Act.

Recommendation 4

2.137 The committee recommends that further consideration be given to amending the Sex Discrimination Act 1984, and any other relevant legislation, to prohibit discrimination by faith-based educational institutions against teachers and staff on the grounds of the protected attributes in the Act. In so doing, consideration should be given to the relevant provisions of the Anti-Discrimination Act 1998 (TAS) discussed in this report.

Recommendation 5

2.140 The committee recommends that consideration be given to inserting in law a positive affirmation and protection of religious freedom in Australia that is appropriately balanced with other rights.
Chapter 1

Introduction

1.1 On 13 November 2018, the Senate referred the following matter to the Legal and Constitutional Affairs References Committee for inquiry and report by 26 November 2018:

Legislative exemptions that 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, with particular reference to proposals for amendments to current legislation, and any related matters.1

Conduct of this inquiry

1.2 Details of this inquiry were advertised on the committee's website, including a call for submissions. The committee wrote directly to a range of organisations inviting them to make submissions. The committee received 180 submissions, of which 13 were received in camera. The submissions are listed at Appendix 1 of this report.

1.3 The committee held a public hearing in Melbourne on 19 November 2018. A list of witnesses who appeared at the hearing is available at Appendix 2.

1.4 The committee thanks all those who made submissions or gave evidence at its public hearing.

Structure of this report

1.5 There are two chapters in this report:

• This chapter provides background and outlines the administrative details of the inquiry.

• Chapter 2 presents the key issues raised in evidence and the committee's view.

Background

Religious Freedom Review

1.6 The recent public debate on the matters being considered in this inquiry has been prompted, in the most immediate sense, by the disclosure of certain recommendations in a review on religious freedom commissioned by the government. This part of the chapter briefly summarises that review and the recommendations in question.

1.7 On 22 November 2017, the then Prime Minister, the Hon Malcolm Turnbull MP, announced the appointment of an Expert Panel (the Panel) to examine whether Australian law adequately protects the human right to freedom of religion. The Panel, which was supported by a secretariat in the Department of the Prime Minister and Cabinet, was comprised of:

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1 Journals of the Senate [Proof], No. 127, 13 November 2018, p. 4077.
1.8 The work conducted by the Panel is known as the Religious Freedom Review (the Review) or the Ruddock Review. The Terms of Reference for the Review were announced on 14 December 2017. The objective, scope and timing of the review were set out as follows:

**Objective**

The Panel shall examine and report on whether Australian law (Commonwealth, State and Territory) adequately protects the human right to freedom of religion.

**Scope**

In undertaking this Review, the Panel should:

- Consider the intersections between the enjoyment of the freedom of religion and other human rights.
- Have regard to any previous or ongoing reviews or inquiries that it considers relevant.
- Consult as widely as it considers necessary.

...  

**Timing**

Following the Prime Minister’s agreement to an extension of its reporting date, the Panel will report its findings to the Prime Minister by 18 May 2018.  

1.9 The Panel received over 15,500 submissions, some of which have been published on the website of the Department of the Prime Minister and Cabinet. The Panel delivered its report to the Prime Minister on 18 May 2018, and released a statement that day summarising its process:

This Report is the culmination of a nationwide consultation process, including a public submission process and face-to-face meetings in every State and Territory.

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The Report reflects the input that the Panel received throughout the life of this process, research undertaken and the individual expertise of the Panel members.\(^5\)

1.10 The Attorney-General's Department was provided with a copy of the report on 21 May 2018.\(^6\) The Panel's report has not been published by the government. Indeed, on 10 October 2018, the Prime Minister, the Hon Scott Morrison MP, said that the report had not yet been considered by Cabinet.\(^7\)

1.11 However, what were reported to be leaked sections of the report appeared in the media on 9 October 2018.\(^8\) On 12 October 2018, *Fairfax Media* published what it claimed was a copy of all 20 recommendations of the Review.\(^9\)

1.12 The Panel's recommendations, as published by *Fairfax Media*, include the following recommendations of particular relevance to the committee's current inquiry:

**Recommendation 5**

The Commonwealth should amend the Sex Discrimination Act 1984 to provide that religious schools can discriminate in relation to the employment of staff, and the engagement of contractors, on the basis of sexual orientation, gender identity or relationship status provided that:

- The discrimination is founded in the precepts of the religion.
- The school has a publicly available policy outlining its position in relation to the matter and explaining how the policy will be enforced.
- The school provides a copy of the policy in writing to employees and contractors and prospective employees and contractors.

**Recommendation 6**

Jurisdictions should abolish any exceptions to anti-discrimination laws that provide for discrimination by religious schools in employment on the basis of race, disability, pregnancy or intersex status. Further, jurisdictions should

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6. Mr Andrew Walter, First Assistant Secretary, Integrity and Security Division, Attorney-General's Department, *Committee Hansard*, Senate Legal and Constitutional Affairs Legislation Committee, 23 October 2018, p. 104.


ensure that any exceptions for religious schools do not permit discrimination against an existing employee solely on the basis that the employee has entered into a marriage.

**Recommendation 7**

The Commonwealth should amend the **Sex Discrimination Act 1984** to provide that religious schools may discriminate in relation to students on the basis of sexual orientation, gender identity or relationship status provided that:

- The discrimination is founded in the precepts of the religion.
- The school has a publicly available policy outlining its position in relation to the matter.
- The school provides a copy of the policy in writing to prospective students and their parents at the time of enrolment and to existing students and their parents at any time the policy is updated.
- The school has regard to the best interests of the child as the primary consideration in its conduct.

**Recommendation 8**

Jurisdictions should abolish any exceptions to anti-discrimination laws that provide for discrimination by religious schools with respect to students on the basis of race, disability, pregnancy or intersex status.¹⁰

**Proposed amendments to the Sex Discrimination Act 1984**

1.13 The leak of the recommendations of the Ruddock Review prompted significant public debate regarding the rights of LGBTIQ+ (lesbian, gay, bisexual, transgender/gender diverse, intersex and queer) students and teachers. Much of the debate focussed on existing exemptions in the **Sex Discrimination Act 1984** (SDA) that allow faith-based educational institutions to discriminate against students, teachers and staff on the basis of various attributes including sexual orientation and gender identity.

1.14 Some evidence to the committee indicated that, in large measure, the Australian public was broadly unaware that these exemptions existed until sections of the Review were leaked.¹¹

1.15 Subsequent to reports about the Review's recommendations, both the government and Opposition expressed support for changing the law to ensure that students cannot be discriminated against on the basis of their sexuality.

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¹¹ See, for example, Mr Peter Black, Queensland Director, Equality Campaign, *Committee Hansard*, 19 November 2018, p. 3; Mr Jonathon Hunyor, Chief Executive Officer, Public Interest Advocacy Centre, *Committee Hansard*, 19 November 2018, p. 53.
On 12 October, the Opposition Leader, the Hon Bill Shorten MP, indicated that the Opposition would be supportive of repealing those discrimination law exemptions that allow religious educational institutions ‘to turn away and expel gay students’.  

On 13 October, the Prime Minister, the Hon Scott Morrison MP, released a statement in which he advised that the government would:

…be taking action to ensure amendments are introduced as soon as practicable to make it clear that no student of a non-state school should be expelled on the basis of their sexuality. I believe this view is shared across the Parliament and we should use the next fortnight to ensure this matter is addressed.

The Prime Minister also stated that he had directed the Attorney-General to prepare amendments and consult with the Opposition to achieve this end.

The proposed legislation was not introduced into Parliament before the end of the sitting fortnight ending 25 October, nor during the Senate-only sitting week ending 15 November. However, the government reportedly presented draft legislation to the Opposition for consideration on 24 October.

The Attorney-General, the Hon Christian Porter MP, indicated at the end of the most recent sitting fortnight (not including the Senate-only sitting) that negotiations with the Opposition had been conducted in good faith. Mr Porter stated that one of the issues arising from removing the clause about LGBTIQ+ students was the potential to remove the ability of faith-based educational institutions to put in place their own rules, such as requiring students to attend chapel or undertake religion lessons. Mr Porter further indicated that he hoped an agreed bill could be introduced in the final sitting fortnight of the year, starting on 26 November.

Legislative changes proposed by the Australian Greens

Separate to the consultations between the government and the Opposition on this matter, on 17 October Senator Richard Di Natale introduced the Discrimination Free Schools Bill 2018 into the Senate, which would remove the exemption for faith-based educational institutions to discriminate against students and teachers. Specifically, the bill seeks to amend:

- the SDA to remove the exemption for religious educational institutions to discriminate against students and teachers on the basis of gender, sexual
orientation, gender identification, marital or relationship status or pregnancy; and

- the Fair Work Act 2009 (FWA) to ensure that religious exemptions from anti-discrimination provisions do not extend to educational institutions.¹⁶

**Responses to proposed legislative changes**

1.22 On 25 October 2018, the heads of 34 Sydney Anglican schools wrote to the Minister for Education, the Hon Dan Tehan MP, requesting that the exemptions in the SDA that allow ‘schools to maintain their ethos and values with regard to core issues of faith’ be maintained.¹⁷

1.23 One gay teacher at a Christian school discussed the personal effect of this letter:

> My Principal has made the same judgement call on behalf of our staff inferring that LGBTIQ teachers are not welcome and is fighting for the right to continue to discriminate against me and others like me within religious schools.

> So here I am in an impossible situation. I am in a position of leadership within a school I love, but where I know I am not welcome. Where many people, if they knew my true self, would want to see me exiled. Do I stay silent and continue to pretend I am someone else? Or do I challenge the school’s stance and ask questions, leaving myself open for suspicion?

> I know you’re wondering why I don’t just leave and teach at a school where I am welcome. At the end of the day I am still a Christian and I want to be here. My Christianity is a choice, my sexuality is not.¹⁸

1.24 It has been reported that up to three of these schools have since apologised to their staff and students for signing the letter.¹⁹ For example, the Head of Barker College, Mr Phillip Heath, reportedly stated in correspondence to a former student:

> The advice I received was that it would help support the parliamentary debate into religious freedom. It is now clear the letter has generated unintended hurt and division.²⁰

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¹⁸ Name Withheld, Submission 128, p. 1.


The current legal framework

1.25 Commonwealth anti-discrimination law, including the SDA, makes it unlawful to discriminate against a person on the basis of a person’s personal attributes, including their sexual orientation, gender identity and intersex status, in areas of public life. However, there are a number of exceptions for religious institutions, including educational institutions established for religious purposes. This exception is also reflected in state and territory anti-discrimination legislation.

1.26 Although each state varies with respect to how it can treat these students, only Tasmania prohibits religious schools from discriminating against prospective or current lesbian, gay, bisexual and transgender (LGBT) teachers. That state also prohibits religious schools from discriminating against students on the grounds of sexual orientation, gender identity and intersex status—a religious school may, however, make use of the exception in the anti-discrimination legislation if it can argue that its discrimination was based on the grounds of religious belief. Importantly, in the Tasmanian regime 'it is the religious belief, affiliation or religious activity of the person against whom the discrimination is directed' that is relevant, rather than the religious belief of the discriminator.21

1.27 The prohibition on religious schools discriminating against LGBT students also applies in Queensland. In contrast, in New South Wales, 'private educational authorities' may discriminate against students and teachers on the grounds of homosexuality.

1.28 The remainder of this chapter examines the legal framework in the Commonwealth, state and territory jurisdictions and the power of religious educational institutions to discriminate against LGBT students and teachers.

Commonwealth laws

Australian Constitution

1.29 Freedom of religion is protected in the Australian Constitution. However, the Constitution does not create a personal or individual right to religious freedom.

1.30 Section 116 of the Australian Constitution provides for the protection of freedom of religion, as follows:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.22

1.31 As Professor George Williams AO identified in his submission to the Australian Government's Religious Freedoms Inquiry, the Constitution 'offers no

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21 Ms Robin Banks, Committee Hansard, 19 November 2018, p. 59.
22 Australian Constitution, s. 116.
direct protection in respect of religion or belief at the State level. This means that States may pass laws that restrict religious freedom or belief.\footnote{23}

1.32 Chapter 2 provides further discussion about constitutional power, namely, the Parliament's power to legislate over non-government schools with respect to the SDA.

**Commonwealth legislation**

1.33 There are two federal legislative instruments that are relevant to this inquiry: the SDA and the FWA.

1.34 Although this legislation sets out the framework within which faith-based educational institutions may discriminate against students in schools as well as against teachers of contractors in the workplace, state and territory laws are also applicable: the SDA and corresponding state and territory laws generally overlap with respect to discrimination on the basis of sexual orientation, gender identity and intersex status.

1.35 However, as each jurisdiction operates in slightly different ways, some gaps exist in the protection against discrimination between states, territories and the Commonwealth. The protections offered under state and territory anti-discrimination laws are set out further below.

**The Sex Discrimination Act 1984**

1.36 The SDA is one of a number of federal anti-discrimination laws that provide protections against discrimination. As with the other federal anti-discrimination laws, the SDA 'gives effect to Australia's international human rights obligations and protects individuals from discrimination and unfair treatment', and 'affirms that every individual is equal before and under the law, and has the right to the equal protection and benefit of the law, without discrimination'.\footnote{24} The international obligations relevant to this inquiry will be discussed in chapter 2.

1.37 When the SDA was first introduced, the Hon Senator Susan Ryan outlined in the Second Reading Speech for the bill that its purpose was to:

> ...give effect to certain provisions of the U.N. Convention on the Elimination of All Forms of Discrimination Against Women which the Government plans to ratify in the near future; to eliminate discrimination on the ground of sex, marital status or pregnancy in the areas of employment, education, accommodation, the provision of goods, facilities and service, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs, and discrimination involving sexual harassment in the workplace and in educational institutions; and to promote recognition and acceptance within the community of the principle of the equality of men and women.\footnote{25}

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\footnote{24} Attorney-General's Department, *Submission 67*, p. 1.

1.38 In 2013 the Parliament legislated to expand the grounds on which discrimination is unlawful to include new protections against discrimination on the basis of a person’s sexual orientation, gender identity and intersex status. These amendments to the SDA by the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* also extended the existing ground of ‘marital status’ to ‘marital or relationship status’ in order to provide protection from discrimination for same-sex de facto couples, and made consequential amendments to the SDA and the *Migration Act 1958*.

1.39 These changes were advanced by the then Labor Government on the following basis:

There is substantial evidence demonstrating that discrimination against lesbian, gay, bisexual, transgender and intersex (LGBTI) people occurs in the community. This discrimination occurs in a range of areas of public life, including work, accommodation and the provision of goods and services. This range of conduct is highly detrimental to LGBTI people, manifesting in barriers to how they carry out their day-to-day lives.

The purpose of the Bill is to foster a more inclusive society by prohibiting unlawful discrimination against LGBTI people and promoting attitudinal change in Australia.\(^\text{26}\)

1.40 These changes to the SDA for the purpose of protecting LGBTI people also inherited the existing exemptions that have applied to other groups in the SDA since it was first passed in 1984.

1.41 The *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* also inserted a qualification on the religious exemptions for the provision of Commonwealth-funded aged care services, such that 'aged care services run by religious organisations will no longer be exempt from the prohibition of discrimination'.\(^\text{27}\) The Supplementary Explanatory Memorandum set out the details of the removal of this exemption:

The Amendments will only apply in the context of service provision. That is, an aged-care provider can still make employment decisions which conform to the doctrines or tenets of the religion or are necessary to avoid injury to religious sensitivities of adherents of that religion.\(^\text{28}\)

1.42 In its current form, the SDA:

…makes it unlawful to discriminate against a person on the basis of their sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or

\(^{26}\) Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013, Explanatory Memorandum, p. 4.

\(^{27}\) Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013, Supplementary Explanatory Memorandum, p. 4.

\(^{28}\) Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013, Supplementary Explanatory Memorandum, p. 4.
family responsibilities in certain areas of public life including work and education.\textsuperscript{29}

1.43 The SDA sets out that discrimination may occur where:

...a person is treated less favourably on the basis of one of the protected attributes in comparison with how a person that does not possess that attribute would be treated in the same or similar circumstances. Discrimination may be direct in nature, for example where an employer refuses a promotion to an employee after the employee discloses that they identify as bisexual. Discrimination may also be indirect in nature, such as in circumstances where a rule or policy that applies consistently to everyone has an unfair effect on persons that possess a particular attribute.\textsuperscript{30}

1.44 Discrimination for a 'protected attribute' includes discrimination on the grounds of sexual orientation,\textsuperscript{31} gender identity\textsuperscript{32} and intersex status.\textsuperscript{33}

1.45 Where a condition, requirement or practice is imposed on a person who has one of these protected attributes, it will not reach the threshold of indirect discrimination 'if the condition, requirement or practice is reasonable in the circumstances', which will be determined by reference to factors including:

(a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; and

(b) the feasibility of overcoming or mitigating the disadvantage; and

(c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice.\textsuperscript{34}

1.46 The SDA provides that it is unlawful for an educational authority to discriminate against a person on the ground of the person’s sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding in respect of:

- the application or admission of a student to school;\textsuperscript{35} or

- by denying the student access, or limiting the student’s access, to any benefit provided by the educational authority; expelling the student; or subjecting a student to another form of detriment.\textsuperscript{36}

\textsuperscript{29} Attorney-General's Department, \textit{Submission 67}, p. 1.

\textsuperscript{30} Attorney-General's Department, \textit{Submission 67}, p. 2.

\textsuperscript{31} \textit{Sex Discrimination Act 1984}, s. 5A.

\textsuperscript{32} \textit{Sex Discrimination Act 1984}, s. 5B.

\textsuperscript{33} \textit{Sex Discrimination Act 1984}, s. 5C.

\textsuperscript{34} \textit{Sex Discrimination Act 1984}, para. 7(b).

\textsuperscript{35} \textit{Sex Discrimination Act 1984}, ss. 21(1).

\textsuperscript{36} \textit{Sex Discrimination Act 1984}, ss. 21(2).
1.47 The SDA defines 'educational authority' as 'a body or person administering an educational institution', which extends the application of the SDA beyond schools to include, for example, universities.

1.48 The SDA also provides that it is unlawful for an employer to discriminate against a person on the ground of the person’s sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities in respect of the offer of employment, or during the course of employment.

1.49 Despite these protections that exist in the SDA for students and teachers, section 38(3) of the SDA exempts educational institutions established for religious purposes from these prohibitions on unlawful discrimination, providing that such treatment is not unlawful if it is:

…conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

1.50 The SDA defines 'educational institution' as 'a school, college, university or other institution at which education or training is provided'. This, too, extends the application of the SDA beyond schools to include universities.

1.51 Further, although making no direct reference to educational institutions, section 37 of the SDA provides a complete exemption from divisions 1 and 2 of the SDA—which address discrimination in work (division 1) and discrimination in other areas (division 2, including with respect to education)—in relation to all protected attributes covered by the SDA and in connection with all areas of public for conduct by religious bodies, including:

…any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

1.52 In its submission, the Attorney-General's Department discussed the implications of removing the exemptions operating in section 38 of the SDA, including the effect this would have on the meaning of direct and indirect

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37 *Sex Discrimination Act 1984*, ss. 4(1).

38 *Sex Discrimination Act 1984*, ss. 14(1).

39 *Sex Discrimination Act 1984*, ss. 14(2). This also applies to contract workers – see s. 16.

40 *Sex Discrimination Act 1984*, ss. 38(1) and 38(3). This also applies to contract workers – see ss. 38(2).

41 *Sex Discrimination Act 1984*, ss. 4(1).

42 *Sex Discrimination Act 1984*, para. 37(1)(d).
discrimination, and implications for the statutory construction of section 37 of the SDA.43 Specifically, the Attorney-General's Department stated that:

While the interaction between sections 37 and 38 is not entirely clear, it is arguable that a body established for religious purposes under paragraph 37(1)(d) of the SDA does not include a religious educational institution due to the inclusion of a specific exemption for religious educational institutions in section 38 of the SDA. Should section 38 of the SDA be removed, consideration would need to be given to the application and operation of the exemption in paragraph 37(1)(d) of the SDA to ensure there are no unintended consequences in relation to the interpretation of its scope in the absence of a specific exemption for religious educational institutions.44

1.53 In its submission, the Law Council of Australia recommended that 'section 37 should be amended to clarify that paragraph 37(1)(d) does not apply to the treatment of students by religious schools'.45

The Fair Work Act

1.54 The FWA sets out limited protection from discrimination in the area of employment on the grounds of religion. The FWA provides that a term of modern award does not discriminate against an employee:

...merely because it discriminates, in relation to employment of the employee as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed:

(i) in good faith; and

(ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.46

1.55 Similar exceptions apply throughout the FWA in respect of discriminatory terms in enterprise agreements,47 adverse action where discrimination is also unlawful under the state or territory law of the place where the action is taken,48 and termination of employment.49

1.56 In its submission to the inquiry, the Public Interest Advocacy Centre (PIAC) recommended amending these sections 'to ensure that religious educational institutions are only allowed to discriminate on the basis of religious belief in

43 Attorney-General's Department, Submission 67, p. 9.
44 Attorney-General's Department, Submission 67, p. 8.
45 Law Council of Australia, Submission 88, p. 18.
49 Fair Work Act 2009, para. 772(2).
employment, and not on the basis of other protected attributes like sexual orientation and gender identity'.

1.57 Further, PIAC noted that 'trans, gender diverse and intersex people are currently not protected against adverse treatment, or unfair dismissal' in the FWA and also recommended that the FWA 'be amended to add the protected attributes of gender identity and sex characteristics to ss 153, 195, 351, 772 and 578'.

1.58 In practice, these exemptions do not apply to action that is not unlawful under federal anti-discrimination law, such that 'there is that direct relationship between the Fair Work Act and antidiscrimination laws'.

States and Territories

1.59 As discussed above, anti-discrimination laws vary across each state and territory, protecting people from discrimination on various grounds and to differing degrees, including students and teachers from discrimination by religious educational institutions. This section sets out the anti-discrimination laws that apply in each state and territory.

Australian Capital Territory

1.60 The Discrimination Act 1991 (ACT) prohibits discrimination on the ground of any of the following attributes: accommodation status; age; association (whether as a relative or otherwise) with a person who is identified by reference to another protected attribute; breastfeeding; disability; employment status; gender identity; genetic information; immigration status; industrial activity; intersex status; irrelevant criminal record; parent, family, carer or kinship responsibilities; physical features; political conviction; pregnancy; profession, trade, occupation or calling; race; record of a person’s sex having been altered under the Births, Deaths and Marriages Registration Act 1997 (ACT) or a law of another jurisdiction that corresponds, or substantially, corresponds, to the Act; relationship status; religious conviction; sex; sexuality; and subjection to domestic or family violence.

1.61 The Act also prohibits sexual harassment and vilification on the basis of race, sexuality, gender identity or HIV/AIDS status.

1.62 Of relevance to this inquiry, the Discrimination Act 1991 (ACT) prohibits discrimination against an applicant for employment and an employee, specifically providing that this includes instances where 'an employer discriminates against an applicant or an employee because the employer reasonably believes that the applicant or employee has a record in relation to a technology that has been altered under the Births, Deaths and Marriages Registration Act 1997 (ACT) or a law of another jurisdiction that corresponds, or substantially, corresponds, to the Act'.

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50 Public Interest Advocacy Centre, Submission 108, p. 5.

51 Public Interest Advocacy Centre, Submission 108, p. 9. Section 578 of the Fair Work Act 2009 prescribes matters that the Fair Work Commission must take into account when performing its functions.

52 Lee Carnie, Senior Lawyer, Human Rights Law Centre, Committee Hansard, 19 November 2018, p. 60.

53 Defined at section 8.

54 Discrimination Act 1991 (ACT), s. 7.
employee if the employer denies the employee access to a benefit associated with employment because the employee is in a same-sex relationship’.\textsuperscript{55}

1.63 This exemption does not apply if the employment is in an educational institution which:

\ldots is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, and the first person so discriminates in good faith to avoid injury to the religious susceptibilities of adherents of that religion or creed.\textsuperscript{56}

1.64 This Act also prohibits discrimination against prospective and existing students.\textsuperscript{57} However, this exemption does not apply in respect of an educational institution which:

\ldots is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, and the first person so discriminates in good faith to avoid injury to the religious susceptibilities of adherents of that religion or creed.\textsuperscript{58}

1.65 In addition to this protection against discrimination in the Discrimination Act 1991 (ACT), the Human Rights Act 2004 (ACT) has recognised freedom from discrimination as a fundamental right.\textsuperscript{59} The Act also protects religious freedom.\textsuperscript{60}

1.66 The Human Rights Act expressly sets out core human rights, but does not exclude, limit or downgrade any rights or freedoms not included in the Act. The Act expressly states that the rights recognised therein are not exhaustive of an individual’s human rights.\textsuperscript{61}

1.67 Reasonable limitations may be placed on a human right where this limitation 'can be demonstrably justified in a free and democratic society’.\textsuperscript{62}

**New South Wales**

1.68 The Anti-Discrimination Act 1977 (NSW) prohibits discrimination on the basis of race, including colour, nationality, descent and ethnic, ethno-religious or national origin; sex, including pregnancy and breastfeeding; marital or domestic status; disability; homosexuality; age; transgender status; and carer responsibilities.

1.69 The Act also prohibits sexual harassment and vilification on the basis of race, homosexuality, transgender status or HIV/AIDS status.

\textsuperscript{55} Discrimination Act 1991 (ACT), ss. 10(3).

\textsuperscript{56} Discrimination Act 1991 (ACT), ss. 33(1).

\textsuperscript{57} Discrimination Act 1991 (ACT), s. 18.

\textsuperscript{58} Discrimination Act 1991 (ACT), ss. 33(2).

\textsuperscript{59} Human Rights Act 2004 (ACT), ss. 8(2).

\textsuperscript{60} Human Rights Act 2004 (ACT), s. 14.

\textsuperscript{61} Human Rights Act 2004 (ACT), s. 7.

\textsuperscript{62} Human Rights Act 2004 (ACT), s. 28.
1.70 In relation to this inquiry, the *Anti-Discrimination Act 1977* (NSW) prohibits discrimination against work applicants or employees on the grounds of homosexuality.63 The discrimination against a prospective or current student on the grounds of homosexuality is also prohibited under the Act.64

1.71 These provisions do not apply to private educational authorities.65 However, homosexual vilification is unlawful and not subject to this exemption.66

**Northern Territory**

1.72 The *Anti-Discrimination Act 1996* (NT) prohibits discrimination on the grounds of race; sex; sexuality; age; marital status; pregnancy; parenthood; breastfeeding; impairment; trade union or employer association activity; religious belief or activity; political opinion, affiliation or activity; irrelevant medical record; irrelevant criminal record; the person's details being published under section 66M of the *Fines and Penalties (Recovery) Act* (NT); and association with a person who has, or is believed to have, one of the above attributes.67

1.73 The Act also prohibits sexual harassment.

1.74 In respect of this inquiry, an exemption applies to the ground of discrimination on the basis of sexuality in respect of prospective students:

   An educational authority that operates, or proposes to operate, an educational institution in accordance with the doctrine of a particular religion may exclude applicants who are not of that religion.68

1.75 An exemption also applies with respect to working in religious educational institutions:

   An educational authority that operates or proposes to operate an educational institution in accordance with the doctrine of a particular religion may discriminate against a person in the area of work in the institution if the discrimination:

   (a) is on the grounds of:

   (i) religious belief or activity; or

   (ii) sexuality; and

   (b) is in good faith to avoid offending the religious sensitivities of people of the particular religion.69

63 *Anti-Discrimination Act 1977* (NSW), s. 49ZH.
64 *Anti-Discrimination Act 1977* (NSW), s. 49ZO.
65 *Anti-Discrimination Act 1977* (NSW), para. 49ZH (3)(c); ss. 49ZO (3).
66 *Anti-Discrimination Act 1977* (NSW), s. 49ZT.
67 *Anti-Discrimination Act 1996* (NT) ss. 19(1). Discrimination is defined at s. 20. This probation does not apply to transgender people.
68 *Anti-Discrimination Act 1996* (NT) ss. 30(2).
69 *Anti-Discrimination Act 1996* (NT) s. 37A.
1.76 The Northern Territory Anti-Discrimination Commission has advised the committee that the *Anti-Discrimination Act 1996* (NT) is currently under review, an area under consideration is the appropriateness of the exemption in the legislation that currently provides for exclusion of staff on the basis of sexuality or religious belief or activity.\(^7^0\)

**Queensland**

1.77 The *Anti-Discrimination Act 1991* (Qld) prohibits discrimination on the basis of 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; gender identity; sexuality; family responsibilities; and association with, or relation to, a person identified on the basis of any of the above attributes.\(^7^1\)

1.78 The Act also prohibits sexual harassment and vilification on the basis of race, religion, sexuality or gender identity.

1.79 Discrimination is prohibited in a specified 'area', which includes education and work.\(^7^2\)

1.80 In respect of education, a school or other educational institution may discriminate by excluding students who are not of the particular religion—religious discrimination is not allowed against LGBT students.

1.81 In respect of the workplace, a school may discriminate against a potential or actual employee if:

- it is a genuine occupational requirement that workers act in a way that is consistent with the religious beliefs of the school or educational institution; and
- the worker or applicant openly acts in a way that is inconsistent with those religious beliefs during the course of work or doing something connected with work; and
- the discrimination action is not unreasonable.\(^7^5\)

**South Australia**

1.82 The *Equal Opportunity Act 1984* (SA) prohibits discrimination on the grounds of age; association with a child, including breastfeeding; caring responsibilities;

\(^7^0\) Northern Territory Anti-Discrimination Commission, *Submission 126*, p. 3.

\(^7^1\) *Anti-Discrimination Act 1991* (Qld), s. 7. The meaning of discrimination on the basis of an attribute is defined at s. 8.

\(^7^2\) *Anti-Discrimination Act 1991* (Qld), div. 3.

\(^7^3\) *Anti-Discrimination Act 1991* (Qld), div. 2.

\(^7^4\) *Anti-Discrimination Act 1991* (Qld), s. 41.

\(^7^5\) *Anti-Discrimination Act 1991* (Qld), ss. 25(3).
disability; gender identity; intersex status; marital status; pregnancy; race; religious
dress; sex; sexual orientation and a spouse or partner's identity.

1.83 The Act also prohibits sexual harassment.

1.84 In relation to this inquiry, discrimination is prohibited on the grounds of sexual orientation or gender identity in the workplace in respect to the offer and conditions of employment.\(^76\)

1.85 However, the prohibition does not apply in circumstances or engagement of employment for the purposes of an educational institution if:

(a) the educational institution is administered in accordance with the precepts of a particular religion and the discrimination is founded on the precepts of that religion; and

(b) the educational authority administering the institution has a written policy stating its position in relation to the matter; and

(c) a copy of the policy is given to a person who is to be interviewed for or offered employment with the authority or a teacher who is to be offered engagement as a contractor by the authority; and

(d) a copy of the policy is provided on request, free of charge—

(i) to employees and contractors and prospective employees and contractors of the authority to whom it relates or may relate; and

(ii) to students, prospective students and parents and guardians of students and prospective students of the institution; and

(iii) to other members of the public.\(^77\)

1.86 The Act also prohibits discrimination by educational authorities of prospective and current students on the basis of sexual orientation and gender identity.\(^78\) Religious bodies are exempt from this prohibition in relation to:

…any other practice of a body [other than that listed in the preceding paragraphs] established for religious purposes that conforms with the precepts of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.\(^79\)

**Tasmania**

1.87 The *Anti-Discrimination Act 1998* (TAS) prohibits discrimination\(^80\) on the grounds of the following attributes: race; age; sexual orientation; lawful sexual activity; gender; gender identity; intersex; marital status; relationship status;

\(^76\) *Equal Opportunity Act 1984* (SA), s. 30. The criteria for discrimination on these grounds are outlined at s. 29.

\(^77\) *Equal Opportunity Act 1984* (SA), ss. 34(3).

\(^78\) *Equal Opportunity Act 1984* (SA), s. 37.

\(^79\) *Equal Opportunity Act 1984* (SA), para. 50(1)(c).

\(^80\) Defined at s. 14 and s. 15.
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pregnancy; breastfeeding; parental status; family responsibilities; disability; industrial activity; political belief or affiliation; political activity; religious belief or affiliation; religious activity; irrelevant criminal record; irrelevant medical record; and association with a person who has, or is believed to have, any of these attributes.\(^{81}\)

1.88 The Act also prohibits sexual harassment and the incitement of hatred on the basis of race, disability, sexual orientation, lawful sexual activity, or religious belief, affiliation or activity.

1.89 In the context of the current inquiry, the Act provides for the following exception for employment based on religion:

A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to 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 accordance with those tenets, beliefs, teachings, principles or practices.\(^{82}\)

1.90 The Act also provides the following exception for admission of a person as a student based on religion:

(1) A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to admission of that other person as a student 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.

(2) Subsection (1) does not apply to a person who is enrolled as a student at the educational institution referred to in that subsection.

(3) Subsection (1) does not permit discrimination on any grounds referred to in section 16 other than those specified in that subsection.

(4) A person may, on a ground specified in subsection (1), discriminate against another person in relation to the admission of the other person as a student to an educational institution, if the educational institution's 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.\(^{83}\)

1.91 As in Queensland, Tasmania does not allow religious schools to discriminate against LGBT students. However, unlike in Queensland, Tasmania also extends this protection to teachers.

\(^{81}\) Anti-Discrimination Act 1998 (TAS), s. 16.

\(^{82}\) Anti-Discrimination Act 1998 (TAS), ss. 51(2).

\(^{83}\) Anti-Discrimination Act 1998 (TAS), s. 51A.
**Victoria**

1.92 The *Equal Opportunity Act 2010* (VIC) prohibits discrimination on the basis of age; breastfeeding; employment activity; gender identity; impairment; industrial activity; lawful sexual activity; marital status; parental status or status as a carer; physical features; political belief or activity; pregnancy; race; religious belief or activity; sex; sexual orientation; personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the above attributes.84

1.93 This Act also prohibits sexual harassment. Further, the *Racial and Religious Tolerance Act 2001* (VIC) prohibits vilification on the basis of race or religion.

1.94 In respect of this inquiry, religious schools—which include 'a religious body, that establishes, directs, controls, administers or is an educational institution that is, or is to be, conducted in accordance with religious doctrines, beliefs or principles'—are exempt from discrimination the above attributes where the discrimination is done so:

…in the course of establishing, directing, controlling or administering the educational institution that:

(a) conforms with the doctrines, beliefs or principles of the religion; or

(b) is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.85

1.95 In addition to this anti-discrimination legislation, Victoria also has a *Charter of Human Rights and Responsibilities Act 2006* (VIC), which sets out the basic rights, freedoms and responsibilities of all people in Victoria including the right to recognition and equality before the law.86 The Charter also includes protection for religious freedom.87

1.96 Although the Charter does not create a new right to begin legal action for a breach of human rights, it does allow a person to raise a human rights argument along with existing remedies or legal proceedings.

**Western Australia**

1.97 The *Equal Opportunity Act 1984* (WA) prohibits discrimination on the grounds of age; breastfeeding; family responsibility; family status; publication of a person's details on the Fines Enforcement Registrar’s website; gender history; impairment; marital status; political conviction; pregnancy; race; racial harassment; religious conviction; sex; sexual harassment; sexual orientation.

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84 *Equal Opportunity Act 2010* (VIC), s. 6. Section 7 of the Act defines discrimination.
85 *Equal Opportunity Act 2010* (VIC), s. 83.
86 *Charter of Human Rights and Responsibilities Act 2006* (VIC), s. 8.
1.98 The Act also prohibits sexual harassment and racial harassment. Further, the Spent Convictions Act 1988 (WA) prohibits discrimination on the basis of having a spent conviction.

1.99 In respect of this inquiry, Western Australian legislation therefore prohibits discrimination against applicants and employees on the grounds of sexual orientation, as well as discrimination against a prospective or current student on the grounds of sexual orientation.

1.100 The Act makes an exception for educational institutions established for religious purposes in respect of employment and in the provision of education or training if this discrimination is done so:

…in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

Acknowledgements

1.101 The committee thanks all individuals and organisations that provided evidence, whether at the hearing or in written submissions. The committee particularly appreciates the efforts made by inquiry participants to provide evidence within necessarily tight timeframes.

88 Equal Opportunity Act 1984 (WA), s. 35O.
89 Equal Opportunity Act 1984 (WA), s. 35W.
90 Equal Opportunity Act 1984 (WA), ss. 73(1) and ss. 73(3). This also applies to contract workers—see: ss. 73(2).
Chapter 2
Key issues

2.1 This chapter presents the key issues raised in evidence, as follows:
- the broader human rights and constitutional contexts in which the public
discussion about discrimination by faith-based educational institutions has
taken place;
- the use of legislative exemptions in the *Sex Discrimination Act 1984* (SDA)
by faith-based institutions;
- support for maintaining the existing legislative exemptions;
- support for removing the exemptions;
- whether the application of the exemptions to students should differ from their
application to teachers; and
- options for reform.

2.2 This chapter concludes by presenting the committee's view.

Human rights and constitutional contexts

2.3 The committee received a considerable amount of evidence about the context
of the existing exemptions in the SDA that 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.

2.4 Most of this evidence went to legal frameworks briefly discussed in the
preceding chapter: namely, international human rights law and constitutional law.

Human rights considerations

2.5 The Attorney-General's Department submitted that the 'legislative
exemptions in the SDA that allow faith-based educational institutions to discriminate
against students, teachers and staff seek to balance competing rights under
international human rights law',1 namely:
- the right to equality and non-discrimination;2
- the right to freedom of thought, conscience and religion or belief;3 and
- other relevant rights such as those under the *Convention on the Rights of the
Child*.4

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1 Attorney-General's Department, *Submission 67*, p. 7.
2 Pursuant to Articles 2(1) and 26 of the *International Covenant on Civil and Political Rights*.
3 Pursuant to Article 18 of the *International Covenant on Civil and Political Rights*. 
The debate regarding legislative exemptions in the SDA therefore takes place within a broader human rights context.

Other evidence to the committee highlighted the tension between certain rights, primarily between the right to equality and non-discrimination, on one hand, and the right to freedom of religion on the other. For example, in its submission to the committee, the Australian Human Rights Commission (the Commission) submitted that 'human rights are universal, inalienable, indivisible, interdependent and interrelated'. The Commission stressed:

Care must be taken to accommodate human rights wherever they come into tension. This includes the right to freedom of religion and the right to be free from discrimination on the basis of sex, sexual orientation and gender identity.

Lee Carnie of the Human Rights Law Centre discussed how to resolve the tension between the right to equality and non-discrimination and the right to freedom of thought, conscience and religion or belief. Lee Carnie suggested that the 'proportionality analysis is one avenue to consider reasonableness, necessity and proportionality in determining where that balance is struck', referring specifically to the Guide to Human Rights (the Guide) published by the Parliamentary Joint Committee on Human Rights (Human Rights Committee).

The issue of proportionality was examined in detail by the Australian Law Reform Commission (ALRC) in its report, Traditional Rights and Freedoms—Encroachments by Commonwealth Laws. In discussing the justification of limits on rights and freedoms in that report, the ALRC stated:

A common way of determining whether a law that limits rights is justified is by asking whether the law is proportionate. This concept is commonly used by courts to test the validity of laws that limit rights protected by constitutions and statutory bills of rights. However, proportionality tests can also be a valuable tool for law makers and others to test the justification of laws that limit other important—even if not strictly constitutional—rights and principles.

In short, a structured proportionality analysis involves considering whether a given law that limits important rights has a legitimate objective and is suitable and necessary to meet that objective, and whether—on balance—
the public interest pursued by the law outweighs the harm done to the individual right.9

2.10 The Guide provides that, in order for a limitation to be considered justifiable, it must comply with the following limitation criteria:

- Any limitation on a right must have a clear legal basis.
- Any limitation on a right must be shown to be aimed at achieving a legitimate objective.
- It must be demonstrated that any limitation on a right has a rational connection to the objective to be achieved.
- Any limitation on a right must be proportionate to the objective being sought.10

2.11 Regarding the right to equality and non-discrimination, the Guide states:
The right to non-discrimination applies to any form of distinction, exclusion, restriction or preference that has the effect of nullifying or restricting the enjoyment of human rights or freedoms on a prohibited ground.11

2.12 As for the right to freedom of religion, the Guide states:
While the right to hold a religious or other belief or opinion is an absolute right, the right to exercise one's belief can be limited given its potential impact on others.
The right can be limited as long as it can be demonstrated that the limitation meets the limitation criteria and is necessary to protect public safety, order, health or morals or the rights of others.12

2.13 Regarding the final criterion—proportionality—the Human Rights Committee notes:
Even if the objective is of sufficient importance and the measures in question are rationally connected to the objective, the limitation may still not be justified because of the severity of its impact on individuals or groups.13

2.14 The Commission also referred to the limitation criteria in its submission, suggesting that 'consideration should be given to replacing the current exemptions to

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the SDA with a general limitations clause—a suggestion recommended by other submitters—on the basis that:

A general limitations clause would clarify that conduct which is necessary to achieve a legitimate objective, including freedom of religion, and is a proportionate means of achieving that objective, is not discrimination.

2.15 However the Commission did note that '[a]ny general limitations clause would need to be carefully worded in order to avoid allowing discriminatory acts that are currently unlawful'.

2.16 The Australian Lawyers for Human Rights (ALHR) offered an alternative way in which rights may be balanced: by 'providing reasonable accommodation to other rights and other persons: "a fair balance needs to be struck between the rights of the individual and the rights of others"'. The ALHR noted that this approach 'is similar to the test of proportionate response to the harm in question which is generally used to assess whether or not legislation is too wide in its scope'.

2.17 In assessing the particular provisions of the SDA within the human rights law framework, Ms Anna Brown, also of the Human Rights Law Centre opined that the existing permanent exemptions in the SDA 'are inappropriate and don't strike the right balance between equality and religious belief'. This position was also presented in other evidence to the committee, by, for example, the Victorian Gay & Lesbian Rights Lobby.

2.18 Jamie Gardiner, Vice-President of Liberty Victoria, acknowledged that the human right to equality is 'subject to some competition from other human rights'. However, 'when it comes to schools, for example, and the teaching of children, the best interests of the children must always come first'.

2.19 While certainly not arguing against the best interests of children, Ms Annette Pereira, Executive Officer at the Australian Association of Christian Schools, took a

14 See, for example, Kingsford Legal Centre and Community Legal Centres NSW, Submission 68, p. 2.
15 Australian Human Rights Commission, Submission 5, p. 3.
16 Australian Human Rights Commission, Submission 5, p. 3.
19 Ms Anna Brown, Director of Legal Advocacy, Human Rights Law Centre, Committee Hansard, 19 November 2018, p. 52. This position was also presented in other evidence to the committee.
20 Victorian Gay & Lesbian Rights Lobby, Submission 89, p. 2.
21 Jamie Gardiner, Vice-President, Liberty Victoria, Committee Hansard, 19 November 2018, p. 3.
22 Jamie Gardiner, Vice-President, Liberty Victoria, Committee Hansard, 19 November 2018, p. 3.
different position, emphasising the importance of protecting freedom of religion in all areas, including the provision of education. Ms Pereira told the committee:

While we recognise that exemptions may not be the best way to balance the various rights that must be held in tension, if they are removed and adequate protection isn't given to schools to hold a commonly held biblical view of sexuality and relationships in what is taught and in managing school life and in who the school employs, you'll be carving out an area of faith and deeming it impermissible. You'll be deciding that those long-held beliefs of many Christians can't be expressed in education at all—and that's a serious step for a government to take.23

2.20 It is worth noting evidence highlighting other rights that are also engaged by this debate, including the rights of children to have an education;24 the right to privacy;25 and enabling parents to choose a school for their children in conformity with their own convictions.26 In her evidence to the committee, Ms Robin Banks elaborated on this latter right, and the tension between this right and freedom of religion:

[I]n the International Covenant on Economic, Social and Cultural Rights, there's a provision that deals specifically with the right to education, and it deals with the question of parents being able to choose the school for their children, to ensure that the religious and moral education of their children is in conformity with their own convictions. The provisions that currently exist in discrimination law undermine that protection, because they allow schools to say, 'This child cannot come to this school,' irrespective of the child's religious beliefs, because of, say, their sexual orientation. With the notion of freedom of religion, it's important to understand that it's a highly personal right. The idea that an institution has a right that overrides the individual's rights seems to me somewhat problematic, because parents do want to be able to choose the school their children go to, and that position has been highly supported by governments in this country, and yet we're saying that, under the current law, that can be overturned or undermined by the school choosing to say, 'This child is not entitled to stay at this school,' because of the child's sexual orientation or gender identity.27

Constitutional considerations

2.21 In addition to human rights considerations, Jamie Gardiner expressed concern that the existing exemptions may be unconstitutional, stating that:

23 Ms Annette Pereira, Executive Officer, Australian Association of Christian Schools, Committee Hansard, 19 November 2018, p. 31.
24 See, for example, Ms Megan Mitchell, National Children's Commissioner, Australian Human Rights Commission, Committee Hansard, 19 November 2018, p. 18.
25 See, for example, Mr Jonathon Hunyor, Chief Executive Officer, Public Interest Advocacy Centre, Committee Hansard, 19 November 2018, p. 53.
26 See, for example, Australian Family Coalition, Submission 61, p. 3.
27 Ms Robin Banks, Committee Hansard, 19 November 2018, p. 58.
...in our view, following the writings of Professor Luke Beck of Monash University, which we commend to the committee...religious exemptions in Commonwealth legislation are in themselves a violation of section 116 of the Constitution. They amount to giving a privilege, a benefit, to religious bodies that is not available to non-religious bodies—and should not be available to anyone, of course. That amounts to a preference and in many ways an establishment of one class of religious thinking against the rest of the country's other class.  

2.22 Dr Tiffany Jones also expressed concern about the constitutionality of the current provisions in the SDA, stating that:

...it is unconstitutional for the Australian Commonwealth to make any law for imposing any religious observance – including allowance for the exclusion of or discrimination against LGBTs in religious schools as currently exists in the SDA. It is also unconstitutional for the Australian Commonwealth to allow a religious test for qualifying for working in Australia’s government-funded religious education sectors and schools for LGBT teachers and staff; and unconstitutional (given our legal requirement that all young people whether religious or not be physically at school until of age) to enforce such religious compliance tests for LGBT students.

2.23 Associate Professor Luke Beck offered an additional perspective on the Commonwealth's power under the SDA with respect to faith-based schools, alerting the committee to the Commonwealth's power under section 51(xx) of the Constitution—the corporations power:

A corporation is an entity that has legal personhood (ie perpetual succession, and the ability to sue and be sued) regardless of how it is described. A trading corporation is such an entity that has some substantial trading activities. Selling education, which is what non-government schools do, is trade and nongovernment schools are corporations.

2.24 Associate Professor Beck concluded that:

If a law is supported by the corporations power it does not matter whether the law implements any of Australia’s treaty obligations or indeed if it breaches any of Australia’s treaty obligations.

2.25 On the other hand, Dr Alex Deagon stated that 'any attempt to remove the exemptions at the Commonwealth level may breach the free exercise clause of Section 116 of the Constitution by prohibiting the free exercise of religion'. Indeed,

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28 Jamie Gardiner, Vice-President, Liberty Victoria, Committee Hansard, 19 November 2018, p. 4.
29 Dr Tiffany Jones, Department of Educational Studies, Macquarie University, Submission 11, p. 12 (emphasis omitted).
31 Associate Professor Luke Beck, Submission 28, p. 2.
32 Dr Alex Deagon, Submission 9, p. 1.
as discussed in chapter 1, section 116 of the Constitution does not directly protect states from passing laws that restrict religious freedom or belief.33

2.26 A further position was expressed by Professor Patrick Parkinson AM, who submitted that there are 'grave doubts' about the constitutionality of any provisions preventing discrimination on the basis of gender identity. This is because Commonwealth antidiscrimination law mainly rests upon the external affairs power, but there are questions over whether prohibitions on discrimination on the basis of gender identity (as distinct from sexual orientation or intersex) is sufficiently linked to a convention or treaty for constitutional purposes.34

2.27 These varying positions indicate that the constitutionality of the existing provisions in the SDA, and any proposed changes to the SDA, remains a matter of some debate.

Do faith-based educational institutions 'use' the legislative exemptions?

2.28 As discussed in chapter 1, much of the public discourse on this issue has focused on the treatment of LGBTIQ+ students and teachers at faith-based schools. One issue raised in evidence considered the extent to which existing legislative exemptions are actually being relied upon by schools.

2.29 A representative of Christian Schools Australia, Mr Mark Spencer, supported the exemptions but presented a clear view regarding discrimination against students:

   Fundamentally, we are here [at today's hearing] because of a lie—a claim that faith based schools are expelling gay students and the government wants to expand that right. This is simply not true. As we've consistently said throughout this debate, our schools have never expelled a student solely on the basis of their same-sex attraction. They never have, they never will and they don't want the right to.35

2.30 Archbishop Peter Comensoli of the Australian Catholic Bishops Conference advised the committee:

   Catholic schools do not discriminate unjustly against students or staff. Our schools would not expel a student just because of their sexual orientation. But we want to maintain laws that would protect our capacity to teach a Christian understanding of sexual ethics and marriage according to our own faith tradition, as is the choice of parents in that regard.36

2.31 In the same vein, Mr Ray Collins of the National Catholic Education Commission stated that, in his experience in the sector, he does not recall 'any


34 Professor Patrick Parkinson AM, Submission 4, pp. 2–4.

35 Mr Mark Spencer, Executive Officer, Policy, Governance and Staff Relations, Christian Schools Australia, Committee Hansard, 19 November 2018, pp. 31–32.

36 Archbishop Peter Comensoli, Delegate, Australian Catholic Bishops Conference, Committee Hansard, 19 November 2018, p. 21.
complaint being lodged by a principal or by parents in relation to the actions of a teacher who might be gay'. Similarly, the President of the Australian Catholic Primary Principals' Association, Mr Brad Gaynor, said that he was 'unaware of situations where we've actually had to use the legislation'.

2.32 Many witnesses at the committee's hearing were asked to provide examples of cases in which the legislative exemptions 'have been involved or invoked', whether in relation to students, staff or contractors at faith-based schools. Noting that some of these questions were taken on notice, many witnesses had not provided examples at the time of writing.

2.33 However, other factors may account for why few formal complaints were presented to the committee.

2.34 For example, Ms Brenda Appleton, Chair of Transgender Victoria, explained that while she is aware of concerning cases, they may not have been recorded as formal complaints:

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\text{…we don't have a lot of cases of discrimination that are out and published where action has been taken. To take action is actually a very outing thing, and for most teachers and for some students we find that they are reluctant to take action because it's going to have an impact on their future career or if they go to another school...}
\]

\[
\text{I've been an advocate for trans and gender-diverse people in Victoria for 20 years and have been aware of more than 100 cases of apparent discrimination. Very few of them get developed and taken to court or have action taken because of the outing process involved...}
\]

2.35 The committee also heard that there may also be some self-selecting of those who are involved with faith-based schools, particularly among teachers. For instance, Mr James Laussen, Principal of Overnewton Anglican Community College, explained that he discusses the school's Christian ethos with prospective teachers. While his school is accepting of diverse sexualities and genders, and argued in favour of removing the current exemptions, Mr Laussen told the committee that he is aware of another school that:

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\text{…has very strict statements about what it expects of its staff in relation to marriage and relationships outside marriage and so on. But they make that}
\]
up front, so therefore the staff member is making a choice to work in that workplace before they actually go there.41

2.36 Similarly, Mr Spencer of Christian Schools Australia explained that these matters are rarely litigated, 'largely because people coming to our schools know who we are, the nature of our school and what is expected of them. There is a self-selection process up-front…’42

2.37 Equal Voices suggested a number of reasons as to why complaints of discrimination rarely reach a tribunal or court, including:

- power imbalances between an educational provider and victims of discrimination;
- the personal damage often caused by discrimination that renders victims unable or unwilling to proceed to a formal complaint; and
- the inherent difficulties in the system of lodging a complaint, most obviously because the exemptions themselves would make such a process futile.43

2.38 Notwithstanding the above points, some examples were received of cases in which faith-based schools appear to have relied upon existing legislative exemptions. For example, the Independent Education Union of Australia described a number of cases in which its members has contacted the union with concerns about discrimination.44

2.39 Mr Anthony Odgers, Assistant Federal Secretary of the Independent Education Union, clarified in respect of these examples that the legislative exemptions are relied upon only by 'a small and diminishing minority of employers in non-government schools'.45 Indeed, he suggested that 'less than two per cent of all employers are responsible for 100 per cent of the issues that we have around discrimination'.46

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41 Mr James Laussen, Principal, Overnewton Anglican Community College, Committee Hansard, 19 November 2018, p. 66.
42 Mr Mark Spencer, Executive Officer, Policy, Governance and Staff Relations, Christian Schools Australia, Committee Hansard, 19 November 2018, p. 33.
43 Equal Voices, Submission 142, p. 4.
44 Independent Education Union, Submission 59, pp. 2–4; also see, Mr Anthony Odgers, Assistant Federal Secretary, Independent Education Union of Australia, Committee Hansard, 19 November 2018, p. 47.
45 Mr Anthony Odgers, Assistant Federal Secretary, Independent Education Union of Australia, Committee Hansard, 19 November 2018, p. 46.
46 Mr Anthony Odgers, Assistant Federal Secretary, Independent Education Union of Australia, Committee Hansard, 19 November 2018, pp. 49–50.
2.40 The committee heard that the majority of schools facing these issues with respect to teachers would treat the issue as a contractual matter. As Mr Odgers explained:

…those protections that are provided to the employer and that are enforceable, whether for breach of the agreement or breach of contract, are sitting alongside a legislative regimen in relation to the Sex Discrimination Act and the Fair Work Act. One is utilised weekly—the common law provisions of the contract and/or the agreement; the other is rarely, if ever, utilised in the Catholic system. It's utilised more often, but still quite rarely, by independent schools.

2.41 Mr Odgers further stated that not only are the legislative exemptions rarely relied upon, but in many cases of alleged discrimination 'the employer doesn't rely on anything.' Mr Odgers also indicated that proportionately few unfair dismissal cases relating to faith-based schools are arbitrated by courts, as disputes about ongoing employment are normally settled through a payment to the employee. In part, this relates to business incentives:

The committee would be aware that it's not good business for schools to have any form of publicity that indicates that those who are responsible for teaching students at the school are in any way unhappy with or that there's any sort of disputation, and that disputation of that sort tends to sit on the front page of daily newspapers for some time.

Support for maintaining the existing legislative exemptions

2.42 There were a number of arguments that were proffered in support for maintaining the existing legislative exemptions. These arguments are summarised below.

Faith-based educational institutions should be able to uphold their religious ethos

2.43 In oral evidence to the committee, some religious groups emphasised the importance of enabling faith-based schools to uphold their religious ethos. For example, as Archbishop Comensoli of the Australian Catholic Bishops Conference stated:

The freedom of Catholic schools to employ staff who support our mission, both inside and outside employment, is essential to ensure the schools are

47 Mr Anthony Odgers, Assistant Federal Secretary, Independent Education Union of Australia, Committee Hansard, 19 November 2018, p. 46.

48 Mr Anthony Odgers, Assistant Federal Secretary, Independent Education Union of Australia, Committee Hansard, 19 November 2018, p. 48.

49 Mr Anthony Odgers, Assistant Federal Secretary, Independent Education Union of Australia, Committee Hansard, 19 November 2018, p. 49.

50 Mr Anthony Odgers, Assistant Federal Secretary, Independent Education Union of Australia, Committee Hansard, 19 November 2018, pp. 48–49.
educational communities that demonstrate Christianity to their students both in word and in practice. 51

2.44 A representative of the Islamic Schools Association of Australia, Mr Adel Salman, made a similar point in respect of Islamic schools:

The association is not calling for staff to be hired and fired on the basis of their sexuality, but they are expected to uphold the ethos and values of the school. Likewise, with students, the association is not calling for students to be discriminated against or in fact to be expelled from the school because of their particular sexuality, but by the same token the students and their families need to understand that the school will be teaching the particular values and principles of the religion. 52

2.45 The Executive Officer of the Australian Association of Christian Schools, Ms Annette Pereira, was concerned that without adequate protection, schools could be forced:

…to teach in ways that contradict what they genuinely believe, to act against their conscience and beliefs in the way they handle behaviour, and to employ staff who don't share in and meaningfully uphold the beliefs of the school. 53

2.46 This concern was shared by a number of submitters. 54

2.47 Ms Pereira expressed further concern about government action in this area:

What we are trying to point out is the position that a faith based school is placed in if the government is to define what is and isn't permissible belief. Either we say faith based schools actually aren't legitimate and there isn't a place for them—that is, the doctrine and teaching of that faith is inherently problematic and unacceptable—or we allow schools to continue operating with boundaries around how they teach, operate and employ consistently with what they believe. 55

2.48 The committee heard various rationales in support of these views. For instance, Ms Beth Blackwood, Chief Executive Officer of the Association of Heads of Independent Schools of Australia, underlined the importance of parental choice:

We believe that a high-quality schooling system in Australia depends on parents having the freedom to exercise their rights and responsibilities in

51 Archbishop Peter Comensoli, Delegate, Australian Catholic Bishops Conference, Committee Hansard, 19 November 2018, p. 21.
52 Mr Adel Salman, Islamic Schools Association of Australia, Committee Hansard, 19 November 2018, p. 68.
53 Ms Annette Pereira, Executive Officer, Australian Association of Christian Schools, Committee Hansard, 19 November 2018, p. 31.
54 See, for example, Mr Blair Courtney-O'Connor, Submission 12, p. 1; Mr Bruce Burgess, Submission 86, pp. 2–3.
55 Ms Annette Pereira, Executive Officer, Australian Association of Christian Schools, Committee Hansard, 19 November 2018, p. 35.
regard to the education of their children, and that includes educating them
in schools of a religious faith.\textsuperscript{56}

2.49 In addition, the Executive Officer of Catholic Secondary Principals Australia, Mr Frank Fitzgerald, highlighted that no-one ‘is compelled to either seek employment or enrolment at our schools’.\textsuperscript{57} He posited that it is entirely reasonable to:

\ldots expect that those who freely choose to become part of our school community as employee, student or family come in the understanding that they are accepting these standards and beliefs. In saying this, our school leaders are realistic in their understanding that not all who join our communities may privately agree with all aspects of the entire range of standards and beliefs that we manifest. Our principals respect the individual's privacy in these matters.\textsuperscript{58}

2.50 A different articulation of this point—regarding the fact that involvement with religious schools is not compulsory—was put by Mr Spencer of Christian Schools Australia:

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

\ldots

And we'd say, for those staff [who are same-sex attracted], that there are lots of other schools that they can seek employment in. No-one's forcing people to come and work in our schools. We're clear, we're explicit, about our faiths and beliefs and the doctrines and tenets we hold to, and people have choices, whether they come into our schools as parents or staff.\textsuperscript{59}

\textit{The existing exemptions protect faith-based educational institutions}

2.51 The committee heard evidence that supported the legislative exemptions as a way to enable schools to act in accordance with their religious ethos.

\textsuperscript{56} Ms Beth Blackwood, Chief Executive Officer, Association of Heads of Independent Schools of Australia, \textit{Committee Hansard}, 19 November 2018, p. 36.

\textsuperscript{57} Mr Frank FitzGerald, Executive Officer, Catholic Secondary Principals Australia, \textit{Committee Hansard}, 19 November 2018, p. 37.

\textsuperscript{58} Mr Frank FitzGerald, Executive Officer, Catholic Secondary Principals Australia, \textit{Committee Hansard}, 19 November 2018, p. 37.

\textsuperscript{59} Mr Mark Spencer, Executive Officer, Policy, Governance and Staff Relations, Christian Schools Australia, \textit{Committee Hansard}, 19 November 2018, pp. 34–35.
2.52 For example, Ms Pereira of the Association of Christian Schools expressed concern that removing the exemptions might create grey areas in the law ‘where it's quite hard for schools to know what they are and are not permitted to do until it's tested’.\textsuperscript{60}

2.53 Mr Salman of the Islamic Schools Association pointed to the risk of unfair dismissal claims if the exemptions were removed:

[W]ithout the current provisions and exemptions [schools] would not be able to hold staff to that level of accountability to adhere to the schools' values and ethos. The schools would then potentially be the subject of unfair dismissal claims.\textsuperscript{61}

2.54 Representatives from both the Catholic organisations and the Christian school organisations indicated that they first aim to resolve issues from a pastoral perspective and in a constructive manner.\textsuperscript{62} However, the exemptions support further action where necessary. As Archbishop Comensoli stated:

School principals work to resolve such issues pastorally...but sometimes there is a breakdown in the relationship, as can happen in any workplace relationship, and then schools need to rely on the protections of the law to undertake their work.\textsuperscript{63}

2.55 On this same issue, Mr Spencer of Christian Schools Australia told the committee that:

…our aim is to resolve these things pastorally in a constructive manner with the staff member involved, and by and large that is the case. In some cases, we can't find that resolution so, yes, we will terminate staff members who don't share our faith, values and beliefs, and that is a fundamental element of our schools.\textsuperscript{64}

2.56 There was some discussion about whether the outcomes sought by these groups, which are currently provided by the exemptions, could still be offered if a distinction were made between a person's attributes (such as their sexual orientation)

\textsuperscript{60} Ms Annette Pereira, Executive Officer, Australian Association of Christian Schools, \textit{Committee Hansard}, 19 November 2018, p. 34.

\textsuperscript{61} Mr Adel Salman, Islamic Schools Association of Australia, \textit{Committee Hansard}, 19 November 2018, p. 68; also see, for example, Mr Mark Spencer, Executive Officer, Policy, Governance and Staff Relations, Christian Schools Australia, \textit{Committee Hansard}, 19 November 2018, p. 33.

\textsuperscript{62} See, for example, Archbishop Peter Comensoli, Delegate, Australian Catholic Bishops Conference, \textit{Committee Hansard}, 19 November 2018, p. 26; Mr Mark Spencer, Executive Officer, Policy, Governance and Staff Relations, Christian Schools Australia, \textit{Committee Hansard}, 19 November 2018, p. 33.

\textsuperscript{63} Archbishop Peter Comensoli, Delegate, Australian Catholic Bishops Conference, \textit{Committee Hansard}, 19 November 2018, p. 21.

\textsuperscript{64} Mr Mark Spencer, Executive Officer, Policy, Governance and Staff Relations, Christian Schools Australia, \textit{Committee Hansard}, 19 November 2018, p. 33.
and their conduct (such as advocating positions contrary to the school's religious teachings).

2.57 In the following exchange, Archbishop Comensoli of the Catholic Bishops Conference posited that a person's attribute is not easily distinguished from their conduct:

Senator RICE: But would you agree that that mere attribute is not sufficient for either a student or a teacher to be asked to be removed from your school communities?

Archbishop Comensoli: That 'mere attribute', as you're saying it, is kind of—

Senator RICE: Well, that's right: someone who is same-sex attracted or gender diverse.

Archbishop Comensoli: Yes. The 'mere attribute' is never divorced from action. So, one's life is lived out in terms of this supposed mere attribute. So, we always come back to those questions of, what are the circumstances here? What's the context of what's happening? And so on and so forth. So those are the pastoral ways in which each situation is considered in its own circumstances.65

2.58 Archbishop Comensoli also provided a hypothetical example—-that would likely be acceptable to a Catholic school—in which a teacher's private life was separate from their school life:

Archbishop Comensoli: …To use a hypothetical example—just as a hypothetical—suppose someone lives in one part of Melbourne, up in the north, and they might be a maths teacher in the southern part of Melbourne. There's no connection in terms of relationships of location and so on. They have made it known privately to the principal that they're in a same-sex relationship, but the person is quite willing to speak and act publicly, within the school context, according to the mission identity. There would be no question asked there, I think. It's when it becomes an act—

CHAIR: An act of advocacy that affects the school community.

Archbishop Comensoli: Yes.66

2.59 As was later stated by Mr FitzGerald of Catholic Secondary Principals Australia, 'if we move by whatever means to a place where a Catholic school is just seen as a place where any views can be promoted and tolerated, it gives rise to tension'.67

65 Archbishop Peter Comensoli, Delegate, Australian Catholic Bishops Conference, Committee Hansard, 19 November 2018, p. 27.

66 Archbishop Peter Comensoli, Delegate, Australian Catholic Bishops Conference, Committee Hansard, 19 November 2018, p. 25.

67 Mr Frank FitzGerald, Executive Officer, Catholic Secondary Principals Australia, Committee Hansard, 19 November 2018, p. 39.
2.60 Regarding the meaning of 'advocacy', Mr Collins of the National Catholic Education Commission stated that it would depend on the circumstances and context in which the act occurs:

You'll have to look at each individual situation, and in those situations I think you'll find that Catholic schools act very pastorally with the staff involved. If that is perceived to be having a negative effect within the school then the principal would work with the teachers involved and come to an understanding in relation to that.68

2.61 On this point, Mr Francis Moore of the Catholic Archdiocese of Melbourne told the committee that without the legislative exemptions:

...if action were to be taken [by a school against a person], it could be taken on the basis that the school is discriminating against the person based on other rights. I see these provisions as, in fact, providing an overlapping of legal protection in terms of both discrimination law and employment law. Those don't completely overlap, but they do overlap in part.69

2.62 Regarding the question of distinguishing a person's attributes and conduct, Mr Spencer of Christian Schools Australia suggested to the committee that current law has commingled the two concepts. He stated that if the legislative exemptions were removed in an attempt to make the two concepts distinct in law, then Christian schools would 'have the potential of litigation on the basis of us merely trying to ensure our staff protect our faith, values and beliefs'.70

2.63 Notably, representatives from both the Catholic Bishops Conference and Christian Schools Australia stated that the schools they represent would likely seek to take action if any person, regardless of their attributes, was advocating positions contrary to their faith, albeit the action may not rely upon the existing exemptions. For example, if a heterosexual teacher was advocating in support of same-sex marriage in the classroom, this would be regarded as an action in contradiction to the Catholic faith.71

2.64 Mr Salman of the Islamic Schools Association also stated that advocating same-sex marriage in the classroom would be problematic.72 On the point of whether

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69 Mr Francis Moore, Executive Director Administration, Catholic Archdiocese of Melbourne, Committee Hansard, 19 November 2018, p. 24.

70 Mr Mark Spencer, Executive Officer, Policy, Governance and Staff Relations, Christian Schools Australia, Committee Hansard, 19 November 2018, p. 33.

71 See Mr Francis Moore, Executive Director Administration, Catholic Archdiocese of Melbourne, Committee Hansard, 19 November 2018, p. 25; Mr Mark Spencer, Executive Officer, Policy, Governance and Staff Relations, Christian Schools Australia, Committee Hansard, 19 November 2018, p. 33.

72 Mr Adel Salman, Islamic Schools Association of Australia, Committee Hansard, 19 November 2018, p. 69.
a person's attribute could be divorced from their conduct, Mr Salman's answer drew on whether the person's attribute was publicly known in the school community:

If the teacher were married in a same-sex union and that became something that the staff community, or the school community, became aware of then that would be a direct contradiction of the school's principles. The school on one hand would be teaching such, and then a member of staff would be doing something altogether different. In that case, some schools would actually take the position that that is not in adherence with our principles and might ask the staff member to resign, or they might take action to dismiss the staff member.73

Support for removing the legislative exemptions

2.65 There were also a number of arguments offered by inquiry participants in support of removing the legislative exemptions, the most significant of which was that the existing exemptions in the SDA are discriminatory and harmful.

The legislative exemptions are discriminatory and harmful

2.66 In contrast to the evidence discussed in the previous section of this chapter, many submitters and witnesses supported the removal of the existing legislative exemptions on the basis that the exemptions are discriminatory and cause harm to various persons and groups, particularly in the LGBTIQ+ community.74

2.67 For example, Mr Jeremy Stowe-Lindner, the Principal at Bialik College who spoke from the perspective of the Jewish faith, and submitted that:

Sexual identity in particular, and rarely but importantly gender identity as well, is a personal decision and reality for individual citizens that should have no impact whatsoever on their education, or educational admission. We are all created equally and I strongly encourage the law to support this, and prevent discrimination.75

2.68 Ms Felicity Marlowe, Executive Director of Rainbow Families Victoria, told the committee '[w]e believe that the current exemptions under the [SDA] are discriminatory, unnecessary and out of step with modern Australia'.76

2.69 Further, Mr Rodney Croome, Spokesperson for Equality Tasmania and just.equal, suggested that when considering this issue:

...we return to the basic reasons we have antidiscrimination laws in Australia. These laws are there to provide the same opportunities in life to everyone. They are there so that we can all be chosen according to our

73  Mr Adel Salman, Islamic Schools Association of Australia, Committee Hansard, 19 November 2018, p. 70.
74  See, for example, Ms Anna Brown, Director of Legal Advocacy, Human Rights Law Centre, Committee Hansard, 19 November 2018, p. 52.
75  Mr Jeremy Stowe-Lindner, Principal, Bialik College, Submission 8, p. 1.
76  Ms Felicity Marlowe, Executive Director, Rainbow Families Victoria, Committee Hansard, 19 November 2018, p 7.
capacity and, to quote Martin Luther King, the content of our character, not irrelevant factors such as our sexual orientation or gender identity. In this context, for students, I think that means having the same opportunities to contribute to and to gain from school life, including if that school life is at a faith based school. For teachers, it means being judged according to their abilities as teachers, not according to irrelevant factors, and I think that is what most parents who send their children to faith based schools will want.77

2.70 Evidence from Mr Daniel Comensoli, Policy Analyst at the National LGBTI Health Alliance, indicated that while most LGBTI Australians live healthy lives, 'a disproportionate number experience poorer mental health outcomes and have a higher risk of suicidal behaviours than their non-LGBTI counterparts'.78 He further explained that these poorer health outcomes are not directly caused by a person's sexual orientation, but rather:

…they are due to experiences of discrimination, harassment and violence, as key social determinants of health. The exemptions currently in federal antidiscrimination law that allow faith based schools to discriminate against staff and students on the grounds of their sexual orientation and gender identity exacerbate and, to some extent, legitimate discriminatory conduct against LGBTI teachers, staff and students, and this will continue to have a detrimental impact on their overall health and wellbeing. That is why the exemptions need to be repealed.79

2.71 The Royal Australian & New Zealand College of Psychiatrists also discussed mental health in their submission, and expressed their concern:

…that laws allowing faith-based education institutions to discriminate against students, teachers and staff on the basis of sexual orientation and gender identity are likely to increase the mental health problems of people in LGBTIQ+ communities.

Evidence shows that the discrimination and marginalisation experienced by lesbian, gay, bisexual, trans, intersex and queer (LGBTIQ+) people increase the risk of developing mental health issues, and also creates barriers to accessing supportive services. For many LGBTIQ+ people, faith is an important source of strength and support which can be beneficial in a person’s journey of recovery. As such, faith-based discrimination can

77 Mr Rodney Croome, Spokesperson, Equality Tasmania and Spokesperson, just.equal, Committee Hansard, 19 November 2018, p. 2.

78 Mr Daniel Comensoli, Policy Analyst, National LGBTI Health Alliance, Committee Hansard, 19 November 2018, p. 2; also see, for example, Ms Brenda Appleton, Chair, Transgender Victoria, Committee Hansard, 19 November 2018, p. 10; Dr Ashleigh Lin, National Health and Medical Research Council Career Development Fellow and Program Head, Mental Health and Youth, Telethon Kids Institute, Committee Hansard, 19 November 2018, p. 15.

79 Mr Daniel Comensoli, Policy Analyst, National LGBTI Health Alliance, Committee Hansard, 19 November 2018, pp. 2–3.
seriously undermine the mental health of LGBTIQ+ individuals, especially children and young people.  

2.72 The committee received evidence regarding a range of adverse actions allegedly taken by faith-based educational institutions against students or staff on the basis of an attribute otherwise protected by the SDA, such as sexual orientation or gender.  

For example, Ms Appleton of Transgender Victoria described the experience of a transgender science teacher who had been assigned male at birth, and was working in a Catholic boys school in Melbourne:

After many years working through her gender identity issues, she approached the school to request their support to enable her to transition at school. They refused, and she was forced to resign. This was at a very vulnerable stage in her life and career. She then needed to seek employment post her transition, which was not easy and required her again to conceal her journey.

2.73 One submitter to the inquiry—who advocated for the repeal of subsection 38(3) of the SDA and amendment of paragraph 37(1)(d)—reflected on their past experience as a student in a faith-based school and shared how the existing provisions of the SDA, if used by their school, could have had serious negative implications for them:

On a personal note, if my faith-based school had expelled me or otherwise discriminated against me on the basis of my sexual orientation, it is likely that this information would have become known to my parents, putting me at risk of homelessness due to rejection by my homophobic family of origin. This is exactly what happened shortly after I completed secondary school: our relationship completely broke down upon their learning about my sexual orientation, forcing me to become independent of my family at short order. This was a difficult and devastating time for me, but at least I was nineteen: a young adult and able to fend for myself. Had I been a few years younger, my position would have been even more precarious, and the outcomes may have been much worse. Not all LGBTIQ young people live in an accepting home environment, and no school student should be put at risk at home due to discrimination on the part of their school.

2.74 The examples received by the committee did not only relate to sexual orientation or gender. As discussed in chapter 1, various other attributes are listed in the SDA, including pregnancy and marital status. The Independent Education Union provided examples that went to some of these issues, such as a case in which a teacher

81 See, for example, Equal Voices, Submission 142, pp. 8–9; Parents of Gender Diverse Children, Submission 57, pp. 5–10.
82 Ms Brenda Appleton, Chair, Transgender Victoria, Committee Hansard, 19 November 2018, p. 10.
83 Name Withheld, Submission 133, p. 1.
at a Catholic school was allegedly dismissed because she became pregnant via IVF.  
A further example, relating to marital status, was explained as follows:

An Assistant Principal in regional Catholic diocese was called to a meeting with the Executive Director who said that 'it had been brought to his attention' that the Assistant Principal was married to a woman whose first marriage had not been annulled. The Assistant Principal was therefore not in a genuine Catholic marriage and this was inconsistent with a leadership role in a Catholic school.

When the Executive Director asked if an annulment could be obtained, the Assistant Principal indicated that his wife was reluctant to pursue this option as her first husband would oppose it and she did not want to subject her two children to the demeaning annulment process.

The Assistant Principal was then demoted to a classroom teacher position with salary maintenance for a year. (It is noted that subsequently an annulment was obtained and the member, now correctly married in the view of the Church, obtained another Assistant Principal position.)

2.75 Ms Megan Mitchell, National Children's Commissioner, provided particular evidence relating to discrimination on the basis of pregnancy. Having investigated the matter in 2017, Ms Mitchell relayed quotes from interviews she conducted with pregnant young people, including:

- 'I was scared the school was going to kick me out because I was pregnant';
- 'The school told me to leave when I got pregnant'; and
- "I was at school, but, by the time I was 20 weeks, I left because I was in and out of hospital. I asked the school for homework, but they didn't provide any support.'

2.76 Ms Mitchell noted that while some of the young people she interviewed would have attended religious schools that the SDA currently exempts from antidiscrimination laws relating to pregnancy, that 'wasn't something I looked at in particular'. However, the Australian Human Rights Commission's National Children's Report 2017 did recommend the following:

The Australian Government, through the Council of Australian Governments' Attorneys-General Council, should work with states and territories to review their laws, policies and practices to ensure that discrimination against a child or young person on the ground of their

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84 Independent Education Union, Submission 59, p. 3.
85 Independent Education Union, Submission 59, p. 2.
87 Ms Megan Mitchell, National Children's Commissioner, Australian Human Rights Commission, Committee Hansard, 19 November 2018, p. 16.
2.77 In addition to these and other examples of adverse action allegedly taken by faith-based educational institutions under the current exemptions, which the committee published, the committee also received some other examples in camera.

2.78 However, not all evidence positing the harms caused by the exemptions relied on adverse action actually being taken by schools. As Mr Odgers of the Independent Education Union suggested:

...many staff and students in faith based schools, fearing persecution, have suppressed their sexual orientation or gender identity and/or their marital status and have been, and are being, harmed as a result.\(^89\)

2.79 One example reflecting this situation was provided by Ms Marlowe of Rainbow Families, who quoted a lesbian stepmother of five children:

'I teach at a conservative Catholic primary school and am constantly afraid that someone will find out and that I will lose my job. I'm the main income earner, and my employment is incredibly important. I worry that I'll lose my job. I worry that my employer won't give me a good reference if she finds out. This could affect my future employment possibilities. I feel like a criminal, and I've done nothing wrong.'\(^90\)

2.80 Similarly, Mr Benjamin Dudson told the committee that while he thoroughly enjoyed his Catholic education:

...the loneliest time of my life came in high school when I realised I was gay and felt I could not reach out to anyone for fear of being rejected and discriminated against.\(^91\)

2.81 Mr Dudson said that he felt left to deal with his sexuality alone:

I considered suicide, I considered somehow masking my sexuality for the duration of my life, I distanced myself from my family and friends as I tried to figure out how to survive as a young, gay person.\(^92\)

2.82 Mr Dudson went on to state:

If religious schools continue to be allowed to discriminate against LGTBQIA+ people, it sends a clear message to young queer people like I was, that you are not accepted, not welcome, and you are somehow wrong for being who you are. None of these are true, but it is what I felt growing

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89 Mr Anthony Odgers, Assistant Federal Secretary, Independent Education Union of Australia, Committee Hansard, 19 November 2018, p. 46.

90 Ms Felicity Marlowe, Executive Director, Rainbow Families Victoria, Committee Hansard, 19 November 2018, p. 7.

91 Mr Benjamin Dudson, Submission 10, p. 1.

92 Mr Benjamin Dudson, Submission 10, p. 1.
up and it is what a lot of students and staff feel on a daily basis in religious schools.  

2.83 For example, Mr Comensoli of the LGBTI Health Alliance stated that even if the exemptions aren't applied, teachers know they exist:

That hovers over employees in religious schools, and that means that there's an extra burden of threat hanging over these people. When teachers or staff want to go to their employer to complain about wages or conditions, they know that the school could terminate their employment on some unrelated ground, and there's no justification for that at all.  

2.84 On behalf of Rainbow Families Victoria, Ms Marlowe stated that if her children are at an otherwise supportive faith-based school, 'we worry that we could be just one new principal or one new school board member away from those exemptions being exercised'.  

2.85 The Principal of Carey Grammar Baptist School, Mr Phillip Grutzner, made a similar point in response to others' argument that the exemption is not used and therefore does not need to be removed:

The first question is the question of: 'We're not going to use the legislation; therefore, it doesn't matter.' My personal opinion is: why have the legislation in the first place if you're not going to use it? So we would be arguing to remove the legislation that allows an opportunity at some time in the future to discriminate.  

2.86 Some witnesses put to the committee that removing the exemptions would help address these problems. As Ms Marlowe of Rainbow Families stated:

I think that the most impactful thing that could occur as part of removing these exemptions is the lifting of the fear and of the daily fear that a child or a young person or a staff member would have going to work or school every day and not being able to be their authentic self.  

2.87 The Rainbow Catholics InterAgency for Ministry also opposed the current exemptions in the SDA 'which [allow] faith-based educational institutions to
discriminate against teachers, students and staff on the basis of their gender identity, sexual orientation, marital status or other attributes', stating that '[t]he existence of discriminative laws and practices are in contradiction to Catholic teachings and have lasting and damaging effects on the health and wellbeing of our whole community'.

**Other arguments supporting the removal of the exemptions**

2.88 The Human Rights Law Centre presented research indicating that Australia is out of step with other likeminded countries on this issue—namely New Zealand, the United Kingdom, Ireland and Canada.  

2.89 While these jurisdictions do have various relevant exemptions, Lee Carnie stated that '[i]n relation to discrimination against students, Australia is a clear outlier'. Further, while the situation is more complicated in these jurisdictions with regard to teachers and other employees, 'Australian laws are still at odds in explicitly singling out LGBT teachers and staff.'

2.90 Mr Rodney Croome also referred to a broadly representative survey of the LGBTI community which found overwhelming support for removing the exemptions.

2.91 Many submitters raised the issue of tax-payer funded schools discriminating against students. This was also highlighted by Ms Marlowe of Rainbow Families in her evidence to the committee:

> …we strongly believe that any educational institution receiving government funding should not be allowed to discriminate due to a person's sexuality, gender diversity, family structure or relationship status, be they a child, young person, family member, parent, carer or school staff member.

2.92 However, Adjunct Associate Professor Mark Fowler submitted that 'such arguments are misguided. They fail to account for the importance of associational freedom to democratic society and undermine liberal neutrality, autonomy and pluralism', elaborating that:

> The Australian Bureau of Statistics notes that ‘Nearly a third of Australians (30 per cent) reported in the Census that they had no religion in 2016.’

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103 Mr Rodney Croome, Spokesperson, Equality Tasmania and Spokesperson, just.equal, *Committee Hansard*, 19 November 2018, p. 2.  
104 See, for example, Mr Phil Browne, *Submission 21*; Church of the Flying Spaghetti Monster Australia, *Submission 29*; Minus18 Foundation, *Submission 134*.  
However, such calls for a ‘secular’ society often overlook the logical extension of the subsidy argument – that the 70% who profess a form of religious belief are also subsidising non-religious persons through the proportion of their taxation that is applied to public schools. Rather a truly neutral, democratic and pluralistic society will seek to most accurately reflect both the religious and non-religious sentiments that are exhibited within its underlying polity. In the context of this current Inquiry, this is most properly acquitted through the ongoing presence of both public schools and private religious schools.106

2.93 Finally, Mr Odgers of the Independent Education Union advanced that the exemptions are rarely used and unnecessary for religious schools—that is, sufficient protections for religious schools already exist.107 As Mr Odgers stated:

The IEUA believes that current requirement at common law requiring an employee to exhibit fidelity and good faith toward their employer is sufficient to address a situation where a staff member is alleged to have acted in a manner contrary to the ethos and fundamental principles of a school.108

2.94 This would be supported by contract and employment law. As Mr Odgers explained, employees of faith-based schools would have signed a letter of appointment that 'commits them contractually to respect the belief system of the school wherein they are employed'.109 In addition, many would be employed under an industrial instrument containing 'an extensive mission statement for the school and an obligation on individuals not to do anything that would offend the principles set out in that statement'.110 Removing the legislative exemptions would not change the current system which operates using contracts, and Mr Odgers did not see the basis for some religious schools' anxieties that they would be exposed to litigation.111

2.95 It should be noted that, with respect to Mr Odgers' evidence, Lee Carnie from the Human Rights Law Centre stated that:

…an employer can't contract out of discrimination law. So, even if there is a preference for the Education Union that it be contained in the terms of an

106 Adjunct Associate Professor Mark Fowler, Submission 46, pp. 20–21 (citations omitted).
107 Mr Anthony Odgers, Assistant Federal Secretary, Independent Education Union of Australia, Committee Hansard, 19 November 2018, p. 48.
108 Independent Education Union of Australia, Submission 59, p. 5.
109 Mr Anthony Odgers, Assistant Federal Secretary, Independent Education Union of Australia, Committee Hansard, 19 November 2018, p. 48.
110 Mr Anthony Odgers, Assistant Federal Secretary, Independent Education Union of Australia, Committee Hansard, 19 November 2018, p. 48.
111 Mr Anthony Odgers, Assistant Federal Secretary, Independent Education Union of Australia, Committee Hansard, 19 November 2018, p. 49.
employment contract, if the exemption is removed from the Sex Discrimination Act, schools would be required to comply with that.  

**Should the application of the exemptions to students differ from their application to teachers?**

2.96 As noted in chapter 1, the exemptions recommended in the Religious Freedom Review in relation to students are different from those in relation to employees.

2.97 Some religious groups giving evidence to the inquiry acknowledged that students and employees differ in important ways, but stopped short of advocating for the removal of the exemptions in relation to either group. For instance, Archbishop Comensoli of the Catholic Bishops Conference noted that staff are employed:

…at least to be supportive of a particular identity and mission, stated up-front from the beginning, just as you would in any circumstance. The more senior the role within employment the more that that applies.

2.98 However, Archbishop Comensoli suggested that the situation in regards to students is different, noting that students 'do not come to a school having signed up to a mission or ethos in an employment contract or any sort of contract'. Nonetheless, representatives of the Bishops Conference and the Catholic Education Commission indicated that there might still be some need for the exemption in relation to students.

2.99 Representing the Islamic Schools Association, Mr Salman observed that teachers have more power and authority in their actions than students, and students are more vulnerable so schools need to 'tread very carefully'. However, the Islamic Schools Association stated that the current exemptions strike 'a reasonable balance', giving flexibility to schools to act according to the religious beliefs of the school. For example, Mr Salman hypothesised that:

If a student were to come out as being same-sex attracted then, as long as they kept that to themselves and were not advocating for that and were not trying to influence other students in that regard, I think the school would

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112 Lee Carnie, Senior Lawyer, Human Rights Law Centre, Committee Hansard, 19 November 2018, p. 60.

113 Archbishop Peter Comensoli, Delegate, Australian Catholic Bishops Conference, Committee Hansard, 19 November 2018, p. 28.

114 Archbishop Peter Comensoli, Delegate, Australian Catholic Bishops Conference, Committee Hansard, 19 November 2018, p. 28.

115 Mr Jeremy Stuparich, Public Policy Director, Australian Catholic Bishops Conference, Committee Hansard, 19 November 2018, p. 29; Mr Ray Collins, Acting Executive Director, National Catholic Education Commission, Committee Hansard, 19 November 2018, p. 29.

116 Mr Adel Salman, Islamic Schools Association of Australia, Committee Hansard, 19 November 2018, p. 68.

117 Mr Adel Salman, Islamic Schools Association of Australia, Committee Hansard, 19 November 2018, p. 68.
have no issue. It is when a student is advocating for that…that would be a
problem.\textsuperscript{118}

2.100 Mr Salman added that a school would not take any steps against that student:
…as long as the student was generally abiding by the school's values and
ethos and was not advocating for a particular view that was in contravention
of what was being taught in the school.\textsuperscript{119}

2.101 However, other witnesses supported the removal of the exemption in relation
to both students and teachers.\textsuperscript{120} Mr Jonathon Hunyor, Chief Executive Officer of the
Public Interest Advocacy Centre, supported a consistent approach in relation to
students and staff.\textsuperscript{121} He suggested that 'trying to draw some sort of line between how
we treat people under 18 and how we treat people over 18 really doesn't make
sense'.\textsuperscript{122}

2.102 Jamie Gardiner also suggested that removing the exemptions only for
students, and not teachers, would continue to harm students:

[I]n a way, discriminating or holding the sword of Damocles over the
heads of teachers and staff is itself indirect discrimination against LGBTI
students. You cannot possibly have safe and equal education in a school
where your teachers have to hide part of themselves and cannot support
you, as was said before. It is essential that teachers and other staff be
covered by the same equal opportunity protections and antidiscrimination
protections as the students and everyone. It's an extension of an existing
right. To split the two makes no logical sense.\textsuperscript{123}

2.103 A similar point was made by Mr Comensoli of the LGBTI Health Alliance,
who explained the need to support students who are sexually and gender diverse,
saying 'amending laws for students but not teachers is unjustifiable. Teachers facing
discrimination at faith based schools on the basis of their sexual orientation or gender
identity can't support students'.\textsuperscript{124}

\textsuperscript{118} Mr Adel Salman, Islamic Schools Association of Australia, \textit{Committee Hansard},
19 November 2018, p. 70.

\textsuperscript{119} Mr Adel Salman, Islamic Schools Association of Australia, \textit{Committee Hansard},
19 November 2018, p. 70.

\textsuperscript{120} See, for example, Ms Anna Brown, Director of Legal Advocacy, Human Rights Law Centre,
\textit{Committee Hansard}, 19 November 2018, p. 52.

\textsuperscript{121} Mr Jonathon Hunyor, Chief Executive Officer, Public Interest Advocacy Centre, \textit{Committee
Hansard}, 19 November 2018, p. 54.

\textsuperscript{122} Mr Jonathon Hunyor, Chief Executive Officer, Public Interest Advocacy Centre, \textit{Committee
Hansard}, 19 November 2018, p. 59; also see Ms Felicity Marlowe, Executive Director,

\textsuperscript{123} Jamie Gardiner, Vice-President, Liberty Victoria, \textit{Committee Hansard}, 19 November 2018,
p. 5.

\textsuperscript{124} Mr Daniel Comensoli, Policy Analyst, National LGBTI Health Alliance, \textit{Committee Hansard},
19 November 2018, p. 5.
Options for reform

2.104 In the course of advocating their position in favour of or against the existing legislative exemptions, some witnesses suggested specific amendments or broader reforms.

2.105 In particular, a number of witnesses supported amendments that would draw on existing Tasmanian antidiscrimination law.125 As discussed in chapter 1, Tasmanian law has a much narrower exemption than current Commonwealth law. Former Tasmanian Anti-Discrimination Commissioner, Ms Robin Banks, explained:

There's a general prohibition against discrimination by education providers in relation to all of the protected characteristics, and, while there are exemptions in the act—or defences, as they are for faith based organisations—they relate only to exempting conduct where the discrimination is on the ground of religious belief, affiliation or activity. A school could refuse to employ or decide not to employ a person in a relevant job if the person wasn't a person of the school's faith.126

2.106 Ms Banks further clarified that the legislation does not permit discrimination based on the religious belief of the discriminator; rather, ‘it is the religious belief, affiliation or religious activity of the person against whom the discrimination is directed’.127 In 2015, Tasmania also introduced an exemption relating to students allowing faith-based schools to discriminate only in relation to a student's first enrolment at a school, not in relation to subsequent enrolments, suspension or expulsion.

2.107 Ms Banks also noted, as context, that the Catholic Education Office had indicated that from time to time that it is forced to make a choice between prospective students, and it desired the ability to preference a child of faith or of a faith-based family.128

2.108 Mr Rodney Croome of Equality Tasmania informed the committee that according to Equal Opportunity Tasmania, over the 20 years that Tasmania has had these laws, there have been no claims of discrimination by staff or students in Catholic or independent schools. Further, Mr Croome was not aware of any religious-based education authority that has found the laws to be onerous, and there has been no

125 See, for example, Mr Rodney Croome, Spokesperson, Equality Tasmania and Spokesperson, just.equal, Committee Hansard, 19 November 2018, p. 1; Jamie Gardiner, Vice-President, Liberty Victoria, Committee Hansard, 19 November 2018, p. 3; Ms Brenda Appleton, Chair, Transgender Victoria, Committee Hansard, 19 November 2018, p. 52; Mr Jonathon Hunyor, Chief Executive Officer, Public Interest Advocacy Centre, Committee Hansard, 19 November 2018, p. 54; Ms Robin Banks, Committee Hansard, 19 November 2018, p. 55; Mr Sam Watson, Committee Hansard, 19 November 2018, p. 55.

126 Ms Robin Banks, Committee Hansard, 19 November 2018, p. 59.

127 Ms Robin Banks, Committee Hansard, 19 November 2018, p. 59.

128 Ms Robin Banks, Committee Hansard, 19 November 2018, p. 55.
public debate to suggest this is the case. Indeed, Mr Croome told the committee that:

…the consensus I have from teachers and students who are LGBTI in the Tasmanian Catholic and independent schools systems is that the culture of those schools has changed immensely over the 20 years in no small part due to the fact that our Anti-Discrimination Act doesn't allow discrimination.

2.109 Notwithstanding these arguments, the Australian Association of Christian Schools submitted that Tasmania’s legislation 'does not provide adequate freedom to religious schools'. It posited that the law is insufficiently clear and that schools are vulnerable to legal action because of this uncertainty:

 Until the law in Tasmania is tested it is unclear what will be considered lawful. Faith-based schools do not have the clarity they need to be certain that they have the freedom to operate in ways that are consistent with their beliefs. If the Commonwealth Government was to adopt the model of Tasmania, it would be failing to protect the freedom of faith-based schools.

2.110 Ms Anna Brown of the Human Rights Law Centre proposed specific amendments to the SDA which, in effect, would remove the current exemptions. She also expressed concern about leaked recommendations of the Religious Freedom Review, particularly the way in which they proposed 'exceptionalism around sexual orientation and gender identity and relationship status, compared with other attributes'. Ms Brown further stated:

 We don't believe it's necessary to introduce or retain exemptions in relation to the protected attributes that are the subject of this inquiry based on what's been described as upholding the religious ethos or values of a religious school. This is because…employment law already allows employers to make employment decisions to uphold a particular ethos within an organisation, and employees already have an obligation of fidelity and

129 Mr Rodney Croome, Spokesperson, Equality Tasmania and Spokesperson, just.equal, Committee Hansard, 19 November 2018, p. 1; also see, for example, Mr Anthony Odgers, Assistant Federal Secretary, Independent Education Union of Australia, Committee Hansard, 19 November 2018, p. 46.

130 Mr Rodney Croome, Spokesperson, Equality Tasmania and Spokesperson, just.equal, Committee Hansard, 19 November 2018, p. 1.

131 Australian Association of Christian Schools, Submission 39, p. 4.

132 Ms Anna Brown, Director of Legal Advocacy, Human Rights Law Centre, Committee Hansard, 19 November 2018, pp. 52–53; also see amendments proposed by, for example, Mr Jonathon Hunyor, Chief Executive Officer, Public Interest Advocacy Centre, Committee Hansard, 19 November 2018, pp. 53–54.

133 Ms Anna Brown, Director of Legal Advocacy, Human Rights Law Centre, Committee Hansard, 19 November 2018, pp. 56–57.
loyalty to their employer, which means that they can't act in a way that undermines their employer.  

2.111 Regarding the protection of religious freedoms, Ms Brown expressed support for, in future, an exemption that would allow a religious school to discriminate on the basis of religion in particular circumstances—that is, the exemption would:

...only allow discrimination on the basis of religious belief and it would have to be part of the inherent requirements of the position held by the employee and also necessary to conform with the doctrines, tenets and beliefs of that religion.  

2.112 More broadly, representatives of the Human Rights Law Centre supported the protection of the right to freedom of thought, conscience, religion and belief in Australian law, and saw a charter of human rights as the most appropriate mechanism for this:

So, ideally, we would say the removal of these exemptions would come as part of a comprehensive modernisation and consolidation of antidiscrimination laws and, we would also say, as part of the introduction of a federal human rights act that protects freedom of religion and belief from government overreach within a robust framework that protects all human rights.  

2.113 Several other witnesses also expressed support for a charter of rights that would protect all rights in a way that is, in their view, appropriately balanced.  

2.114 In respect of amendments to the SDA, Ms Megan Mitchell, National Children's Commissioner, told the committee that the Australian Human Rights Commission supports removing subsection 38(3) in its entirety, but also supports other changes:

The position of the commission is that there should be alternatives to the current system of religious exemptions to antidiscrimination laws that do recognise a protected attribute for freedom of religion and belief.  

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134 Ms Anna Brown, Director of Legal Advocacy, Human Rights Law Centre, Committee Hansard, 19 November 2018, p. 52; also see, for example, Mr Anthony Odgers, Assistant Federal Secretary, Independent Education Union of Australia, Committee Hansard, 19 November 2018, p. 48.

135 Ms Anna Brown, Director of Legal Advocacy, Human Rights Law Centre, Committee Hansard, 19 November 2018, p. 53.

136 Ms Anna Brown, Director of Legal Advocacy, Human Rights Law Centre, Committee Hansard, 19 November 2018, p. 52; also see Ms Anna Brown, Director of Legal Advocacy, and Lee Carnie, Senior Lawyer, Human Rights Law Centre, Committee Hansard, 19 November 2018, p. 56.

137 See, for example, Ms Robin Banks, Committee Hansard, 19 November 2018, p. 61; Mr Jonathon Hunyor, Chief Executive Officer, Public Interest Advocacy Centre, Committee Hansard, 19 November 2018, p. 61; Northern Territory Anti-Discrimination Commissioner, Submission 31, p. 2.
In advocating for the removal of the exemptions, Mr Jonathon Hunyor of the Public Interest Advocacy Centre emphasised the importance of simplicity, noting that the drafting and legal interpretation of current discrimination law is 'notoriously complicated'. He suggested that this 'is particularly unhelpful when it comes to Australians understanding their rights and ensuring they're protected and respected'.

On behalf of the Catholic Archdiocese of Melbourne, Mr Francis Moore expressed concern with religious freedoms being expressed as an 'exemption' in antidiscrimination law rather than as a positive right. He stated that the recognition of religious freedoms:

...as exemptions rather than as rights can give rise to the perception they are less significant as rights because they are framed as exemptions rather than rights. We understand that rights need to be balanced. But I think the challenge that we have is: why are our rights recognised as exemptions when others are recognised in terms of rights?

Archbishop Comensoli of the Catholic Bishops Conference also supported 'getting a positive statement into legislation around religious freedom as a fundamental right'. He suggested that this:

...might start to enable the possibility of recognising this right in its fullest sense, alongside all the other various rights that we enjoy in Australia, such that there are then mechanisms by which balancing can happen rather than one right trumping another.

The representative of Christian Schools Australia, Mr Mark Spencer, reiterated what his organisation had put to the Religious Freedom Review:

Firstly, we want to redefine discrimination properly so that we have a better understanding of it and the public has a better understanding of it, and to say that there is a need to balance rights. Secondly, we want to incorporate

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139 Mr Jonathon Hunyor, Chief Executive Officer, Public Interest Advocacy Centre, *Committee Hansard*, 19 November 2018, pp. 53–54; also see some discussion about the possible benefits of ensuring that the approach taken by faith-based educational institutions is clear and transparent, by for example, Mr Anthony Odgers, Assistant Federal Secretary, Independent Education Union of Australia, *Committee Hansard*, 19 November 2018, p. 47; Ms Anna Brown, Director of Legal Advocacy, Human Rights Law Centre, *Committee Hansard*, 19 November 2018, p. 57.

140 Mr Francis Moore, Executive Director Administration, Catholic Archdiocese of Melbourne, *Committee Hansard*, 19 November 2018, p. 23.

141 Archbishop Peter Comensoli, Delegate, Australian Catholic Bishops Conference, *Committee Hansard*, 19 November 2018, p. 27.

142 Archbishop Peter Comensoli, Delegate, Australian Catholic Bishops Conference, *Committee Hansard*, 19 November 2018, p. 27.
protections for religious freedom that allow faith communities to live out their faith in a balanced and proportional way.\textsuperscript{143}

2.119 It should be noted that, with respect to possible reforms and as discussed in chapter 1, evidence from the Attorney-General's Department discussed the technical implications of various amendments, indicating that amendments would need to be closely considered.\textsuperscript{144}

2.120 Furthermore, a large number of witnesses\textsuperscript{145} and submitters\textsuperscript{146} from organisations across the spectrum—including organisations that support the existing exemptions as well as those that oppose them—supported the release of the full report of the Religious Freedom Review, in order to put the leaked recommendations in context and better inform public debate.

\textbf{Committee view}

2.121 The leak of the recommendations of the Religious Freedom Review caused great concern in much of the community, not least because it appears many Australians were unaware of the broad exemptions to discrimination laws provided to faith-based educational institutions. The issue sparked deep and understandable concern regarding the possibility of a student being expelled from a school solely because of their sexuality. It is clear that action must be taken to address this issue.

2.122 In the first instance, the government should publish the full report of the Religious Freedom Review. The Expert Panel heard from over 15,000 Australians who took the time to engage with this significant review. While the recommendations are now available, the public still does not know the basis on which the Panel reached those conclusions. It is telling that so many participants in this inquiry—even those holding opposing views—support the release of the Panel's full report to better inform public debate.

2.123 In particular, the report and findings of the Religious Freedom Review are pertinent to both the subject of this inquiry and to any legislation on this issue that may be introduced to the Parliament, by any party, in the coming days or weeks.

2.124 The fact that the government may not have yet considered and finalised its response to the review is not a sound basis for not releasing it now. It is open to the government to publish the report now, and subsequently finalise its position on the

\textsuperscript{143} Mr Mark Spencer, Executive Officer, Policy, Governance and Staff Relations, Christian Schools Australia, \textit{Committee Hansard}, 19 November 2018, p. 36.

\textsuperscript{144} Attorney-General's Department, \textit{Submission 67}, p. 8.

\textsuperscript{145} See, for example, Jamie Gardiner, Vice-President, Liberty Victoria, \textit{Committee Hansard}, 19 November 2018, p. 6; Archbishop Peter Comensoli, Delegate, Australian Catholic Bishops Conference, \textit{Committee Hansard}, 19 November 2018, p. 22; Mr Ray Collins, Acting Executive Director, National Catholic Education Commission, \textit{Committee Hansard}, 19 November 2018, p. 22.

\textsuperscript{146} See, for example, Association of Heads of Independent Schools of Australia, \textit{Submission 2}, p. 1; Law Council of Australia, \textit{Submission 88}, p. 8.
issues raised. Indeed, this would allow the government the benefit of a more informed public debate on which to draw.

2.125 Further, apparent leaks of the Review's recommendations show that the Panel recommends amending legislation to permit discrimination by faith-based schools against students or employees on the basis of sexual orientation, gender identity or relationship status. The weight of evidence to the committee indicated that this kind of legislation would not provide adequate protections for LGBTIQ+ communities. The committee is concerned that the Panel's recommendations would carve out and entrench discrimination against certain groups in particular—that is, on the basis of sexual orientation, gender identity or relationship status, in particular circumstances.

**Recommendation 1**

2.126 The committee recommends that the government reject recommendations 5 and 7 of the Religious Freedom Review, which permit faith-based educational institutions to single out certain groups for discrimination on the basis of sexual orientation, gender identity or relationship status, in particular circumstances.

**Recommendation 2**

2.127 The committee recommends that the government immediately release to the public the full report and findings of the Religious Freedom Review.

2.128 The committee considers that all students should be protected from discrimination on the basis of gender, sexuality, and the other attributes covered by the Sex Discrimination Act. The committee heard harrowing stories of the suffering that this discrimination can and has caused. Even where the exemptions are not acted upon, the mere fact that the discrimination is permitted by law sends a destructive message to children and reinforces homophobia. The children who might suffer discrimination under these exemptions are often experiencing the most vulnerable period of their lives. It is critical that legislation which enables and exacerbates the trauma of children be removed.

2.129 The committee was pleased to hear various faith-based educational institutions indicate that they have not, would not, and do not wish to expel students on the basis of their sexuality. It was also positive to hear that these schools generally consider the child's best interests in the first instance.

2.130 However, if it is the case that the exemptions are not being used against students, that is no reason to maintain them. Rather, it is reason to remove them as unnecessary. The committee did not hear any satisfactory examples of cases in which a school might need these exemptions in order to uphold its religious ethos.

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Recommendation 3

2.131 The committee recommends the Australian Government amend section 37 and remove subsection 38(3) of the *Sex Discrimination Act 1984*, and amend any other relevant legislative provisions, to prohibit discrimination against students on the grounds of the protected attributes in the Act.

2.132 Regarding teachers and other employees, the committee heard mixed evidence about whether the existing legislative exemptions are necessary for schools to uphold their ethos.

2.133 It is clear that some schools simply have no desire to rely on the exemptions. However, other evidence suggested that the exemptions are necessary and minimise the risk of schools being caught up in litigation.

2.134 The committee understands that schools are anxious to ensure that their staff uphold the ethos of the school. Nonetheless, it has not been fully established that schools need to be able to discriminate on the basis of a teacher's *attribute*, as distinct from their *conduct*. If an employee conducts themselves in the school community in accordance with the school's values, it is not clear why there should be scope for adverse action to be taken against them simply because they hold a particular attribute.

2.135 The committee is concerned about the stress and fear experienced by employees as a result of these exemptions. Even if a school is otherwise supportive, the fact that the exemptions exist creates a fundamental risk to employees' livelihood, particularly if the school's attitude were to change. Importantly, the exemptions do not only harm staff. Students are also being sent the wrong message about what is and is not acceptable in modern Australia.

2.136 In addressing these issues—and removing the current exemptions relating to both students and teachers—the committee considers that Tasmanian antidiscrimination law provides a useful model. As was explained by various witnesses, the Tasmanian laws appear to have worked successfully for over 20 years. They also appear to strike the right balance between ensuring that students and staff are protected from unreasonable and harmful discrimination, while also ensuring that religious schools can maintain their religious ethos. Consideration should be given to amending Commonwealth legislation to remove the current exemption in relation to both students and teachers, while also maintaining some protections for religious schools.

Recommendation 4

2.137 The committee recommends that further consideration be given to amending the *Sex Discrimination Act 1984*, and any other relevant legislation, to prohibit discrimination by faith-based educational institutions against teachers and staff on the grounds of the protected attributes in the Act. In so doing, consideration should be given to the relevant provisions of the *Anti-Discrimination Act 1998* (TAS) discussed in this report.

2.138 The committee acknowledges that this debate takes place in a broader human rights context. In the committee's view, the existing exemptions do not strike the right
balance between the right to religious freedom and other rights, such as the right to equality and non-discrimination.

2.139 However, it is important that faith-based educational institutions be able to uphold their ethos in a reasonable way. Australia's religious communities should feel that their religious freedoms are respected and protected. The committee considers that, within appropriate bounds, there is scope to affirm positively and protect religious freedoms in Australia.

Recommendation 5

2.140 The committee recommends that consideration be given to inserting in law a positive affirmation and protection of religious freedom in Australia that is appropriately balanced with other rights.

Senator Louise Pratt
Chair
DISSENTING REPORT OF THE COALITION SENATORS

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Introduction

1. On 13 November 2018, the Senate referred the following matter to the Legal and Constitutional Affairs References Committee for inquiry and report:

   Legislative exemptions that 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, with particular reference to proposals for amendments to current legislation, and any related matters.

2. The context of the current referral is the introduction of the Discrimination Free Schools Bill 2018 (the Bill) by the Australian Greens as well as the leak in the Sydney Morning Herald of recommendations purporting to be of the Ruddock Review. It is appropriate then to conduct an analysis of the relevant issues through examination of the Bill, and indeed this is the approach adopted by many submissions to the Inquiry. The Bill proposes to remove the existing exemptions at section 38 of the Sex Discrimination Act 1984 (SDA) provided to educational institutions that are conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed. Those exemptions cover the employment of staff, the engagement of contract workers and the provision of education and training. The Bill also clarifies that such an institution cannot be a ‘body established for religious purposes’ under section 37 of the SDA.
3. This committee has not been established to undertake an examination of the substantial issues raised by this question in good faith. It has been hurried in a way that exposes its true purpose: to provide a platform for some Labor and Greens Senators to project their pre-determined views onto a larger stage, for their own political advantage. Those involved should be condemned for doing so.

4. It is therefore unsurprising that the Senators who are a party to this dissenting report cannot support the majority report. Our reasons for that view are set out in the remainder of this report. In summary, it is our view that the committee’s work demonstrates the need for further consideration to be given to a positive and stand-alone protection of religious freedom in Australia.

Inconsistency with the relevant international law

5. The Bill must be considered with reference to the applicable international human rights. The Statement of Compatibility with Human Rights that accompanies the Bill is two paragraphs in length and only refers to one of the applicable rights, the right to equality and non-discrimination. It fails to reference the right to religious freedom and, for the reasons set out below, thus discloses its extraordinarily one-sided and inadequate consideration of the applicable human rights. Indeed, as the following analysis shows, the Bill could be described as undermining human rights in the name of arbitrarily selected human rights. It does not provide an adequate statement of the relevant human rights, and limits human rights in a way that is not permissible in international law.
6. The primary protection to religious freedom to which submitters drew attention is contained in Article 18 of the *International Covenant on Civil and Political Rights 1966*, which protects freedom of thought, conscience and religion. That protection extends to both individuals and institutions.\(^1\) The UN General Assembly, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (the *Religious Declaration*), which has been used by the United Nations Human Rights Committee for interpretive purposes,\(^2\) enfraps within that protection the right to ‘to establish and maintain appropriate charitable or humanitarian institutions’.\(^3\) The provision of education is recognised as a charitable purpose in Australian Commonwealth law\(^4\) and has also been recognised as such within various statements of the United Nations Special Rapporteur on freedom of religion or belief.\(^5\)

7. The former United Nations Special Rapporteur on freedom of religion or belief Heiner Bielefeldt has emphasized the importance of religious institutional autonomy in the following terms:

> Freedom of religion or belief also covers the right of persons and groups of persons to establish religious institutions that function in conformity with their religious self-understanding. This is not just an

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\(^1\) Human Rights Committee, *General Comment No 22: Article 18*, 48th sess, (20 July 1993), [8].


\(^3\) UN General Assembly, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, 25 November 1981, A/RES/36/55, Article 6.

\(^4\) Section 12(1) *Charities Act 2013* (Cth).

external aspect of marginal significance. Religious communities, in particular minority communities, need an appropriate institutional infrastructure, without which their long-term survival options as a community might be in serious peril, a situation which at the same time would amount to a violation of freedom of religion or belief of individual members (see A/HRC/22/51, para. 25). Moreover, for many (not all) religious or belief communities, institutional questions, such as the appointment of religious leaders or the rules governing monastic life, directly or indirectly derive from the tenets of their faith. Hence, questions of how to institutionalize religious community life can have a significance that goes far beyond mere organizational or managerial aspects. Freedom of religion or belief therefore entails respect for the autonomy of religious institutions.⁶

8. This nation advocated for the importance of freedom of expression when Australia was seeking a position on the United Nations Human Rights Council, and subsequently having been elected to that body, we should be very cognizant of the importance of recognizing freedom of religion.

9. While not forming a part of its submission to the current inquiry, expressing similar sentiments, the Australian Human Rights Commission (AHRC) has in the past recognised that:

special provision for religious institutions is appropriate. It is reasonable for employees of these institutions to be expected to have a degree of commitment to and identification with the beliefs, values and teachings of the particular religion ... Accommodating the distinct identity of

religious organisations is an important element in any society which respects and values diversity in all its forms.\textsuperscript{7}

10. International human rights law stipulates that strict conditions must be satisfied in order for the manifestation of the freedom of religion or belief to be limited. The majority report states various generic principles for when limitations may be imposed upon the right to religious freedom. However, as further set out below, it fails to accurately apply those requirements to the matters considered by this Inquiry. Furthermore, in its consideration of the equality right, the majority report fails to recognise the general principle of international law that:

\begin{quote}
not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.\textsuperscript{8}
\end{quote}

The implications of this are further set out below.

11. In this context, the right to manifest religious belief at Article 18(3) may only be limited to the extent that it is ‘necessary’ in order to ‘protect … the fundamental rights and freedoms of others’. As now set out, the Bill fails to comply with this requirement. Moreover, the Statement of Compatibility with Human Rights does not engage with this requirement as it does not even identify Article 18 as a relevant right. As Professor Patrick Parkinson Dean of the TC Beirne School of Law at the University of Queensland noted in his submission:

\begin{quote}
[footnotes]
\end{quote}
As is well understood, different human rights are not infrequently in conflict with one another and balances must be found between them. So legislation that cherry picks Article 26 concerning non-discrimination, ignoring other rights guaranteed by the ICCPR, cannot be a proper implementation of that Convention. Article 26 must be read in the light of other Articles in the Convention, including Article 18 (freedom of religion), Article 22 (freedom of association) and Article 27 (rights of ethnic minorities).

12. In its submission the AHRC also recognised that the exemptions for religious schools exist to ‘balance’ religious freedom with non-discrimination:

Certain exemptions from federal anti-discrimination legislation for religious bodies and educational institutions established for religious purposes also seek to protect freedom of religion by balancing that right with the right to non-discrimination.9

13. Although the full report of the Expert Panel on Religious Freedom (the Ruddock Review) has not been tabled, the twenty recommendations of that review have been reported in the Sydney Morning Herald. Assuming that that reporting is accurate (which we cannot confirm), in respect of the permissible scope of limitations to the right to manifestations of religious belief the Ruddock Review recommended that:

Commonwealth, state and territory governments should have regard to the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights when drafting laws that would limit the right to freedom of religion.

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Similarly, last year the Chair’s foreword to the Australian Commonwealth Parliament Human Rights Sub-Committee Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry into the Status of the Human Right of Freedom of Religion or Belief concluded that ‘the Siracusa Principles provide guidance for interpreting the “limitations clauses” in the ICCPR, such as those found in Article 18(3)’.10

14. The United Nations Economic and Social Council’s Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights were promulgated by the American Association for the International Commission of Jurists in 1985. The Siracusa Principles state that ‘all limitation clauses shall be interpreted strictly and in favor of the rights at issue’. The Principles require that:

Whenever a limitation is required in the terms of the Covenant to be "necessary," this term implies that the limitation:

a. is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant,

b. responds to a pressing public or social need,

c. pursues a legitimate aim, and

d. is proportionate to that aim.

15. The Bill fails to satisfy the requirement of proportionality, as it extinguishes the right to religious freedom for a right that can be maintained through other means. The Institute for Civil Society (ICS) submitted:

It is not necessary in order to protect teachers and students from discrimination on the grounds of sexual orientation to give them State protection under anti-discrimination laws to disrupt and oppose the religious values and ethos of a religious school of which they are a part.\footnote{Institute of Civil Society, Submission 35, 11.}

16. The ICS submitted:

a balance of harms analysis favours the religious school over the teacher or the student because the teacher and student have many other options for employment or education. However, the school cannot recover its religious ethos once compromised … An individual applicant or employee whose beliefs or conduct contradict the doctrines, beliefs or practices of the religion of the religious employer will in almost all cases be able to find alternative employers where there is no such conflict.\footnote{Ibid, 12. Mark Spencer from Christian Schools Australia submitted similarly at Committee Hansard, 35.}

17. Professor Patrick Parkinson noted:

Because … the Discrimination Free Schools Bill [does] not include a provision affirming the positive right of faith-based schools and other faith-based organisations to employ staff, taking into account the school’s religiously defined raison d’être and corporate identity, those provisions cannot be reconciled with Australia’s international human rights obligations concerning freedom of religion.

18. Relevantly, the Siracusa Principles also state that ‘In applying a limitation, a state shall use no more restrictive means than are required for the
achievement of the purpose of the limitation.'\textsuperscript{13} The complete removal of the religious freedom of a school is clearly more restrictive than is required in order to progress the right to equality. As Dr Alex Deagon of the Queensland University of Technology argued:

In most circumstances there are other equivalent options reasonably available for those discriminated against, such as employment or enrolment in the public system or in private/independent schools which do not have incompatible religious convictions. The harm against religious educators is therefore likely to be much greater than that suffered by discriminated persons.\textsuperscript{14}

19. Furthermore, lawyer and Adjunct Associate Professor at the University of Notre Dame Mark Fowler submitted:

International law recognises that differential treatment will not be unlawful where a distinction is legitimate, reasonable and to pursue a recognised human right. The European Court of Human Rights has recognised that the autonomous ability of religious bodies to retain staff who can convey their identity "is indispensable for pluralism in a democratic society." Such freedoms are reasonable and legitimate components of a free and open society.

In light of its restrictions on these most fundamental considerations, the Bill cannot be said to be a proportionate means of limiting religious freedom, nor can it be considered to ‘use no more restrictive means than are required’ to progress equality.

\textsuperscript{13} Op cit., 11, paragraph 11.

\textsuperscript{14} Dr Alex Deagon, Submission 9, 16.
International human right to establish private religious schools

20. With particular regard to the position of faith-based schools, Article 18(4) of the ICCPR provides:

   The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

   This Convention right protects the right to establish private religious schools.\(^\text{15}\) This is the same right by which parents who do not wish their children to participate in religious instruction provided in public schools may excuse their children from that teaching.

21. As noted by the Australian Human Rights Commission:

   The [United Nations] Human Rights Committee has stated that the freedom from coercion to have or to adopt a religion or belief and the liberty of parents and guardians to ensure religious and moral education cannot be restricted.

22. The United Nations Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child each also provide relevant protections to children and their parents.\(^\text{16}\) The Convention on the Rights of the Child, which Australia has ratified, requires State Parties to ‘undertake to ensure the child such protection and care as is necessary for his or her wellbeing, taking into

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\(^{15}\) Manfred Nowak, CCPR Commentary, 2nd revised edition (Kehl: N P Engel, 2006), 443.

account the rights and duties of his or her parents ...’ 17 Article 14 protects the right of the child to ‘freedom of thought, conscience and religion’. 18 States must respect the ‘rights and duties of parents ... to provide direction to the child in the exercise of his or her right.’ 19 These rights similarly protect the right to establish private schools.

23. With reference to the Religious Declaration, Adjunct Associate Professor Fowler submitted:

The establishment and maintenance of such faith-based schools in accordance with their religious freedom rights necessitates their ability to exercise discretion over their leadership, their staff and their volunteers. 20

24. He argued:

Groups are only able to convey their identity through the collective character and efforts of the individuals who comprise them. A failure to grant "exemptions" would compel a body to forego the ability to define its character, goals and imperatives. Ultimately, it would remove the identity of the institution and deprive society of its unique voice. In effect, it would breach the right "to establish and maintain" the institution as a religious institution. 21

25. Many of the submitters who represented faith-based schools emphasised that their particular model of education requires ongoing discretion over staff as a

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18 Ibid art 14(1).
19 Ibid art 14(2). See also art 5, which contains a general requirement for State Parties to ‘respect the responsibilities, rights and duties of parents ... to provide ... appropriate direction and guidance in the exercise by the child of the rights contained in the Covenant.’
20 Mark Fowler, Submission 46, 7.
21 Ibid.
means to define the religious character of the institution and the education it provides. Mr Adel Salman appearing on behalf Islamic Schools Association of Australia submitted that staff ‘are expected to uphold the ethos and values of the school.’\textsuperscript{22} In a Christian context, a leading example of this reasoning was provided by Associated Christian Schools (ACS):

For Christian schools to fulfil their objects of providing education from a Christian worldview, maintaining an environment where Christian values prevail is essential. The key way that ACS Member Schools achieve this is the ability to select staff with a personal commitment to the Christian faith and a lifestyle that reflects this...lifestyle alone is not sufficient... ACS considers that maintaining strong allowances for faith-based organisations such as Christian Schools to hire staff who are able to uphold the school’s values and maintain a consistent witness in all aspects of their lives, is essential to enable Member Schools to fulfil their mandate to parents to provide education from a Christian worldview.

The ACS further submitted:

ACS Member Schools view adherence to the Christian faith as an essential requirement for employment, with no distinction being drawn between teaching and support staff ... In our Member Schools, all staff interact with parents and students and are integral parts of the Christian community of the school. This concept of community is essential if a Christian school is to fulfil its obligation to parents who enrol their children in these schools. Once an individual agrees to be bound by these rules and expectations, they agree to behave accordingly. In the Christian school, this understanding is an essential

\textsuperscript{22} Committee Hansard, 68.
element of the contractual and personal relationship between the school and parents.

26. Similarly, Christian Schools Australia (CSA) submitted:

this goes to the very heart of our identity as a religious school and the ability to uphold our faith and teachings in the classroom and our broader school community. As the Melbourne Declaration on Educational Goals for Young Australians recognises, education encompasses ‘intellectual, physical, social, emotional, moral, spiritual and aesthetic development’. At our schools, staff members are asked to share the school’s beliefs and to demonstrate an active Christian faith so that they can adequately fulfil their role in teaching, mentoring, and supporting students in a way that is consistent with the character of the school. Christian faith requires not simply holding Christian beliefs, but attempting to live according to those beliefs.

27. Dr Alex Deagon also acknowledged that:

Whether framed as exemptions to discrimination or as a legal right to select, allowing faith-based schools to select staff designed to consistently uphold this ethos is an essential aspect of maintaining this ability.23

28. The ICS submitted that the Bill would breach international law principles by preventing religious schools from maintaining their distinct religious ethos:

The effect of the Bill is that religious schools will be forced to employ persons whose beliefs or actions and lifestyles in relevant respects do not conform to the doctrines, beliefs or practices of the religion. This

23 Dr Alex Deagon, Submission 9, 4.
will limit the ability of those schools to ensure that staff are ambassadors for, and models of, the values of the religion. If religious schools are forced to employ staff who contradict the values of the religion by word or example, that will limit the ability of religious schools to provide a religious and moral education in accordance with the convictions of parents who voluntarily choose the value system of that school, contrary to the ICCPR and UN Declaration provisions.24

29. The Australian Association of Christian Schools (AACS) submitted:

This matter cuts to the essence of how we understand religious freedom rights. To remove the ability of religious schools to ensure their staff share their religious worldview is a direct limitation of their religious freedom rights. The Government would effectively push faith schools into an impossible position in which they would be compelled to either change their deeply held religious convictions by order of the State, to act against their convictions in significant ways, or to close.25

30. Against the presumptions seemingly underpinning the Bill, Dr Alex Deagon notes that:

The idea of religious freedom is to protect religious belief and practice from any prevailing orthodoxy (e.g. equality) which might oppose it. The idea is ‘worthless’ if it is allowed only when it fits in with that particular orthodoxy ... As Trigg powerfully observes, ‘the essence of religious freedom is that people are allowed to follow their religion, even if it is a different one from that of the majority. The

24 Institute of Civil Society, Submission 35, 7.
25 Australian Association of Christian Schools, Submission 49, 2.
accommodation of minority beliefs is what distinguishes democracy from a totalitarian state’.26

31. Adjunct Associate Professor Fowler also argued:

To fail to recognise the rights of faith-based institutions would strip the wider community of the unique voice of such bodies. It is no understatement to say that in the Western tradition associational freedom has been the single greatest preserve of the equality rights of the individual. It is precisely the freedom of individuals to aggregate around common concerns and elect leaders who are able to articulate their unique view to the majority that has given birth to the fundamental freedoms we enjoy today. Individual equality is best preserved by a plurality of institutions, whose capacity to advocate for the fundamental rights of their members enjoys strong protection at law. In modern Australia it is the practical, granular terms and scope of the exemptions in anti-discrimination law that determine whether these foundational freedoms are maintained.

The Bill Amounts to Religious Discrimination

32. Furthermore, various submitters argued that the Bill actually discriminates against religious believers as it imposes a burden that they alone encounter on the basis of their religious conviction. The particular burden was summarised by the AACS as follows:

For the Government to determine that religious educational institutions have no claim to act according to their beliefs in relation to sexuality, gender and relationships, is to carve out an area of religious

26 Dr Alex Deagon, Submission 9, 7.
conviction and to say that religious schools can no longer lawfully manifest those convictions.\textsuperscript{27}

33. Accordingly, Adjunct Associate Professor Fowler submitted:

The proposal for removal of the exemption raises the concern that religious institutions and believers are being subject to detrimental action solely on the basis of their religious belief, in contravention of the right to equality.\textsuperscript{28}

Referring to a decision of the European Commission on Human Rights, \textit{Verein Gemeinsam Lernen v Austria},\textsuperscript{29} he noted that the principles of equality have been extended to faith-based schools in various respects:

in that decision the Commission also confirmed that private schools have a right based on article 14 [right to equality] in the context of article 2 First Protocol to non-discriminatory conditions of existence, including equal access to State funding for schools of their type. Similarly, in \textit{Waldman v Canada}, the United Nations Human Rights Committee held that the differential treatment granted by Ontario to Roman Catholic religious schools, which were publicly funded, as opposed to schools of other religions, which were not, amounted to discrimination. The distinction drawn by the State could not be considered to be reasonable and objective, and thus violated Article 26.

34. Similarly, the ICS submitted ‘The Bill is discriminatory because it imposes a legal standard of discrimination law which applies only to religious organisations.’ The ICS stated:

\begin{itemize}
\item \textsuperscript{27} Australian Association of Christian Schools, \textit{Submission 49}, 2.
\item \textsuperscript{28} Mark Fowler, \textit{Submission 46}, 4.
\item \textsuperscript{29} (1995) 20 EHR CD 78.
\end{itemize}
Our society would not expect the ALP, the Liberal Party, or the Greens (also voluntary associations), to have to employ and retain persons who consistently spoke or acted against core party policy. So why should a law force a conservative religious school to justify to a human rights commission or a tribunal why it should not have to hire a gay rights activist maths teacher or vice versa?30

35. Adjunct Associate Professor Fowler asked:

Why should believers — be they Islamic, Jewish, Protestant, Hindu or any other faith — be prevented from coming together with their fellow believers to act upon the dictates of their faith that encourage humanitarian concern? No similar limitation is proposed for persons who are motivated to humanitarian acts absent religious compulsion. It's a bizarre conclusion, and it represents a form of discrimination on the basis of religious belief.31

36. Dr Alex Deagon argued that the removal of exemptions:

allows actions which violate their religious convictions, preventing them from holistically participating in a democratic society and undermining freedom and equality for these citizens and communities.32 ... As Trigg explains, uniform treatment can make ‘religious people feel like they are marginalised in their own society’ because they alone are subject to an unequal burden through generally applicable legislation. So religious people may resent their ‘commitments being ignored and that they are being treated unfairly and unequally... Obviously there is no doubt equality legislation is an

30 Institute of Civil Society, Submission 35, 9.
31 Mark Fowler, Submission 46, Supplementary Submission 1, 2.
32 Dr Alex Deagon, Submission 9, 5.
essential aspect of liberal democracy. But if administered in a coercive fashion without due attempts at accommodation and proportionality, it will burden some in society unnecessarily and inequitably.\textsuperscript{33}

37. Dr Deagon further articulated:

legally compelling [religious schools] to accept employees with views or conduct inconsistent with that perspective undermines their religious identity and, consequently, their democratic position as equal and valued citizens... And as Trigg emphasises, ‘the idea of reasonable accommodation highlights the need to adjust rules when they bear down unfairly on some categories, including religious believers’. As such the need to accommodate religious practices can be traced to equality itself.\textsuperscript{34}

38. By precluding the ability of religious believers to associate and form educational institutions founded on the basis of their religious beliefs, the Bill subjects them to a burden that they alone incur on the basis of that belief. It thus breaches the equality principle.

Summary

39. Returning to the scope of permissible limitations under the Article 18(3), and the \textit{Siracusa Principles}, in light of the foregoing analysis, the withdrawal of such foundational societal freedoms is not a proportionate means to progress the equality right. Rather, the Bill actually breaches the equality rights of religious believers. In light of these considerations, the Bill’s proposal is more restrictive of religious freedom than is required and is not a proportionate

\textsuperscript{33} Ibid, 7-8, 9.
\textsuperscript{34} Ibid, 13-4.
means to achieve the asserted countervailing rights under the international human rights law that Australia has ratified.

European Convention on Human Rights

40. Although not binding on Australia, the decisions of the European Court of Human Rights are highly influential in the jurisprudence of the United Nations Human Rights Committee and the provisions of the European Convention on Human Rights bear strong analogy to the ICCPR, particularly Article 9 concerning freedom of thought, conscience and religion. The European Court of Human Rights has a long-running and established jurisprudence that affords high levels of protection to religious institutional autonomy. This is based upon the link between such autonomy and democratic freedom and pluralism. For example, in Hasan v Bulgaria the European Court of Human Rights stated:

the believer's right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully free from arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which article 9 affords. It directly concerns not only the organisation of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members. Were the organisational life of the community not protected by article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable.35

35 Hasan and Chaush v Bulgaria (European Court of Human Rights, Grand Chamber, Application no. 30985/96, 26 October 2000), cited in Mark Fowler, submission 46, 9.
41. The First Protocol to the European Convention on Human Rights contains the right corresponding to Article 18(4) of the ICCPR. It states that:

   No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

42. In its consideration of Article 2 of the First Protocol the Court has applied the principles to the context of private education:

   The second sentence of Article 2 (P1-2) aims in short at safeguarding the possibility of pluralism in education which possibility is essential for the preservation of the "democratic society" as conceived by the Convention ... The right set out in the second sentence of Article 2 (P1-2) is an adjunct of this fundamental right to education ... It is in the discharge of a natural duty towards their children - parents being primarily responsible for the "education and teaching" of their children - that parents may require the State to respect their religious and philosophical convictions. Their right thus corresponds to a responsibility closely linked to the enjoyment and the exercise of the right to education.36

43. In *Jordebo v Sweden* the European Commission on Human Rights applied these principles to conclude that the Article 2 of the First Protocol guarantees the right to start and run religious educational institutions:

   the principle of the freedom of individuals, forming one of the cornerstones of the Swedish society, requires the existence of a possibility to

36 *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1979-80) 1 EHRR 711, at 21-22.
run and to attend private schools ... In particular, it was pointed out that it should be possible at a private school to give certain topics a more, and others a less, prominent position than that given in public schools and that the activity in a private school should be allowed "within very wide ranges to bear the stamp of different views and values".\textsuperscript{37}

44. In that decision, the Commission criticised the Swedish Government, which:

seem[ed] to regard the right to keep a school as something entirely within "le fait du Prince" [permissible acts of government]. But this is clearly different from the mainstream in the countries of the High Contracting Parties, necessitating an autonomous way of judgment... The Government seem to look at schooling the same way as at military service, where of course no competing “private regiments” could be tolerated.\textsuperscript{38}

45. The Bill demonstrates no consideration of these issues. In its proposal to completely remove the religious identity of private religious schools the \textit{Discrimination Free Schools Bill 2018} appears to proceed from the same totalitarian presumptions as that remonstrated by the European Commission on Human Rights.

Students

46. Certain distinct considerations arose in respect of students within faith-based schools. The AACS clarified a common concern:

\textsuperscript{37} \textit{Ingrid Jordebo Foundation of Christian Schools v Sweden} (European Commission of Human Rights, Application No. 11533/85, 7 May 1985).

\textsuperscript{38} \textit{Ingrid Jordebo Foundation of Christian Schools v Sweden} (European Commission of Human Rights, Application No. 11533/85, 7 May 1985).
Christian schools have no desire to expel students on the grounds of sexuality orientation or gender identity. However, in the absence of exemptions, schools have no adequate legal protection to:

- Teach in accordance with widely held Christian beliefs regarding sexuality, gender and relationships;
- Manage the school community and student behaviour in ways that are appropriate to the faith of the school; and
- Employ only people who share their beliefs and manifest those beliefs in their own lives.\(^{39}\)

47. As noted at paragraph 2.32 of the majority report witnesses were asked to provide examples of cases in which the legislative exemptions ‘have been involved or invoked’. Due to the sensitive nature of the matters, several submitters provided confidential examples. At paragraph 2.130 the majority report concludes that ‘if it is the case that the exemptions are not being used against students, there is no reason to maintain them.’ However the report itself acknowledges that examples were provided in camera by schools where reliance was placed upon the exemptions. Several submitters opposed the passage of the Bill on the basis of various practical circumstances that they asserted would arise were the Bill to pass into law. Without disclosing the personal circumstances of any individual, their submissions highlighted the kinds of matters that have arisen, and may foreseeably arise in the future. The ICS submitted:

A student may assert the right to use the change rooms and toilets of the gender they identify as rather than their biological gender. A student may assert the right to take a same sex partner to a school

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dance or to run and publicise a student club celebrating the gay lifestyle ... If the school is unable to set and enforce behaviour standards and limit the promotion of views which are antithetical to the religion because of the threat of discrimination lawsuits by the student, the school is unable to maintain its religious ethos and modelling of the beliefs and values of the religion... If the Bill is enacted, a student who wanted to start a Gay Pride Club or a Gay Pride page on the student intranet to promote LGBTI lifestyles in a traditional Muslim, Jewish or Christian school could claim that a refusal by the school was prohibited discrimination under the Sex Discrimination Act and take the school to the Human Rights Commission and the Federal Court.40

48. Similarly, Professor Patrick Parkinson asked:

Should a person born male, and who has reached adulthood with no hormonal or surgical treatment that alters physical characteristics associated with being male (including genitalia, body mass and physical strength), be regarded, for the purposes of sex-segregated sporting competitions as female, because the person feels and presents as female? ... Is it unlawful to continue referring to the boy by the first name under which he was enrolled or which is recorded on his birth certificate? If the child is in a mixed gender school, must it, as a matter of law, allow the child to wear the girls’ uniform to the extent that it is different from the boys’ uniform? In high school, does non-discrimination require allowing a child who feels and identifies as being of the opposite sex, to participate in sex-segregated sports competitions organised for that opposite sex?

40 Institute of Civil Society, Submission 35, 8.
Does the law require a natal female who now wishes to transition to identify as male, to be accepted by a boys’ school? Conversely, does it require that a natal male who now wishes to transition to identify as female be allowed to enrol in a girls’ school? What is in the best interests of both the student experiencing gender dysphoria and the other students at the school, especially considering that single-sex schools are established for a host of well-considered reasons? These are complex and difficult questions.41

49. Christian Schools Australia submitted:

Schools must be able to make reasonable requests of the students to respect the school’s values and beliefs regarding sexuality, gender and relationships even if that student does not agree with the school’s beliefs. Changing the existing exemptions in the *Sex Discrimination Act* in the way that has been reported in the media, would not give schools the ability to confidently maintain behaviour standards that are in line with the beliefs of the school.42

In concluding that as ‘the exemptions are not being used against students, there is no reason to maintain them’, the majority report appears to misunderstand that, in certain circumstances, even the mere making of a request that a student or staff member respect the school’s values could be an action that requires reliance on the exemptions to be lawful (at least on the law as it currently stands). In light of the foregoing examples, it cannot be said that the ‘committee did not hear any satisfactory examples of cases in

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41 Professor Patrick Parkinson, *Submission 4*, 6-7.
which a school might need these exemptions in order to uphold its religious ethos.\textsuperscript{43}

50. Professor Patrick Parkinson argued that the constitutional basis for the provisions of the \textit{Sex Discrimination Act 1984} (SDA) extending to gender identity were in some doubt:

It seems very difficult to find a constitutional basis for the 2013 amendments concerned with gender identity. Discrimination on the basis of gender identity is not the subject of a specific treaty like CEDAW and nor could it plausibly be said that by enacting antidiscrimination provisions concerning gender identity, the Parliament is in some way giving effect to a Convention or treaty... It is very hard to argue that discrimination against a person on the basis of how a person feels and presents is a matter covered by international conventions prohibiting discrimination... there are the most serious doubts about whether the 2013 amendments, so far as they concern gender identity, can find constitutional justification in the external affairs power.

51. Given this uncertainty he cautioned against an extension of the existing provisions to faith-based schools:

It follows from this that unless the Parliament, properly advised on the Constitutional position, is satisfied on the balance of probabilities that its proposed legislation is constitutional, it should not make any laws which further extend the prohibition on discrimination on the basis of gender identity to organisations which are not currently subject to those laws. In short, the Parliament should not now apply the

\textsuperscript{43} Committee majority report, paragraph 2.130.
prohibition to faith-based schools which are currently exempted by
operation of s.38 of the SDA.44

52. The Bill and its accompanying Explanatory Memorandum provide no
consideration of these very important issues. Any reform will need to give
detailed consideration to these complicated matters and, in light of the
practical circumstances raised above, will need to ensure that faith-based
schools are able to maintain standards that are in accordance with their
religious convictions.

Constitutional Implications

53. Furthermore, Dr Alex Deagon argued that the Bill ‘would likely’ breach the
Constitutional protection to the free exercise of religion contained at section
116 of the Australian Constitution:

Religious conduct protected by s 116 extends to ‘faith and worship, to
the teaching and propagation of religion, and to the practices and
observances of religion’. Since staff of religious educational institutions
engage in, at the very least, the teaching and propagation of religion,
the ability of these institutions to select staff consistent with their
religious convictions comes within the ambit of free exercise... the right
to free exercise in the Constitution ‘does not suggest a “balance” to be
struck between anti-discrimination standards and rights of religious
liberty, but a constitutionally required preference for religious liberty’...
Section 116 was designed precisely to prevent the direct targeting of
religious practice by religious entities by Commonwealth laws, and
since the provision of education by a religious institution is a religious
practice in accordance with religious convictions, and any removal of

44 Professor Patrick Parkinson, Submission 4, 7.
exemptions would directly prohibit that practice in accordance with those convictions, it follows that the removal of exemptions would be likely to breach the free exercise clause.\textsuperscript{45}

Again, the Bill and its accompanying Explanatory Memorandum provide no consideration to these very important issues. Any reform will need to give detailed consideration to these matters, which go to the validity of the proposed Bill.

\textbf{Public Funding and Liberal Autonomy}

54. In their submission to the Inquiry the Church of the Flying Spaghetti Monster Australia argue:

Faith-based institutions do not pay tax, however they are also recipients of taxpayer funds to run educational facilities, hospitals, social services and other businesses. This situation needs to stop for faith-based organisations that wish to continue to use the exemptions to discrimination.

55. In contrast, Adjunct Associate Professor Fowler submitted:

The Australian Bureau of Statistics notes that ‘Nearly a third of Australians (30 per cent) reported in the Census that they had no religion in 2016.’ However, such calls for a ‘secular’ society often overlook the logical extension of the subsidy argument - that the 70\% who profess a form of religious belief are also subsidising non-religious persons through the proportion of their taxation that is applied to public schools. Rather a truly neutral, democratic and pluralistic society will seek to most accurately reflect both the religious and non-religious

\textsuperscript{45} Dr Alex Deagon, \textit{Submission 9}, 17.
sentiments that are exhibited within its underlying polity. In the context of this current Inquiry, this is most properly acquitted through the ongoing presence of both public schools and private religious schools.⁴⁶

56. Dr Alex Deagon argued that the withdrawal of funding from religious schools would limit pluralism, a hallmark of liberal democracies:

secularist separation is neither desirable nor practical. A truly democratic society needs a system of governance which promotes equal representation of religious and non-religious perspectives in accordance with constitutional prescriptions. ... Reasonable accommodations of difference are part of a flourishing, pluralist community, and we must learn to live together harmoniously with our differences if the idea of liberal democracy is to retain currency today.⁴⁷

57. Similarly, the AACS submitted:

What is at stake in this inquiry is not simply the operation of faith-based schools, but the viability of pluralism. If faith-based schools are no longer permitted to operate according to their beliefs in the key areas of teaching; managing behaviour; and employing staff, choice in education will be eroded along with diversity and Australia’s commitment to core human freedoms.⁴⁸

⁴⁶ Mark Fowler, Submission 46, 21.
⁴⁷ Dr Alex Deagon, Submission 9, 6.
⁴⁸ Australian Association of Christian Schools, Submission 49, 3.
58. As Canadian Supreme Court Justices Cote and Brown said in minority in *Trinity Western*: ‘In a liberal and pluralist society, the public interest is served, and not undermined, by the accommodation of difference’. 49

59. Adjunct Associate Professor Fowler submitted:

Calls to defund faith-based charities fail to consider democratic government’s obligation to preserve pluralism and autonomous choice for those individuals seeking charitable support. They fail to appreciate that to defund faith-based charities is to endorse a form of state-enforced monochromaticity.

60. He argued:

Where religious institutions are one of a number of service suppliers, the autonomy and choice of the recipient is enhanced. Members of the public are free to choose to receive services from an entity that is not religiously motivated or one that is. To enforce the withdrawal of religious institutions from the service provider offering is to limit the choice available to individuals within wider society. Conversely, the existing framework does not limit the choice of those who do not wish to receive services from religiously inspired institutions. Applying this principle to schooling, parents who wish to ensure a secular education for their children may do so in either State or independent secular schools. The removal of exemptions for faith-based schools would remove the choice of parents who wish to ensure the particular form of religious education that accords with their worldview is provided to their children.

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Proposed Alternative Models

61. Various submitters proposed, or provided critique of other alternative models for reform of section 38 of the *Sex Discrimination Act 1984*. The primary alternatives considered are canvassed in the remainder of this analysis.

Tasmanian Legislation

62. Various submitters recommended that the Tasmanian *Anti-Discrimination Act 1998* provided a suitable model for religious schools. The AACS stated that ‘the Tasmanian model of legislation does not provide adequate freedom to religious schools.’\(^{50}\) At paragraph 2.136, the majority report concludes that the Tasmanian laws ‘appear to strike the right balance between ensuring that students and staff are protected from unreasonable and harmful discrimination, while also ensuring that religious schools can maintain their religious ethos.’

63. The exemptions granted to religious bodies and educational institutions that are or are to be conducted in accordance with the tenets, beliefs, teachings, principles or practices of a particular religion at section 51 of the *Anti-Discrimination Act 1998* (Tas) extend only to religious belief. They do not extend to the protected attributes of sex, gender identity, sexual orientation, marital or relationship status. The application of each of the protected attributes to a given set of facts must be determined independently. For example, if a set of circumstances enlivens both the protected attributes of religious belief and relationship or marital status, say for example an atheist teacher in an unmarried heterosexual relationship, the exemption will apply to the attribute of religious belief, but will not apply to the relationship

\(^{50}\) Australian Association of Christian Schools, *Submission 49*, 3.
status.\textsuperscript{51} The result is that the religious institution could not take action to ensure it offers leadership that reflects its teachings with integrity. The practical effect of this limitation is that a Tasmanian religious body or religious school cannot require that their representatives act consistently with their beliefs across a wide range of fields, including matters where most major religious beliefs provide substantive requirements. They are not then able to ensure valid and authentic models of faith can be offered in integrity to either their own believers or the wider community.

64. Practically, under the Tasmanian legislation, a pastor, imam, priest or rabbi, or teacher or chaplain could not be refused on the grounds of sex, on the basis that they were in a married relationship (applicable to those religions which require celibacy in their leaders), or on the basis that they were in a relationship outside of marriage or on the basis that they were in multiple relationships, or were homosexual, or were transgender. To compel religious institutions to accept persons who do not model or share their religious beliefs as their representatives is a direct limitation on their religious freedom. When these outcomes are weighed against the analysis of the applicable international human rights law outlined above, the conclusion of the majority report that the Tasmanian laws ‘appear to strike the right balance between ensuring that students and staff are protected from unreasonable and harmful discrimination, while also ensuring that religious schools can maintain their religious ethos’ simply cannot be sustained. The Tasmanian legislation does not provide a suitable model for reform.

\textsuperscript{51} See for example the reasoning of Lee v Ashers Baking Company Ltd [2018] UKSC 49 (10 Oct 2018), per Lady Hale, with whom Lord Mance, Lord Kerr, Lord Hodge and Lady Black agree, at paragraphs 45 following.
Genuine Occupational Requirements Tests

65. Various submitters counselled against the imposition of a genuine occupational requirements / inherent requirements / genuine occupational qualifications (variously described) test to religious schools. The ACS submitted:

The problem with these provisions is that they enable tribunals to make determinations about the inherent or genuine requirements of a position, as if the tribunal has a better understanding of the religious beliefs of the school that the school itself ... ACS Member Schools view adherence to the Christian faith as an essential requirement for employment, with no distinction being drawn between teaching and support staff ... In our Member Schools, all staff interact with parents and students and are integral parts of the Christian community of the school. This concept of community is essential if a Christian school is to fulfil its obligation to parents who enrol their children in these schools. Once an individual agrees to be bound by these rules and expectations, they agree to behave accordingly. In the Christian school, this understanding is an essential element of the contractual and personal relationship between the school and parents.52

66. Dr Renae Barker argued:

While those of no particular faith and those who embrace atheism or agnosticism may not see the need for those fulfilling an ostensibly secular role to comply with the beliefs of the religious organisation employing them this only highlights an important difference between those of faith and those who are not. Taking the example of a gardener

52 Australian Christian Schools, Submission 45, 2.
a person who has no religion is likely to see the role as being the care and maintenance of the religious organisations grounds and gardens. However the care of the natural environment can also be seen as a profound act of worship or spiritual fulfilment in honouring God’s creation. Similarly the role of receptionist is likely to be seen by those with no religion as an administrative role involving answering the telephone, greeting people and attending to general administrative tasks. For a religious organisation and individuals the role could be seen as the first contact between those seeking spiritual guidance and the religion involved... As with others teachers the maths teacher is likely to be approached by students for guidance on a range of issues, not just trigonometry or algebra. They may also be required to participate in religious activities of the school. A teacher whose belief and values conflict with the religious ethos of the school is unlikely to be able to do either of these things both in line with the school’s religious ethos nor authentically. 53

67. The ACS argued that a genuine occupational requirements test ‘is unsuitable for application in the area of faith-based institutions’.54 This it considered is because ‘under a genuine occupational requirements test a Court is not obligated to consider the tenets of the institution and its view on whether its doctrines require that the entire institution be staffed by persons who share the faith’ ... ‘As the test is to be objectively determined, a Court may reach a view that fails to take account of the doctrinal position of the particular religious institution. If however, the Court does choose to take into account the doctrines of the institution, the Court must then interpret doctrine at the level of each instant position, giving rise to high levels of uncertainty and

53 Dr Renae Barker, Submission 1, 2-3.
54 Associated Christian Schools, Submission 45, 4.
administrative cost\textsuperscript{55} for the school. They argued that in practice the test has amounted to ‘an extraordinary incursion into the internal affairs of an association.’\textsuperscript{56}

68. The ACS submitted that:

Any proposal to remove the exemption for religious schools ignores the importance of ‘mission fit’ to associations generally ... the assertion that only those roles that are inherently ‘spiritual’ should be afforded the exemption also suffers from a fundamental misunderstanding of the nature of religious conviction, including as understood within the Christian tradition. Belief is transformative and, if sincere, is demonstrated in action.\textsuperscript{57}

69. The ACS submitted:

for many schools, the desire that staff hold the faith of the institution is a preference to be sought wherever possible across the whole of the institution. A genuine occupational qualifications test has the direct effect of removing that ability to maintain discretion over the character of the institution as a whole.\textsuperscript{58}

70. For the foregoing reasons a genuine occupational requirements / inherent requirements / genuine occupational qualifications (variously described) tests is not a suitable model for reform.

\textsuperscript{55} Ibid, 6.
\textsuperscript{56} Ibid, 9.
\textsuperscript{57} Australian Christian Schools, Submission 45, 9.
\textsuperscript{58} Ibid, 13.
The Distinction between Attribute and Conduct

71. Various submitters considered the alternative proposal that a school could not discriminate against a teacher on the basis of the existence of a protected attribute (whether religious belief, sexual orientation, relationship status, gender identity or otherwise), but could instead take action where the teacher failed to act in conformity with the belief system of the relevant school. Various submitters and schools argued against such a requirement, emphasising that a purported distinction between identity and conduct was not workable in law. At paragraph 2.134 the majority report concludes ‘it has not been fully established schools need to be able to discriminate on the basis of a teacher’s attribute, as distinct from the conduct.’

72. For many schools the opposition to such a test stems from their understanding of the particular nature of religious belief and its distinct implications within the context of education. The AACS submitted:

There are a range of faith-based school models in Australia. The schools within AACS were established as places in which faith would infuse all areas of education. All AACS schools are committed to offering a distinctively Christian education and to the employing of teachers who share the Christian faith.

All schools—religious or otherwise—operate out of values and beliefs. For schools in our membership, those values and beliefs reflect the faith of the school. This impacts all aspects of school life including the way behaviour is managed, pastoral care is undertaken and curriculum is taught. Faith is embedded in the essence of the school and staff
members are therefore expected to be committed to the school’s beliefs and to model their lives in accordance with those beliefs.\textsuperscript{59}

73. Similarly, the ACS submitted:

For Christian schools to fulfil their objects of providing education from a Christian worldview, maintaining an environment where Christian values prevail is essential. The key way that ACS Member Schools achieve this is the ability to select staff with a personal commitment to the Christian faith and a lifestyle that reflects this... lifestyle alone is not sufficient... There is also no distinction between identity or the holding of belief, on the one hand, and conduct on the other. In a Christian context we believe that conduct flows from belief...

A fundamental component of education, as understood within Christian schools, is the modelling of the practical consequences of religious belief in the actions of all staff and volunteers.\textsuperscript{60}

The ACS argued that within this particular form of education ‘It is necessary to ensure the child has access to authentic models of lived conviction that are reflective of the applicable religious tenets espoused.’\textsuperscript{61}

74. The AACS submitted:

There has been some suggestion that faith-based schools should simply require staff members to verbally endorse the schools beliefs without any expectation that they will live in accordance with those beliefs. This has been described as “upholding” the school’s ethos. This suggestion

\textsuperscript{59} Australian Association of Christian Schools, \textit{Submission 49}, 1.
\textsuperscript{60} Associated Christian Schools, \textit{Submission 45}, 10.
\textsuperscript{61} Ibid, 11.
thoroughly misunderstands the nature of Christian faith and what it means to “uphold” religious belief.

The Christian faith does not permit a person to separate their convictions and the conduct of their lives. Recognising that each person lives in the tension between their desire for what is good, and their own proclivities, there is much room for grace. However, to uphold the Christian faith is to be in movement towards what the faith teaches to be true. If someone does not share the faith convictions of the school, they cannot meaningfully uphold that faith in their employment.\textsuperscript{62}

75. Professor Nicholas Aroney of the TC Beirne School of Law, University of Queensland has said:

some people who regard themselves as religious nonetheless tend to regard their religion as one aspect of their lives among many; others see their religion as definitive of their whole lives, so that even the most mundane activities are seen in religious terms. Such people frequently gather together, not only for narrowly 'religious' activities such as prayer or scriptural study, but also for what might be described as social and cultural activities, such participation in games and sports, or the provision of educational, medical or charitable services. For many such people, such activities are deeply religious.\textsuperscript{63}

76. Many submitters argued that this understanding takes a particular form within the context of education. The ICS submitted:

a religious school is entitled to choose staff who believe in and will model the values of the religion. Religion and its moral life are

\textsuperscript{62} Australian Association of Christian Schools, \textit{Submission 49}, 2.
\textsuperscript{63} Cited in Dr Alex Deagon, \textit{Submission 9}, 12-3.
modelled and not merely taught by staff. Religious schools can legitimately require that the beliefs and behaviour of staff conform to those of the religion, otherwise it cannot fulfil its mission of showing students how to be a Muslim or a Jew or a Christian.64

77. As Professor Patrick Parkinson has stated: “modelling [the religion] within a faith community is as important as teaching [the religion] within a classroom or from a pulpit. Indeed it may well be more important and have more impact on people’s lives”.65 Similarly, Dr Alex Deagon submitted:

A religious educational institution may want to preserve their distinctive identity as religious in order to be a community which approaches questions of education from that particular religious perspective. Indeed, they may see the practice of education itself as a religious injunction which is to be performed in accordance with their religious convictions. Maintaining this religious identity allows them to present a unique perspective in a democracy.66

78. In the context of sexual orientation, the Victorian Court of Appeal has affirmed the view that a distinction between identity and conduct cannot be drawn:

Sexual orientation, like gender, race and ethnicity, [is] part of a person’s being, or identity. The essence of the prohibitions on discrimination on the basis of attributes such as sexual orientation, gender, race or ethnicity is to recognise the right of people to be who or what they are. ... To distinguish between an aspect of a person’s identity, and conduct which accepts that aspect of identity, or

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64 Institute of Civil Society, Submission 35, 4.
66 Dr Alex Deagon, Submission 9, 13.
encourages people to see that part of identity as normal, or part of the natural and healthy range of human identities, is to deny the right to enjoyment and acceptance of identity.\textsuperscript{67}

Contrary to the majority report’s conclusions, such a proposal is highly problematic, and would require further work if it were to offer genuine protection of schools’ religious freedoms.

79. For instance, it could require a structural rewrite of Commonwealth anti-discrimination law. That is because most anti-discrimination law extends to not only discrimination on the basis of a protected attribute but also:

\begin{itemize}
  \item a characteristic that appertains generally to persons who have the attribute; or
  \item a characteristic that is generally imputed to persons who have the attribute.\textsuperscript{68}
\end{itemize}

Such provisions might need to be displaced solely in respect of faith-based schools, or removed from Commonwealth anti-discrimination law entirely. Neither are considered to be realistic proposals.

80. Accordingly, a proposal that the law should be reformed to provide that a school could not discriminate against a teacher on the basis of a protected attribute, provided that the teacher is willing to act in conformity with the belief system of the relevant school, would require further detailed consideration if it is to afford religious schools with an appropriate degree of freedom to maintain their religious ethos.

\textsuperscript{67} Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors [2014] VSCA 75 (16 April 2014), per Maxwell J at 57, citing Hampel J at first instance.

\textsuperscript{68} See for example section 5A SDA.
Amendments to Remove Exemptions in Respect of Direct Discrimination and Amend the Reasonableness Test for Indirect Discrimination

81. As noted at paragraph 1.19 of the majority report, amendments to the SDA were recently proposed by the Attorney-General to the Opposition. In its submission the AACS stated that those amendments would ‘remove section 38(3) of the Sex Discrimination Act 1984 (SDA) and replace it with a new provision that pertains only to indirect discrimination.’\textsuperscript{69} CSA described the proposal as follows:

- Remove the existing section 38(3) of the SDA;
- Insert an additional factor into section 7B of the SDA for the Courts to consider when determining ‘reasonableness’ in relation to a claim of indirect discrimination (only in relation to primary and secondary schools).

82. This would remove any exemption in relation to direct discrimination and only permit indirect discrimination where such was ‘reasonable’ having regard to a range of factors. As CSA outlined ‘Indirect discrimination occurs when, broadly, you have a policy or practice that applies to all students but is argued to disproportionately impact students with a protected attribute.’ A policy that imposes a ‘condition, requirement or practice’ formulated uniquely with respect to a particular protected attribute would not be neutral, or of general application, but would be aimed at persons with that protected attribute. Thus any action taken pursuant to that policy would not amount to indirect discrimination, but would be direct discrimination (assuming the other requirements of that test are met).

\textsuperscript{69} Associated Christian Schools, \textit{Submission 45}, 2.
83. The AACS was particularly concerned with the range of conduct that would no longer be lawful on the basis that it would not fall within the definition of indirect discrimination. It argued that:

This amended legislation would be inadequate in providing the necessary protection for schools to operate according to their ethos ... If the proposed amendments were enacted, there would be many situations in which schools are currently seeking to balance the needs of all students, and are supporting students in ways that are consistent with the faith of the school, which would likely be deemed direct discrimination.

For example, if a ten-year-old student requested to transition gender at a Christian school that upheld a view of gender as biologically determined, the school would have little defence if they were to manage this in a way that was appropriate to their beliefs. The school might give the child flexibility in uniform and bathroom use for example, but may draw the line at compelling other ten-year-old children and teachers at the school to support the transition and use the student’s chosen pronoun. If exemptions regarding direct discrimination are removed it is very likely that a court would find this decision to be unlawful.

In another instance, if a high-school student was to disagree with the school’s position on sexuality and relationships, it is unclear whether the school would be permitted to ask that student not to advocate for their view among primary school students whose parents are seeking to educate their children in accordance with the Christian faith.70

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70 Australian Association of Christian Schools, Submission 49, 2.
84. CSA was concerned that the proposal would limit the ability of faith-based schools to teach in accordance with their beliefs: ‘One of our concerns in this area relates to the teaching of a Biblical view of sexuality and sexual conduct which could be argued to constitute indirect discrimination. This is based on the broad ambit of ‘any other detriment’ in section 21.’ They concluded ‘These proposed amendments would be inadequate in providing the necessary protection for schools to operate according to their faith, values and beliefs and would create greater uncertainty for all within the school community – including students.’

85. The ICS noted that under the Bill:

The training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order remains exempt. But the religious or other training of missionaries, religious chaplains, youth workers or ordinary members of the religion loses its exemption. Several religions consider that persons in same sex relationships are not conforming to the beliefs and practices of the religion and therefore would not make suitable missionaries or chaplains or youth workers or instructors in theological education for that religion.

86. Adjunct Associate Professor Fowler noted:

Any reform proposal should also be aware that the existing section 38 extends not only to primary and secondary schools, but also to tertiary

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71 Christian Schools Australia, Submission 110, 4.
72 Institute of Civil Society, Submission 35, 5.
institutions. There are many Australian tertiary faith-based institutions who would not be able to employ staff, engage board members who believe and act consistently with the applicable religious belief, or teach or act in accordance with that belief if the section 38 exemption was removed.\textsuperscript{73}

87. The Bill again fails to contemplate these distinctions. Any reform proposal should give consideration to these concerns.

Conflict with State Laws

88. The ACS submitted:

Christian schools nationwide call on the Federal Parliament to enact overriding legislation to ensure that state laws do not interfere with our right to religious freedom by selecting and maintaining staff who fully adhere to the religious and moral convictions of the parents who entrust their children to our care. Without such protections Australia is not meeting its obligations under Article 18 of the ICCPR to respect the liberty of parents to ensure the religious and moral education of their children is in uniformity with their own convictions. Australia, as signatory nation to the ICCPR and its First Optional Protocol, may be subject to a complaint to the UNHRC that domestic legislation (including legislation of individual States within a federation, pursuant to Article 50 of the ICCPR) do not comply with the protections afforded by the ICCPR.\textsuperscript{74}

89. Again, the interaction of State law with Commonwealth law is a complicated matter. Any reform proposal should give proper consideration to these issues and the obligations of the Commonwealth in international law.

\textsuperscript{73} Associate Professor Mark Fowler, \textit{Submission 46}, 4.
\textsuperscript{74} Australian Christian Schools, \textit{Submission 45}, 2.
The Best Interests of the Child Test

90. Plainly, no student of a non-state school should be expelled on the basis of their sexuality alone. But the Ruddock Review reportedly went further, recommending the introduction of amendments to section 38(3) that would establish a legislative requirement that a school act in the ‘best interests of the child’. The full Report has not been released, and the specific content of that recommendation is not yet known. However Adjunct Associate Professor Fowler submitted:

On the face of it, this articulation appears to be decidedly imprecise. Without some degree of further clarification, such a test will introduce a high level of uncertainty for students, their families and for religious educational institutions.75

91. In its comments on the best interests test the ACS submitted:

Parents trust that our Member Schools are able to make such determinations about the best pastoral care and support for their children in a safe and caring community. It is the school itself who is best positioned to make determinations as to what is in the best educational interest of students. The determination can only be undertaken in light of a holistic appraisal, including with reference to the interests of the other students in the school community.76

92. Similarly the AACS submitted:

If the requirement that the school act in the ‘best interests of the child’ is to be employed, the legislation should acknowledge that the school, having regard to the appropriate factors, is the institution that is best

75 Associate Professor Mark Fowler, Submission 46, 3.
76 Associated Christian Schools, Submission 46, 2.
placed to make the determination of what is in the child’s best educational interest. Those factors may include the obligations of the school to other students, the maintenance of the religious ethos of the school as a component of the educational offering provided and the relevant professional advice.\textsuperscript{77}

93. CSA was concerned that this test could operate ‘to the exclusion of the best interests of other children or the broader school community’. Both CSA and AACS made recommendations in respect of this requirement, which are further outlined below. Again, the Bill fails to give any consideration to these matters. Any reform proposal should give proper consideration to these issues and the above proposals.

**A ‘Positive Right’**

94. Various submissions called for the introduction of a ‘positive right’ to protect religious freedom. Some submissions argued that such a right should supplant the existing exemptions in the SDA. Some submitters argued that at least one means by which this may be done is through a ‘general limitations clause’, a recommendation put forward by the Australian Human Rights Commission in its submission to the Inquiry. The Commission recommended:

that the Government examine alternatives to the current system of religious exemptions to anti-discrimination laws, including a general limitations clause, and that proposed changes should adhere to Australia’s obligations under international law...federal law should be amended to include a general prohibition against discrimination on the basis of religion or other belief. This would help to incorporate

\textsuperscript{77} Australian Association of Christian Schools, \textit{Submission 49}, 3.
important elements of Articles 18 and 26 of the International Covenant on Civil and Political Rights (ICCPR) into Australia’s domestic law.  

95. The ACS recommended ‘the removal of the current exemptions and their replacement by a redefined definition of ‘discrimination’ in Commonwealth law, consistent with international law, to recognise that not all differentiation is discrimination and to ensure a balancing of rights and a range of positive protections for religious freedom.’ Similarly, the ACS provided drafting that attempted to reflect the recognition under international law that certain:

distinctions are reasonable and objective, and are not regarded as unlawful discrimination. A general limitations clause proceeds from this understanding by distinguishing between acts that legitimately draw distinctions between differing substances, and those that are unlawful discrimination.  

That drafting provided that acts will not constitute unlawful discrimination where they are done pursuant to the principles of international law concerning equality and religious freedom, outlined above.

96. In addition, both CSA and the AACS set forward four broad principles for legislative reform, that they assert would reflect the notion of a positive right:

1. The ability of religious educational institutions to both act in accordance with and teach their beliefs in respect of students should continue to be lawful, and thus should apply to both direct and indirect discrimination.

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79 Associated Christian Schools, Submission 45, 3.
80 Associated Christian Schools, Submission 45, 15.
2. If the requirement that the school act in the ‘best interests of the child’ is to be employed, the legislation should acknowledge that the school, having regard to the appropriate factors, is the institution that is best placed to make the determination of what is in the child’s best educational interest. Those factors may include the obligations of the school to other students, the maintenance of the religious ethos of the school as a component of the educational offering provided and the relevant professional advice.

3. The amendments should extend beyond primary and secondary schools to tertiary institutions. To fail to do so would mean that tertiary faith-based institutions (with the exception of bible colleges exempt under section 37 of the SDA) would not be able to teach or act in accordance with the applicable doctrines.

4. Explicit permission should be given to religious educational institutions to act in accordance with their beliefs regarding marriage, gender identity being biologically determined, and the proper expression of sexuality (including through the form of teaching provided by such schools).

CSA also emphasised the need to ensure teaching within faith-based schools can continue to conform to the relevant belief systems: ‘The changes that have been proposed would also make it unclear whether a school could teach a historic, Biblical view of sexuality and relationships.’

97. Contrary to the recommendations of the majority, these four principles may indeed provide a suitable framework for reform. However these are matters that require detailed consideration. They are beyond the scope of what can properly be considered within the short time frame allotted for the undertaking of this Inquiry. The Inquiry has however enabled some degree of
consideration of the relevant human rights law, and has illuminated the clear inadequacies of the Bill in light of that law. The committee’s processes have made it abundantly clear that there is a pressing need for protection of the right of individuals to have the freedom to practice their faith, including when they come together to form schools and other religiously-based organisations. It has brought into the fore the desirability of legislation that protects this right, along with the need for several Commonwealth acts to be amended consequentially.

Conclusion

98. We reject the the majority committee report, for the reasons outlined above, and instead recommend that the Government give further consideration to legislation that would enshrine and protect the right of religious freedom that would make it clear that religious schools and religious universities are permitted to operate in accordance with the doctrines, tenets and beliefs of their particular faith. To do any less would have the practical effect of depriving religious institutions of the ability to teach their beliefs and operate consistently with their ethos. It would also assist for there to be a nationally consistent approach to the issue of discrimination of this kind.

99. The existing exemptions for schools in the SDA should not be eroded unless adequate protections for religious freedom are afforded in their place. For this reason, Government members believe that further investigation and consultation is required on the issues raised by the majority’s recommendations. The Committee majority is not able to provide any reliable or persuasive conclusions. Clearly this matter needs to be subject of serious and intense consultations with schools, religious leaders, parents and teachers and all other stakeholders and cannot be adequately dealt with in this rushed inquiry.
100. We recognise that the Sydney Morning Herald’s coverage of the Ruddock Review leaks caused a concern in the community. This committee process has made it plain that in practice schools have been focussed on the pastoral support of all students, irrespective of their gender or sexual orientation. Our focus as a Parliament must be on ensuring that we set the conditions to ensure that religious schools remain able to do so in accordance with their religious ethos. Further consideration of positive legislative protections of the right to religious freedom would assist with achieving that objective.

Senator Ian Macdonald
Senator for Queensland
Deputy Chair of the committee

Senator Concetta Fierravanti-Wells
Senator for New South Wales
Voting member of the committee

Senator Jane Hume
Senator for Victoria
Voting member of the committee

Senator Eric Abetz
Senator for Tasmania
Participating member of the committee
AUSTRALIAN GREENS ADDITIONAL COMMENTS

1.1 The Australian Greens believe that the committee report is an excellent articulation of issues of discrimination against LGBTIQ+ students and staff in faith-based schools, and we support the pathway forward that is outlined to remove discrimination against LGBTIQ+ students.

1.2 However the Greens also recommend immediate action to remove discrimination against LGBTIQ+ teachers and other staff. We do not agree that further consideration is needed before acting, as recommended in the chair's report.

1.3 Further delay at achieving this reform is unacceptable, with multiple witnesses and submitters making the case that discrimination against LGBTIQ+ staff in faith-based education settings is unjustifiable and causes untenable harm.

1.4 The committee heard from Mr Jonathon Hunyor, Chief Executive Officer of the Public Interest Advocacy Centre, that a consistent approach in relation to students, teachers and staff is vital.¹ He advised that 'trying to draw some sort of line between how we treat people under 18 and how we treat people over 18 really doesn't make sense'.²

1.5 The Equality Campaign urged the committee to recommend the repeal of legislative exemptions for students, teachers and staff at faith-based schools. Included in their submission were personal stories illustrating the serious impact of the exemptions on teachers and staff:

I teach at a conservative Catholic Primary school. I am constantly afraid that someone will find out and that I will lose my job. I am the main income earner and my employment is incredibly important. I worry that I will lose my job. I worry that my employer won't give me a good reference if she finds out. This could affect my future employment opportunities. I feel like a criminal and I have done nothing wrong.³

1.6 Equal Voices urged the committee to recommend the repeal of legislative exemptions for students, teachers and staff of faith-based schools highlighting that staff are 'forced to lead double lives, placed under suspicion merely for supporting LGBTQ students and are left in untenable work situations, often suffering ill-health from related stresses and ultimately forcing them to resign'.⁴

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1 Mr Jonathon Hunyor, Chief Executive Officer, Public Interest Advocacy Centre, Committee Hansard, 19 November 2018, p. 54.
2 Mr Jonathon Hunyor, Chief Executive Officer, Public Interest Advocacy Centre, Committee Hansard, 19 November 2018, p. 59; also see Ms Felicity Marlowe, Executive Director, Rainbow Families Victoria, Committee Hansard, 19 November 2018, p 11.
3 The Equality Campaign, Submission 72, p. 11.
4 Equal Voices, Submission 142, p. 7.
1.7 The Australian Discrimination Law Experts Group also highlighted the impact of continuing discrimination against teachers and staff on students in faith-based schools:

Continuing to permit discrimination in employment by faith-based schools on the grounds of sexual orientation or gender identity perpetuates the negative messaging to LGBT students about their school's lack of acceptance of their sexual orientation or gender identity, even where the students themselves are not directly subjected to overtly discriminatory actions.5

1.8 The Public Interest Advocacy Centre informed the Committee that by making the necessary amendments to the Sex Discrimination Act it would be possible to 'ensure a clear and simple legal framework' that protects the rights of LGBTIQ+ students, teachers and staff 'while supporting the exercise of religious freedom'.6

Recommendation 1

1.9 The Australian Greens recommend that the entirety of section 38 of the *Sex Discrimination Act 1984* be repealed.

1.10 Evidence from both witnesses and submitters also made clear that reform to section 37 would be required to ensure that faith-based schools are not able to access the exemptions available to bodies established for religious purposes as a work around to the repeal of section 38.

1.11 The Australian Discrimination Law Experts Group advised the Committee that 'removing the existing exception in section 38(3) without also amending section 37(1)(d) may not remove the ability for faith-based schools to discriminate against LGBT students'.7 Furthermore, the Group highlighted that section 37(1)(d) 'offers a potentially wider exception than that offered by section 38'.8

1.12 The Public Interest Advocacy Centre recommended that section 37 be amended 'to clarify that the broad religious exception in s 37(1)(d) does not allow discrimination by religious educational institutions'.9

1.13 The Human Rights Law Centre supported this view, recommending that an exception be inserted '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'.10

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Recommendation 2

1.14 The Australian Greens recommend that the *Sex Discrimination Act 1984* be amended to make clear that section 37(1)(d) does not apply in relation to the employment of staff or teachers by a faith-based school.

1.15 The Australian Greens believe that consequential changes are also needed to the Fair Work Act to fully protect the employment rights of LGBTIQ+ teachers and staff at faith-based schools.

1.16 The Public Interest Advocacy Centre indicated a need for sections 153(2), 195(2), 351(2) and 772(2) of the Fair Work Act to be amended to 'ensure that religious educational institutions are only allowed to discriminate on the basis of religious belief in employment, and not on the basis of other protected attributes like sexual orientation and gender identity'.\(^{11}\)

1.17 Similarly, Human Rights Law Centre recommended that 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'.\(^{12}\)

Recommendation 3

1.18 The Australian Greens recommend that subsections 153(2)(b), 195(2)(b), 351(2)(c) and 772(2)(b) of the *Fair Work Act 2009* be amended to remove employment related exemptions for all protected attributes except religion in faith-based educational institutions.

1.19 Australia is the only western democracy that does not protect the basic rights and freedoms of its people in either legislation or the Constitution. So many of our freedoms have been hard won, and others are still being fought for.

1.20 As noted by the chair's report, multiple submissions made the argument that a Charter of Rights would be the best mechanism to enshrine everyone's rights in law and balance conflicting rights such as the right to live free from discrimination with the right to hold a religious belief.\(^{13}\)

1.21 Human Rights Law Centre acknowledged that ideally:

> ...the removal of these exemptions would come as part of a comprehensive modernisation and consolidation of antidiscrimination laws and, we would also say, as part of the introduction of a federal human rights act that

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\(^{11}\) Public Interest Advocacy Centre, *Submission 108*, p. 4.

\(^{12}\) Human Rights Law Centre, *Submission 105*, p. 4.

\(^{13}\) Mr Jonathon Hunyor, Chief Executive Officer, Public Interest Advocacy Centre, *Committee Hansard*, 19 November 2018, p. 61; Northern Territory Anti-Discrimination Commission, *Submission 126*, p. 2.
protects freedom of religion and belief from government overreach within a robust framework that protects all human rights.14

1.22 Ms Robin Banks, Tasmania's former Anti-Discrimination Commissioner, supported a Charter of Rights as the best way to meet our international obligations:

…[T]he best way to deal with any of the freedoms that exist in our international human rights regime is to implement a charter of rights that recognises and protects all of them at once. Then the balancing work can be done in the way that it is intended to be done under international law.15

1.23 However, given the evidence of the ongoing harm of discrimination against LGBTIQ+ teachers, staff and students and the outrage of the community at the continuation of this discrimination; removing this discrimination cannot wait until political support for a Charter of Rights is achieved. We must not squander the opportunity we have now to enshrine anti-discrimination protections for teachers and staff at faith-based schools at the same time as students.

1.24 It is clear that the broader LGBTIQ+ community are also demanding this change as a matter of urgency. Mr Rodney Croome, spokesperson for just.equal, told the committee that just.equal's survey of the LGBTI community found that when 'asked whether teachers and other staff should be included within the legislation so that discrimination against them is prevented … almost 93 per cent agreed'.16

1.25 Given this, it is logical, appropriate and important that reforms to prevent discrimination against teachers and other staff are made at the same time as changes to the law to prevent discrimination against students in faith-based schools.

Recommendation 4

1.26 The Australian Greens recommend that the Parliament conduct an inquiry into the appropriate form and scope of an Australian Charter of Rights.

Recommendation 5

1.27 The Australian Greens recommend that any Bill before the 45th Parliament relating to discrimination in faith-based schools include protections for teachers and staff in addition to students.

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14 Ms Anna Brown, Director of Legal Advocacy, Human Rights Law Centre, Committee Hansard, 19 November 2018, p. 52 also see Ms Anna Brown, Director of Legal Advocacy, and Lee Carnie, Senior Lawyer, Human Rights Law Centre, Committee Hansard, 19 November 2018, p. 56.
15 Ms Robin Banks, Private capacity, Committee Hansard, 19 November 2018, p. 58.
16 Mr Rodney Croome, Spokesperson, just.equal and Spokesperson, Equality Tasmania, Committee Hansard, 19 November 2018, p. 2.
Senator Janet Rice
Australian Greens LGBTIQ+ Spokesperson
Appendix 1
Submissions

1  Dr Renae Barker
2  Association of Heads of Independent Schools of Australia
3  Australian Lawyers Alliance
4  Professor Patrick Parkinson
5  Australian Human Rights Commission
6  Association of Independent Schools of South Australia
7  Civil Liberties Australia
8  Mr Jeremy Stowe-Lindner, Principal, Bialik College
9  Dr Alex Deagon
10 Mr Benjamin Dudman
11 Dr Tiffany Jones, Department of Educational Studies, Macquarie University
12 Mr Blair Courtney-O'Connor
13 Ms Margaret Knagge
14 Mr Karl Schmude
15 Mr Howard Smith
16 Mr Ian Kilminister
17 Ms Wendy East
18 Ms Leisha Stevens
19 Mr Ian Humphries
20 Mr Kevin Boreham and Ms Anja Hilkemeijer
21 Mr Phil Browne
22 Mr John J Morrissey
23 Mr James Dol
24 Ms Teresa Ryan
25 Name Withheld
26 Mr Greg Byrne
27 Name Withheld
28 Associate Professor Luke Beck
29 Church of the Flying Spaghetti Monster Australia
30 Professor Mary Rasmussen, Associate Professor Andrew Singleton, Associate Professor Anna Halafoff, Professor Gary Bouma
31 Anti-Discrimination Commissioner (Tasmania)
32 Name Withheld
33 Mr Charles Masters
34 Mr Neville Threlfall
35 Institute for Civil Society
36 Parents, Families & Friends of Lesbians and Gays, Perth
37 Ms Halina Pazniewski
38 Australian Family Association
39 Name Withheld
40 Mount Scopus Memorial College
41 Dr Roger Bourne
42 Chairo Christian School
43 Name Withheld
44 Name Withheld
45 Associated Christian Schools
46 Mr Mark Fowler
47 The King David School
48 Australian Catholic Bishops Conference
49 Confidential
50 Mr Craig Mills
51 Parents of Gender Diverse Children
52 FamilyVoice Australia
53 Australian Council of Social Service (ACOSS)
54 Mount Evelyn Christian School
55 Mrs Fiona Butler
56 Marriage Equality Gilmore
57 Intersex Human Rights Australia
58 Associate Professor Rob Cover
59 Independent Education Union of Australia
60 Australian Christian Higher Education Alliance
Australian Family Coalition
Mrs Sandy Timbrell
Freedom for Faith
Thorne Harbour Health
Catholics for Renewal
National LGBTI Health Alliance
Attorney-General’s Department
Kingsford Legal Centre and Community Legal Centres NSW
Ms Ingrid Bishop
Independent Schools Council of Australia
Australian Christian Lobby
Equality Campaign
Name Withheld
Rainbow Catholics InterAgency for Ministry
Parents, Families & Friends of Lesbians and Gays, NSW
Ms Catherine Zodins
Mr and Mrs David and Suzie Cannings
Just.equal
Rainbow Families Queensland
Mr Max Monin
Rainbow Labor New South Wales
Drummond Street Services
Rationalist Society of Australia Inc
Dr David Hastie
Mrs Debra Robinson
Mr Bruce Burgess
Australian Lawyers for Human Rights
Law Council of Australia
Victorian Gay and Lesbian Rights Lobby
Mr David Miller
ACT LGBTIQ Ministerial Advisory Council
Equality Tasmania
Ms Ruth Lucas
NSW Gay and Lesbian Rights Lobby
Mr John Gray
Aleph Melbourne
Associate Professor Neil Foster
The Centre for Excellence in Child and Family Welfare
Mr Kurtis Budden
Mrs Rowan Shann
Australian Discrimination Law Experts Group
Ms Barbara Hockley
Toongabbie Anglican Church
Telethon Kids Institute
Human Rights Law Centre
The Royal Australian and New Zealand Collegen of Psychiatrists
Mr Hugo Walker
Public Interest Advocacy Centre
Confidential
Christian Schools Australia
Mrs Shirley Dunn
Mr Paul Dunn
Mr Philip Hindley
Amnesty International Australia
Commissioner for Children and Young People (Western Australia)
Parklands Christian College
Name Withheld
Name Withheld
Mr Joshua Dunn
Name Withheld
Mr Stephen Tierney
Name Withheld
Name Withheld
Mr Walter Lee
Mr and Mrs Rowan and Margaret Ford
Northern Territory Anti-Discrimination Commission
Association for Reformed Political Action
Name Withheld
Name Withheld
South Australian Rainbow Advocacy Alliance
Dr Greg Walsh
Name Withheld
Name Withheld
Minus18 Foundation
Mr and Mrs Andrew and Jody van Burgel
Rainbow Families New South Wales
Name Withheld
Name Withheld
Mr Jonathan Busch
Name Withheld
Name Withheld
Equal Voices
Anglican Diocese of Sydney
Mr Kendall Waller
Mr Guy Yeomans
Name Withheld
Name Withheld
Transgender Victoria
Reverend Stefan Slucki
Mrs Rosemary Albert
Anglican Schools Commission (Inc)
Name Withheld
Name Withheld
Ms Moira Kirkwood
Name Withheld
Name Withheld
Rainbow Families Victoria
Dr Paul Morrissey
Institute for Judaism and Civilization Inc
Answers to questions on notice

1 Parents of Gender Diverse Children - answer to question taken on notice from the public hearing on 19 November 2018 (received 22 November 2018).

2 Association of Heads of Independent Schools of Australia - answer to question taken on notice from the public hearing on 19 November 2018 (received 22 November 2018).

3 Liberty Victoria - answers to questions taken on notice at the public hearing on 19 November 2018 (received 22 November 2018).

4 Australian Human Rights Commission - answers to questions taken on notice at the public hearing on 19 November 2018 (received 22 November 2018).

5 Rainbow Families Victoria - answers to questions taken on notice at the public hearing on 19 November 2018 (received 22 November 2018).
6 Australian Catholic Bishops Conference - answers to questions taken on notice at the public hearing on 19 November 2018 (received 23 November 2018).

**Tabled documents**

1 Document tabled by Mr Sam Watson at the public hearing on 19 November 2018 - opening statement.

2 Document tabled by Mr Philip Grutzner at the public hearing on 19 November 2018 - opening statement.

**Media release**

1 Statement by the Chair, Senator Louise Pratt, released 16 November 2018.
Appendix 2

Public hearings and witnesses

Monday, 19 November 2018 – Melbourne
APPLETON, Ms Brenda, Chair, Transgender Victoria
BANKS, Ms Robin, Private capacity
BLACK, Mr Peter, Queensland Director, Equality Campaign
BLACKWOOD, Ms Beth, Chief Executive Officer, Association of Heads of Independent Schools of Australia
BROWN, Ms Anna, Director of Legal Advocacy, Human Rights Law Centre
CARNIE, Lee, Senior Lawyer, Human Rights Law Centre
COLLINS, Mr Ray, Acting Executive Director, National Catholic Education Commission
COLYER, Mr Paul, Executive Officer, Australian Catholic Primary Principals' Association
COMENSOLI, Archbishop Peter Andrew, Delegate, Australian Catholic Bishops Conference
COMENSOLI, Mr Daniel James, Policy Analyst, National LGBTI Health Alliance
CROOME, Mr Rodney, Spokesperson, Equality Tasmania; and Spokesperson, just.equal
FitzGERALD, Mr Frank, Executive Officer, Catholic Secondary Principals Australia
GARDINER, Jamie, Vice-President, Liberty Victoria
GAYNOR, Mr Brad, President, Australian Catholic Primary Principals' Association
GREENWICH, Mr Alex, Co-Chair, Equality Campaign
GRUTZNER, Mr Philip, Principal, Carey Grammar Baptist School
HUNYOR, Mr Jonathon, Chief Executive Officer, Public Interest Advocacy Centre
LAUSSEN, Mr James, Principal, Overnewton Anglican Community College
LAWRIE, Mr Alastair, Senior Policy Officer, Public Interest Advocacy Centre
LIN, Dr Ashleigh, National Health and Medical Research Council Career Development Fellow; and Program Head, Mental Health and Youth, Telethon Kids Institute
MACDONALD, Ms Meagan, Co-Founder, Parents of Gender Diverse Children
MARLOWE, Ms Felicity, Executive Director, Rainbow Families Victoria
MITCHELL, Ms Megan, National Children's Commissioner, Australian Human Rights Commission

MOORE, Mr Francis, Executive Director Administration, Catholic Archdiocese of Melbourne

ODGERS, Mr Anthony, Assistant Federal Secretary, Independent Education Union of Australia

PEREIRA, Ms Annette, Executive Officer, Australian Association of Christian Schools

SALMAN, Mr Adel, Islamic Schools Association of Australia

SPENCER, Mr Mark, Executive Officer, Policy, Governance and Staff Relations, Christian Schools Australia

STRAUSS, Ms Penelope, PhD Candidate, Telethon Kids Institute

STUPARICH, Mr Jeremy, Public Policy Director, Australian Catholic Bishops Conference

WALKER, Ms Karyn, Co-Founder, Parents of Gender Diverse Children

WATSON, Mr Sam, Private capacity