



Australian Government

Australian Law Reform Commission

CONSULTATION PAPER

RELIGIOUS EDUCATIONAL INSTITUTIONS AND ANTI-DISCRIMINATION LAWS

January 2023



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TERMS OF REFERENCE — SUMMARY

Review of Religious Educational Institutions and Anti-Discrimination Laws

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

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

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

[View the full Terms of Reference](#)

This paper sets out **four general propositions** supported by **14 technical proposals** for reform on which the ALRC seeks stakeholder submissions.

Proposition A seeks to implement the first limb of the Terms of Reference to protect students from discrimination on *Sex Discrimination Act* grounds in schools and other educational institutions. Proposition B seeks to implement the second limb of the Terms of Reference to protect teachers and other staff from discrimination on *Sex Discrimination Act* grounds. Propositions C and D seek to implement the third limb of the Terms of Reference to continue to allow religious educational institutions to build a community of faith. Propositions C and D would do this by allowing religious educational institutions to:

- continue to give preference to prospective staff on religious grounds where the teaching, observance, or practice of religion is, genuinely, a part of the role and the criteria are proportionate (and not on *Sex Discrimination Act* grounds); and
- require all staff to respect their religious ethos.



INTRODUCTION

1. On 4 November 2022, the ALRC received Terms of Reference to review the existing exceptions in the *Sex Discrimination Act 1984* (Cth) (*'Sex Discrimination Act'*) and the *Fair Work Act 2009* (Cth) (*'Fair Work Act'*), that apply to religious educational institutions. The Terms of Reference require the ALRC to conduct this review in a manner that gives effect to the Australian Government's commitment that 'an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed':

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

2. For the purposes of this Consultation Paper, the protected attributes set out above are referred to as 'Sex Discrimination Act grounds'.¹

3. Federal anti-discrimination and employment laws, including the *Sex Discrimination Act* and the *Fair Work Act*, prohibit discrimination in a wide range of settings on grounds including Sex Discrimination Act grounds. However, these laws currently provide broad exceptions for religious educational institutions, including early childhood education centres, schools, colleges, and universities.²

4. These exceptions mean that discrimination on Sex Discrimination Act grounds by religious educational institutions is allowed under Commonwealth law in relation to both staff and students when it is 'in good faith' and 'in order to avoid injury to the religious susceptibilities of adherents of that religion or creed'.³

5. This Inquiry follows several years of activity regarding potential law reform across Australia on related issues, and in the context of numerous inquiries and reviews considering these and similar exceptions, including by the ALRC, over nearly 40 years. Since November 2022, the ALRC has, in line with the Terms of Reference, reviewed the many past reports of reviews and inquiries on this issue, and a large number of submissions made to them. A list of relevant past reports is provided on the [ALRC website](#). The ALRC has also reviewed the relevant legislation concerning exceptions for religious educational institutions in all Australian states and territories, much of which has undergone significant reform in recent years, or is currently subject to review following recommendations of law reform or human rights bodies. In addition, the ALRC has conducted

1 That is, when referring to students, sexual orientation, gender identity, marital or relationship status, or pregnancy, and, when referring to staff, sex, sexual orientation, gender identity, marital or relationship status, or pregnancy. These are the anti-discrimination grounds for which religious educational institutions currently benefit from a wide exception.

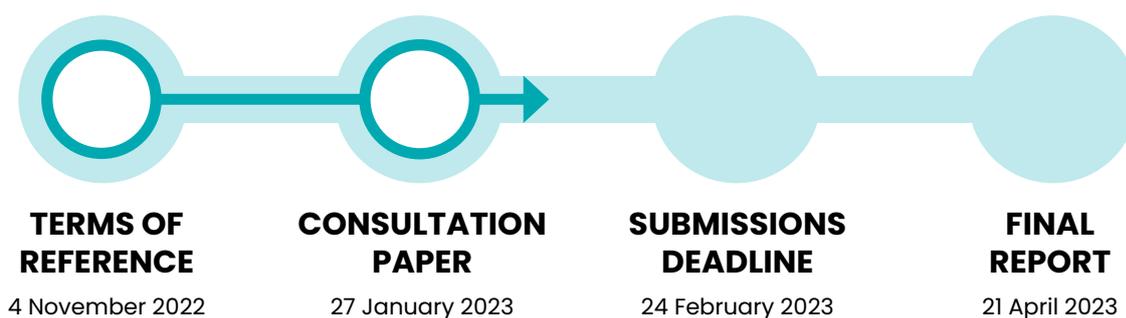
2 The definition of 'educational institution' in s 4 of the *Sex Discrimination Act* is 'a school, college, university or other institution at which education or training is provided': *Sex Discrimination Act 1984* (Cth) s 4. The relevant exceptions apply to educational institutions 'conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed': *ibid* s 38. In the *Fair Work Act*, the relevant exceptions apply more broadly to 'an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed': *Fair Work Act 2009* (Cth) ss 153(2)(b), 195(2)(b), 351(2)(c), 772(2)(b).

3 Commonwealth law uses the term 'exemptions' for these permanent exceptions to the generally applicable law, but there is a move towards greater consistency across states and territories by using 'exceptions' for this type of provision, and 'exemptions' for temporary individual exemptions. This Consultation Paper will distinguish between the two types of provisions on that basis.

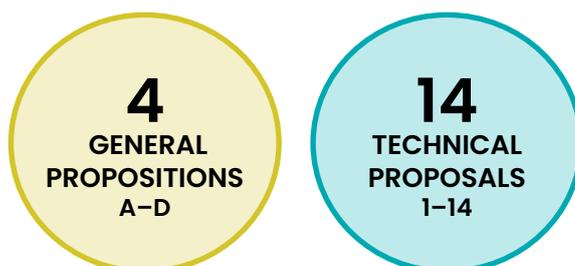
a preliminary review of the legal position across a number of overseas jurisdictions to gain an insight into comparative practice.⁴

6. The ALRC has also conducted targeted consultations with a broad cross-section of stakeholders, meeting more than 80 individuals in approximately 35 meetings and roundtables. Among them have been past students, school principals, teachers, parents, education administrators, religious leaders, members of human rights commissions, lawyers, unions, and academics. Consultees have included members of the LGBTIQ+ community, including LGBTIQ+ people of religious faith, Aboriginal and Torres Strait Islander people, and people from cultural and linguistically diverse backgrounds. A list of those consulted is available on the [ALRC website](#).

7. The ALRC is seeking written submissions in response to this Consultation Paper until 24 February 2023. The Final Report is due to the Attorney-General on 21 April 2023.



8. The ALRC seeks stakeholder submissions on **four general propositions** and **14 technical proposals** for reform. Stakeholders are welcome to comment on the propositions, or the technical proposals, or both. Both the propositions and the proposals describe a preliminary view about how the government's three key policy objectives outlined in the Terms of Reference can be achieved, consistently with international law, for the purpose of discussion. The propositions explain the substance of what the law reform is aimed at achieving, while the proposals detail the way that they could be implemented through specific amendments to the *Sex Discrimination Act*, *Fair Work Act*, and associated legislation.



⁴ With a focus on the law applicable in England, Hong Kong, Ireland, New Zealand, Northern Ireland, and the European Union.

Inquiry approach

9. The issues at the heart of this Inquiry are deeply personal, and relate to individuals' and groups' sense of identity and self. Debates concerning these issues can therefore give rise to heightened emotions and anxieties. The task of this Inquiry is relatively narrow and technical in scope, and the ALRC is not tasked with assessing the relative importance of religion and equality, nor of related human rights such as the rights to privacy and the rights to freedom of association. Rather, the ALRC has been asked to formulate a legislative approach to implement the Government's policy position in relation to quite specific circumstances concerning religious educational institutions, their students, and their staff. The ALRC is required by the Terms of Reference to formulate a legislative approach that is consistent with Australia's human rights obligations. Importantly, it is not the ALRC's role in this Inquiry to question the policy framework the Government has set in the Terms of Reference.

10. Freedom of religion and freedom from discrimination (among others) are 'important rights in a liberal society and represent important underlying values'.⁵ Religion is of great importance in many people's lives, and can be central to a person's identity, sense of self, and purpose.⁶ Similarly, protection from discrimination supports a person's sense of self-worth, belonging, equal respect, and value.⁷

11. The personal nature of these issues also gives rise to a greater risk of personal harm when rights are limited. For example, interferences with religious freedom may be experienced as 'intensely burdensome and disorienting'.⁸ In addition, discrimination (and particularly the cumulative impact of repeated discrimination on a particular ground or grounds) can result in socio-economic disadvantage, lowered self-esteem, mental illness, stigma, and significant stress and disengagement.⁹

12. In this Inquiry, the ALRC adopts frameworks provided by international human rights law to seek a legislative solution that would maximise the enjoyment of all relevant rights by all persons, while being sensitive to the impact on the rights of others.¹⁰ Accordingly, the ALRC has sought to understand all relevant rights broadly, and to recognise that any limitation on those rights will be experienced as an 'interference' with the right by those affected.¹¹ The question is then whether the interference is justifiable. International human rights law, incorporating concepts of necessity, reasonableness, and proportionality, provides a structure 'within which to ... adjudicate complex and variable decisions'¹² fairly and to demonstrate respect by showing that all human rights have been taken seriously.¹³

5 Megan Pearson, *Proportionality, Equality Laws, and Religion: Conflicts in England, Canada, and the USA* (Routledge, 2017) 3 ('*Proportionality, Equality Laws and Religion*'); see also Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart Publishing, 2008) 19.

6 Pearson (n 5) 4–5.

7 Ibid 8.

8 Ibid 5.

9 Ibid 7–10.

10 See *Universal Declaration of Human Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 29(2) for the principles underpinning the limitations regime in international human rights law, and further below at [23]–[28].

11 Pearson (n 5) 44.

12 Ibid 69.

13 Heiner Bielefeldt, 'Limiting Permissible Limitations: How to Preserve the Substance of Religious Freedom' (2020) 15 *Religion and Human Rights* 3, 13.

MAKING A SUBMISSION

13. The ALRC seeks submissions from a broad cross-section of the community, as well as those with a special interest in the Inquiry. These submissions are crucial in assisting the ALRC to develop its recommendations.

14. Stakeholders may wish to comment on the propositions, or the technical proposals, or both. It is helpful if comments address specific propositions or proposals in the Consultation Paper.

15. Uploading submissions through the ALRC website is preferred. Alternatively, submissions may be emailed in PDF format to antidiscriminationlaw@alrc.gov.au.

16. Stakeholders may make a public or confidential submission to the Inquiry. Public submissions may be published on the [ALRC website](#). Submissions that are public are preferred. In the absence of a clear indication that a submission is intended to be confidential, the ALRC will treat the submission as public.

17. The ALRC will not publish submissions that breach applicable laws, promote a product or a service, contain offensive language, may be defamatory, express sentiments that are likely to offend or vilify sections of the community, or that do not substantively comment on the issues relevant to the Inquiry.

18. The ALRC has also provided a [confidential survey](#) for members of the public to share their views and experiences on some key questions relevant to the Inquiry. Stakeholders may complete that confidential survey in addition to or instead of making a formal written submission in response to this Consultation Paper. The survey will remain open until 24 February 2023.

MAKE A SUBMISSION

www.alrc.gov.au/inquiry/anti-discrimination-laws/submission/

Submissions due by 24 February 2023

PRINCIPLES

The propositions and technical proposals in this Consultation Paper are framed by the following principles.

Principle 1:	Human dignity is central to the expression and protection of all human rights.
	The recognition and protection of human dignity underlies and holds unconditional status in the international human rights framework. All of the human rights at issue in this Inquiry are important to human dignity. Although people may hold differing views about how difficult issues should be resolved, the methods used to resolve them should promote respect.
Principle 2:	All human rights engaged by this Inquiry are fundamentally important.
	All human rights are universal, inalienable, indivisible, interdependent, and interrelated. This Inquiry engages with a broad range of human rights. Respect for, and the protection and fulfilment of, each of these rights is fundamentally important.
Principle 3:	Human rights should be considered holistically. In managing intersections between human rights, the substance of the rights at issue should be preserved to the maximum degree possible.
	The broad range of rights relevant to education within religious educational institutions must be considered holistically. International human rights law provides a framework for managing the intersection of these rights. In situations where human rights appear to be in tension, 'pragmatic elasticity' is required to produce 'practical concordance' of all human rights involved, to the maximum degree possible. ¹⁴ Application of a competing or hierarchical lens, or engaging in a balancing act that produces 'trade-offs' should be avoided
Principle 4:	Education performs a key role in maintaining a pluralist and socially cohesive society.
	Australian society is diverse, with many different ethnic, racial, religious and social groups all living together. The <i>Alice Springs (Mparntwe) Education Declaration</i> , agreed on by all Australian Education Ministers in 2019 commits Australian governments to ensuring 'education promotes and contributes to a socially cohesive society that values, respects and appreciates different points of view and cultural, social, linguistic and religious diversity'.
Principle 5:	Students are at the centre of this Inquiry.
	Students are the direct beneficiaries of education and are owed a duty of care by all institutions that deliver that education. The design of policy that impacts students must place at its heart the best of interests of those students. Parents, carers, and religious educational institutions and their staff, including teachers, perform an important role in supporting the educational and spiritual development, and wellbeing, of students. Staff also deserve safe workplaces and fair conditions of employment.

14 Ahmed Shaheed, *Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/HRC/43/48 (24 August 2020) [53], citing Heiner Bielefeldt and Michael Wiener, *Religious Freedom Under Scrutiny* (University of Pennsylvania Press, 2020), 99.

RELEVANT LEGAL FRAMEWORK

19. In formulating its proposals, the ALRC must consider how the policy objectives set out in the Terms of Reference can be achieved, to the extent practicable, in a way that is consistent with Australia's international legal obligations.¹⁵ It must also consider how the existing law and any proposed reforms would interact with other Australian laws, including in relation to access to justice.¹⁶ This section includes a high level summary of key aspects of the legal framework underpinning this Inquiry.

Australia's international legal obligations

Relevant human rights

20. Australia is a State Party to a number of international treaties imposing obligations relevant to this Inquiry.¹⁷ These obligations relate to a broad range of human rights, including:

- equality and non-discrimination on the grounds of sex, sexual orientation, gender identity, marital or relationship status, pregnancy, race, or religion;¹⁸
- the right to freedom of thought, conscience, and religion (and the right to manifest it);¹⁹
- children's rights,²⁰ parents' rights,²¹ cultural rights,²² minority rights,²³ and Indigenous rights;²⁴
- rights to privacy,²⁵ education,²⁶ employment,²⁷ and health;²⁸ and
- freedom of expression,²⁹ and association.³⁰

21. Under each treaty, Australia is obliged to respect, protect and fulfil human rights. This means that the Australian Government must:

- not unduly interfere with or limit human rights;
- take measures to prevent others from interfering with human rights; and
- take positive measures to fully realise human rights.

15 See the Terms of Reference and *Australian Law Reform Commission Act 1996* (Cth) s 24(1).

16 *Ibid* s 24(2).

17 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (ICESCR); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (ICCPR); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) (CERD); *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) (CEDAW); *Convention on the Rights of the Child*, opened for signature 20 December 1989, 1577 UNTS 3 (entered into force 2 September 1990) (CRC); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) (CRPD); *Discrimination (Employment and Occupation) Convention*, opened for signature 25 June 1958, ILO No. 111 (entered into force 15 June 1960) (ILO C11); *Convention against Discrimination in Education*, opened for signature 14 December 1960, 429 UNTS 93 (entered into force 22 May 1962) (CADE).

18 See ICCPR arts 2(1), 3, 26; CEDAW arts 3, 5(a), 10, 11(2)(a); CRC arts 2, 13, 14, 19, 24(1), 29(1), 30; ILO C111 arts 1, 2. Multiple UN treaty bodies and special procedures recognise that sex-based discrimination amounts to gender-based discrimination. See further Shaheed (n 14) [64].

19 See ICCPR arts 18; CERD art 5(d)(vii); CRC art 14; UNDRIP art 12; UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief; CADE art 2(b).

20 See CRC arts 1, 2, 3, 4, 12, 13, 14, 16, 28, 29(1); ICCPR art 24(1).

21 See ICCPR arts 17, 23; CRC arts 3, 5, 18; CEDAW art 16(1)(d); CADE art 5(1)(b).

22 See ICESCR arts 1, 3, 15(1)(a); ICCPR arts 1, 27; CRC art 30; CERD art 5(e)(v)–(vi). CEDAW arts 1, 3, 13(c).

23 See ICCPR art 27; CRC art 30; CADE art 5(1)(c); Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

24 See UNDRIP arts 5, 12, 14(1); ICCPR art 27; CRC art 30.

25 See ICCPR art 17; CRC art 16.

26 See ICESCR art 13; CERD art 5(e)(v); CEDAW arts 10, 14(2)(d); CRC art 28(1); CRPD art 24(1); UNDRIP art 14(1); CADE arts 3(b), 5(1)(a).

27 See ICESCR arts 6, 7(c); CERD art 5(e)(i); CEDAW art 11(1).

28 See ICESCR art 12(1); CERD art 5(e)(iv).

29 See ICCPR art 19; CERD arts 4–5; CRC arts 12–13.

30 See ICCPR arts 21–22; CERD art 5; CRC art 15.

22. Some treaties impose duties on Australia to take positive measures, in the context of education, to address discrimination in society.³¹ For example, under the Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW'), Australia is required to take appropriate measures to eliminate 'any stereotyped concept of the roles of men and women at all levels and in all forms of education', including by the revision of textbooks and school programmes and the adaptation of teaching methods.³²

Limitation of human rights

23. Only a small number of human rights are absolute. Most rights can be limited to a certain extent to protect other objectives known as legitimate aims. Depending on the right, these legitimate aims might include the protection of public health, public order, or to protect the fundamental rights and freedoms of others.

24. Article 18(1) of the International Covenant on Civil and Political Rights ('ICCPR'), protecting freedom of thought, conscience, and religion, contains two key aspects: the right to have or adopt a religion or belief; and the right to manifest that religion or belief (for example, through worship, observance, practice, or teaching) either individually or in community with others.³³ While the first aspect is absolute, Article 18(3) expressly contemplates that the second aspect — manifestation of religion or belief — can be limited as prescribed by law 'where this is necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.

25. Because human rights are fundamental to human dignity, the rights themselves are to be interpreted generously and any limitations require 'a compelling justification'.³⁴ Treaties set out the permissible limits of such justifications.³⁵ These are further elaborated in the Siracusa Principles, which — while not binding — are authoritative and have been endorsed by the Attorney-General's Department (Cth), the Australian Human Rights Commission, and the Parliamentary Joint Committee on Human Rights (Cth) ('PJCHR').³⁶ In general, a limitation on a right recognised in the ICCPR must:

- be provided for by law;
- pursue a legitimate goal, as set out in the relevant article;
- be necessary — that is, respond to a pressing social need; and
- be proportionate to the specific need it is aimed at addressing.³⁷

26. In relation to assessing proportionality, guidance from the PJCHR describes the types of factors that are often taken into account, including:

- whether there are other less restrictive ways to achieve the same aim;
- whether there are effective safeguards or controls over the measures, including the possibility of monitoring and access to review;
- the extent of any interference with human rights — the greater the interference the less likely it

31 See, eg, ICESCR art 13(1); ICERD art 7.

32 CEDAW art 10(c).

33 Human Rights Committee, *General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 48th sess, UN Doc CCPR/C/Rev.1/Add.4 (20 July 1993) [4].

34 Bielefeldt (n 13) 6–7. See also Parliamentary Joint Committee on Human Rights, *Guidance Note 1: Draft Statements of Compatibility* (December 2014) 2.

35 See, eg, ICCPR art 18(3).

36 See UN Commission on Human Rights, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4 (28 September 1984); Attorney-General's Department (Cth), 'Permissible Limitations' <<https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/permissible-limitations>>; Australian Human Rights Commission, 'Human Rights Brief No. 4: Lawful Limits on Fundamental Freedoms' <<https://humanrights.gov.au/our-work/publications/human-rights-brief-no-4>>. Parliamentary Joint Committee on Human Rights (n 34) 2.

37 See also Human Rights Committee, *General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 48th sess, UN Doc CCPR/C/Rev.1/Add.4 (20 July 1993) [8].

- is to be considered proportionate;
- whether affected groups are particularly vulnerable; and
- whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case.³⁸

Managing the intersection of rights

27. Applying limitation criteria is more complicated when multiple rights intersect — that is, where limitations to a right are necessary to protect the fundamental rights of others — because limitations have to be considered in relation to each of those rights.³⁹ The aim is to ‘preserve the substance of human rights ... of *all the legitimate human rights concerns at issue* in a particular case — to the maximum degree possible’.⁴⁰

28. In the context of considering rights relevant to this Inquiry, the United Nations (‘UN’) Special Rapporteur on Freedom of Religion or Belief has explained:

The legally instituted limits on manifesting freedom of religion or belief reflect the fact that an essential part of the right to freedom of religion or belief is that freedom of religion or belief must not be used for ends that are inconsistent with the United Nations Charter or relevant human rights instruments. Both Article 30 of the [Universal Declaration of Human Rights] and Article 5 of the ICCPR further clarify that no human right may be invoked to destroy another human right.⁴¹

Commonwealth and state and territory law

29. A range of laws at the Commonwealth, state, and territory level are potentially relevant to the reforms contemplated by this Inquiry. These include:

- **Constitutional law:** Australia does not have a Constitutional Bill of Rights, nor does it have comprehensive Commonwealth human rights legislation. Free exercise of religion is one of the few express rights enshrined in the Constitution.⁴² This constitutional right has been interpreted narrowly by the High Court of Australia and is only engaged when a law explicitly has the aim of interfering with the exercise of religion.⁴³ Exceptions to anti-discrimination laws would not ordinarily be caught by this section, unless an exception was explicitly discriminatory as between religions.⁴⁴
- **Commonwealth anti-discrimination and employment law:** Prohibitions on discrimination at the Commonwealth level are contained across a number of different Acts protecting persons with certain personal characteristics. Those containing exceptions relevant for religious educational institutions are the *Sex Discrimination Act*, *Fair Work Act*, *Age Discrimination Act 2004* (Cth), and the *Australian Human Rights Commission Act 1986* (Cth).⁴⁵ At the federal level, there is no specific religious anti-discrimination law, although the Terms of Reference for the Inquiry refer to the Australian Government’s commitment to introduce such legislation. In addition, members of some religious groups that can also be classified as ethnic groups, such as Sikh and Jewish people, are protected from discrimination and

38 Parliamentary Joint Committee on Human Rights (n 34) 2–3.

39 Bielefeldt (n 13) 13.

40 Ibid (emphasis in original). See further Shaheed (n 14) [53].

41 Shaheed (n 14) [61].

42 *Australian Constitution* s 116.

43 See *Kruger v Commonwealth* (1997) 190 CLR 1; *Minister for Immigration and Ethnic Affairs v Lebanese Moslem Association* (1987) 17 FCR 373. See also Carolyn Evans, *Legal Protection of Religious Freedom in Australia* (Federation Press, 2012) 74–9.

44 The Australian Constitution is also relevant to whether the Australian Government has power to make laws with respect to particular issues. Where (as in the laws at issue in relation to this Inquiry) legislation is implementing obligations flowing from international human rights treaties, such power will be found in its external affairs power: Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination Law and Equal Opportunity Law* (The Federation Press, 3rd ed, 2018) 69–70.

45 The *Age Discrimination Act 2004* (Cth) will not be considered further as it only regulates discrimination in relation to age, which is not a relevant attribute for the purposes of this Inquiry (except in relation to interactions with the *Fair Work Act*).

vilification under the *Racial Discrimination Act 1975* (Cth).⁴⁶ The *Fair Work Act* and *Australian Human Rights Commission Act 1986* (Cth) also include some limited provisions concerning discrimination on religious grounds.

- **State and territory anti-discrimination law:** Each state and territory also has an equality or anti-discrimination law which covers essentially the same attributes as those covered by the *Sex Discrimination Act*, along with other attributes. New South Wales and South Australia are the only states that do not include religion or religious belief as one of the protected grounds.⁴⁷ All of these Acts provide certain exceptions for religious bodies and/or religious educational institutions. [Table 1](#) summarises the relevant protected attributes in relation to students and staff, and the range of specific exceptions applying to religious educational institutions. A number of jurisdictions also have human rights legislation that may be relevant.
- **Commonwealth, state, and territory laws** concerning anti-discrimination may often overlap. The laws are drafted so that a complainant may choose whether to bring a complaint under Commonwealth law, or under the relevant state or territory law. In general this means that, where both apply, duty holders must apply with the most restrictive law. For example, if an educational institution is in Queensland, and certain conduct is prohibited under Queensland law but not Commonwealth law, the educational institution must comply with the Queensland law.
- **Other laws:** Other laws and duties are also relevant in the context of this Inquiry, and apply to religious educational institutions without specific exceptions. These include duties of care owed by schools to staff and students, and by teachers to students.⁴⁸ Employment law is also particularly relevant to the relationship between religious educational institutions and staff, including common law implied duties owed by employees to their employers, such as the duty to obey lawful and reasonable directions, and duties of loyalty and fidelity, along with potential fiduciary duties for senior staff. These duties impose some limits on how employees can behave both inside and outside of the workplace, depending on the nature of their role and the employer. Workplace health and safety laws are relevant to employers providing a safe environment for work. Schools are also subject to specific curriculum and accreditation requirements that they must meet in order to be able to operate.

Operation of the *Sex Discrimination Act* in relation to students and staff

30. The *Sex Discrimination Act* provides that it is unlawful to discriminate in a number of contexts based on a number of 'protected attributes'. These include sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding, and family responsibilities. Discrimination is defined to include:

- treating a person with a protected attribute (or a characteristic associated with it) less favourably than a person without that protected attribute in the same or similar circumstances (known as 'direct discrimination'); and
- imposing or proposing to impose a condition, requirement, or practice that has or is likely to have the effect of disadvantaging the person with the protected attribute, and which cannot be shown to be reasonable in the circumstances (indirect discrimination).⁴⁹ Reasonableness

⁴⁶ *Jones v Scully* (2002) 120 FCR 243 [110]–[113].

⁴⁷ South Australia's legislation does, however, make discrimination on the grounds of religious appearance or dress unlawful: *Equal Opportunity Act 1984* (SA) s 85T(1)(f).

⁴⁸ *Commonwealth v Introvigne* (1982) 150 CLR 258 establishes that a school authority owes a special category of non-delegable duty of care for students, as well as being vicariously liable for any breach of duty carried out by an employee. See also *Richards v Victoria* [1969] VR 136; *Geyer v Downs* (1977) 138 CLR 91.

⁴⁹ See, eg, *Sex Discrimination Act 1984* (Cth) s 5(2).

is to be considered by reference to a non-exhaustive list of factors set out in s 7B of the Act, including the proportionality of the disadvantage caused.⁵⁰

31. **Discrimination in education:** Section 21 of the *Sex Discrimination Act* makes it unlawful for a body or person administering a school, college, university, or other institution at which education or training is provided, to discriminate against a student or prospective student on the grounds of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding in the provision of education. In particular it is unlawful to:

- refuse a prospective student's application for admission as a student;
- discriminate in the terms or conditions on which the educational institution is prepared to admit a prospective student;
- deny or limit a student's access to any benefit provided by the educational authority;
- expel the student; or
- subject the student to any other detriment.

32. However, s 38(3) of the *Sex Discrimination Act* provides an exception for religious educational institutions from the requirements of s 21, so that it is lawful for the institution to discriminate against a student on some of these grounds (sexual orientation, gender identity, marital or relationship status, or pregnancy) where the discrimination is in 'good faith in order to avoid injury to the religious susceptibilities of the adherents of that religion or creed'. A number of other specific exceptions apply in relation to single sex schools, and the provision of accommodation.⁵¹

33. **Discrimination in employment:** Section 14 of the *Sex Discrimination Act* makes it unlawful for an employer to discriminate against a person on the grounds of the person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding, or family responsibilities:

- in offering employment;
- in the conditions on any offer of employment;
- in the opportunities for promotion, transfer or training, or to any other benefits associated with employment;
- by dismissing the employee; or
- by subjecting the employee to any other detriment.

34. Section 38(1) of the *Sex Discrimination Act* provides an exception in relation to employees of religious educational institutions where discrimination on some of these grounds (sex, sexual orientation, gender identity, marital or relationship status, or pregnancy) is in 'good faith in order to avoid injury to the religious susceptibilities of the adherents of that religion or creed'. This operates more narrowly than the exception in relation to students, as it only applies in terms of selection, appointment, and dismissal. Section 38(1) does not provide any exception for discrimination in relation to: the terms or conditions on which employment is offered; limiting an employee's opportunities for promotion or training; or, subjecting an employee to any other detriment.⁵²

35. The *Sex Discrimination Act* applies equivalently to contract workers. For the purposes of this Inquiry, the ALRC refers to employees and contract workers collectively as 'staff'.

50 Ibid s 7B(2). Factors to be taken into account include: '(a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; and (b) the feasibility of overcoming or mitigating the disadvantage; and (c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice'.

51 Ibid ss 21(3), s 23(3)(b), 34(2).

52 Ibid s 38(1) specifies that the exceptions operate only in relation to the prohibitions in ss 14(1)(a), 14(1)(b), 14(2)(c).

36. **Religious bodies exceptions:** The *Sex Discrimination Act* also provides broader exceptions for religious institutions in s 37(1). This provides that the discrimination prohibitions in the Act do not apply to:

- the ordination, appointment, training, or education of ‘priests, ministers of religion or members of any religious order’;
- the selection of persons to perform functions in connection with, or otherwise to participate in, ‘any religious observance or practice’; and
- ‘any other act or practice of a body established for religious purposes ... that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion’.⁵³

37. Another specific exception (without limitations) applies to religious bodies in connection with the provision of accommodation,⁵⁴ and a more specific exception allowing discrimination on the grounds of sex, or marital or relationship status, in connection with the provision of accommodation, applies to charities.⁵⁵

Operation of the *Fair Work Act* in relation to employees

38. The *Fair Work Act* also provides relevant protection from discrimination in some employment contexts, providing access to the Fair Work Commission to decide complaints. The protected grounds overlap significantly with those found in Commonwealth anti-discrimination law, including most of the relevant Sex Discrimination Act grounds⁵⁶ and, notably for this inquiry, ‘religion’.

39. The *Fair Work Act* is relevant to this Inquiry as follows:

- prohibition of discriminatory terms in enterprise agreements (ss 194, 195(1)) and modern awards (s 153(1));
- protection from adverse action taken in relation to an employee or prospective employee on discriminatory grounds (s 351(1)); and
- protection from termination on discriminatory grounds (s 772(1)(f)), where the employee cannot bring proceedings under the adverse action provision.⁵⁷

40. The latter two provisions (concerning adverse action and termination) have been interpreted as providing protection from both direct and indirect discrimination.⁵⁸ However, it is not clear if the first two provisions (concerning discriminatory terms) encompass indirect discrimination.⁵⁹

41. Section 351(2) expressly provides that the provision does not make unlawful any act which is not unlawful under an applicable anti-discrimination law. This has been interpreted to mean that the section does not extend anti-discrimination protections beyond those already existing in the relevant Commonwealth law, or applicable state and territory law.⁶⁰

42. Each of the relevant provisions includes an exception ‘if the reason for the discrimination is the inherent requirements of the particular position’ and a specific exception for religious

53 This is, however, subject to s 37(2), which provides that religious institutions must not discriminate in relation to the provision of Commonwealth-funded aged care services, although they may discriminate when employing people to provide those services.

54 *Sex Discrimination Act 1984* (Cth) s 23(3)(b).

55 *Ibid* s 23(3)(c).

56 Although note that it covers the protected attribute of ‘marital status’, rather than ‘marital or relationship status’.

57 Section 723 prohibits a person from making an unlawful termination application under s 772 if they are entitled to make a general protections application (which covers an application under s 351).

58 *Klein v Metropolitan Fire and Emergency Services Board* (2012) 208 FCR 178, [88]–[102]. In relation to the predecessor to s 772(1)(f) under the *Workplace Relations Act 1996* (Cth) see *Sapevski v Katies Fashions (Aust) Pty Ltd* [1997] IRCA 219.

59 See *Minister for Industrial Relations v Metropolitan Fire and Emergency Services Board* [2019] IR 1, [68]–[73].

60 *Krcho v University of New South Wales* (2021) 309 IR 1, [37]–[40]. For a discussion of the effect of this aspect of the provision, see Rees, Rice and Allen (n 44) 966–7.

institutions acting in good faith ‘to avoid injury to the religious susceptibilities of adherents of that religion or creed’.⁶¹

Table 1: Cross-jurisdictional summary of exceptions for religious educational institutions

No exceptions
 Narrow exceptions
 Broad exceptions
 No prohibition

* Indicates that law reform proposals are currently under consideration by the relevant state or territory government in relation to this exception.

EXCEPTIONS FOR STUDENTS						
	Sex	Gender Identity	Marital/ Relationship Status	Pregnancy	Sexual Orientation	Religion and Belief
ACT						
Cth						
NT						
NSW						
Qld						*
SA						
Tas						
Vic						
WA	*	*	*	*	*	*

EXCEPTIONS FOR STAFF						
	Sex	Gender Identity	Marital/ Relationship Status	Pregnancy	Sexual Orientation	Religion and Belief
ACT						
Cth						
NT						
NSW						
Qld	*	*	*	*	*	*
SA						
Tas						
Vic						
WA	*	*	*	*	*	*

The ALRC has summarised the relevant provisions in a document available on its [website](#).

Methodology: General exceptions on the basis of sex for single sex educational institutions have not been included in the table, nor have specific exceptions in relation to the provision of accommodation. The exceptions compared are those specific to religious educational institutions only (or in the absence of a specific exception for religious educational institutions, exceptions available to religious institutions or (for NSW) private schools). For the Northern Territory, the table represents the law as enacted in November 2022, but not yet in force.

61 This exception (under s 195(2)(b) of the *Fair Work Act*) was held to ‘clearly’ apply to a term of an enterprise agreement that the agreement would not apply ‘to members of a recognised religious order and/or clerks in Holy Orders, and/or Ministers of Religion; provided that application may be made on behalf of any such member to be included within [its scope]’: *Re Teachers Enterprise Agreement 2011* [2010] FWAA 10015, [3], [8].

SUBSTANTIVE REFORM PROPOSITIONS

43. Having considered the policy objectives set out in the Terms of Reference in light of Australia's international legal obligations, the ALRC has reached the following preliminary views about how those policy objectives can be achieved consistently with Australia's international obligations. Further legal analysis underlying these substantive propositions is set out in the Appendix.

Reforms in relation to students

44. Proposition A relates to achieving the policy commitment set out in the Terms of Reference that religious educational institutions must not discriminate against a student on the basis of sexual orientation, gender identity, marital or relationship status, or pregnancy.

45. The ALRC's preliminary view is that this policy commitment can be implemented in a way that is consistent with Australia's international obligations as follows.

PROPOSITION	
A	Discrimination against students on the grounds of sexual orientation, gender identity, marital or relationships status, or pregnancy
1.	Religious educational institutions should not be allowed to discriminate against students (current or prospective) on the grounds of their sexual orientation, gender identity, marital or relationship status, or pregnancy, or on the grounds that a family member or carer has one of those attributes. ⁶²
2.	Religious educational institutions should be permitted to train religious ministers and members of religious orders, and regulate participation in religious observances or practices, unfettered by sex discrimination laws. Where applicable, religious educational institutions should also continue to benefit from the exception available to charities in relation to the provision of accommodation.
3.	Religious educational institutions should be permitted to teach religious doctrines or beliefs on sex or sexual orientation in a way that accords with their duty of care to students and requirements of the curriculum.

Proposals 1, 3, 4, 6, and 7 are intended to achieve this position in Commonwealth anti-discrimination law.

46. Implementing laws in accordance with Proposition A would mean that, generally, a religious educational institution could no longer treat a student or prospective student less favourably because they were LGBTQ+, unmarried, or pregnant (direct discrimination).⁶³ It would also mean that a religious educational institution could no longer impose policies or practices that had the effect of disadvantaging students with those characteristics (indirect discrimination), although

⁶² Noting that they are already prohibited, with limited exceptions, from discriminating on the grounds of sex, intersex status, potential pregnancy, and breastfeeding.

⁶³ *Sex Discrimination Act 1984* (Cth) s 21(1)–(2).

the educational institution would be allowed to impose such policies (for example uniform or behaviour policies) that were reasonable and proportionate in the circumstances.⁶⁴

47. This position is generally consistent with the law as it already applies (or has been enacted) in the ACT, Northern Territory, Queensland, South Australia, Tasmania, and Victoria, and is in line with reforms proposed in Western Australia.⁶⁵ It is also consistent with existing duties of care that educational institutions owe to their students in all states and territories.⁶⁶

48. The position set out in Proposition A is also consistent with the laws in a majority of overseas jurisdictions considered by the ALRC.⁶⁷ It would also be consistent with a recommendation that the ALRC made in 1994 that the exception for religious educational institutions under the *Sex Discrimination Act* should be removed.⁶⁸

Examples: What could it mean in practice?

As set out at [47], the majority of states and territories have narrower exceptions for religious educational institutions than those that apply under the *Sex Discrimination Act*. As such, in a number of states and territories the effect of Proposition A would be minimal or have no effect in practice.

Considering only the position under the *Sex Discrimination Act*, the ALRC expects that the effect of Proposition A would be, for instance:

- a school could no longer refuse to enrol a student who is LGBTQ+;⁶⁹
- LGBTQ+ students would not be able to be expelled from a school on the grounds of their LGBTQ+ status;
- a school could not refuse to enrol a student because her parents were in a same-sex relationship;
- a school could continue to teach its religious beliefs or doctrine on matters of sexuality and relationships (while continuing to be subject to existing legal requirements to do so in a way that respects its duty of care to students, and accreditation and curriculum requirements);
- a school could continue to segregate students by sex for participation in prayers;
- a school would need to take reasonable and proportionate measures to facilitate the continuing education of a student who became pregnant;
- a school could continue to impose reasonable uniform requirements as long as adjustments could be made to accommodate transgender or gender diverse students;
- a school could continue to restrict participation in religious ceremonies or prayers to students who were considered to be in conformity with religious doctrines, even as they relate to Sex Discrimination Act grounds;

64 Ibid s 7B.

65 See Table 1 and ALRC, 'Cross-jurisdictional summary of exceptions for religious educational institutions', available on the ALRC's website.

66 See above [29].

67 For example England, under the *Equality Act 2010* (UK) (subject to some specific exceptions in relation to harassment); Ireland, under the *Equal Status Act 2000* (Ireland); and New Zealand, under the *Human Rights Act 1993* (NZ).

68 Australian Law Reform Commission, *Equality before the Law: Justice for Women* (Report No 69, 1994) rec 3.11. At that time, the protected grounds in relation to students to which the exception applied were marital status and pregnancy.

69 Note that there is no existing exception in s 38(3) concerning intersex status, so discriminating on that ground is already prohibited.

- a theological college could continue to discriminate on the grounds of sexual orientation or gender identity in relation to students studying to be religious ministers;
- a university college with charitable status could continue to provide accommodation solely for students of one relationship or marital status (as long as it did not distinguish on the grounds of sexual orientation, gender identity or intersex status);
- a school could no longer refuse to accept as school captain a LGBTQ+ student elected or appointed in accordance with its applicable process;
- a failure to address homophobic or transphobic bullying in a school would be unlawful;
- the running of competitive sports by high schools or universities would be unaffected as it is covered by a separate exception;⁷⁰ and
- a religious school could continue to preference students on the grounds of the student's religion, as long as this did not amount to discrimination on the Sex Discrimination Act grounds.⁷¹

Proposition A: consistency with Australia's international legal obligations

49. The ALRC's preliminary view is that reforming the law to achieve Proposition A would be consistent with Australia's international human rights obligations:

- Proposition A has the potential to interfere with institutional autonomy connected to the right to manifest religious belief in community with others, parents' liberty in relation to their children's religious and moral education, and freedoms of expression and association.
- However, Proposition A is **necessary** in an educational setting to achieve the legitimate aim of protecting the fundamental rights and freedoms of students (including the rights to equality and non-discrimination, education, health, privacy, freedom of conscience, belief and religion, and, in institutions attended by children, the rights of the child). The suggestion that students can enrol in or move to an alternative education option does not take away from the necessity of the reforms, given the fact that this may often not be a realistic option, and the potentially harmful impacts of exclusion on prospective and enrolled students.
- Proposition A is also **proportionate**, particularly in an educational setting. Less restrictive measures considered by the ALRC would not adequately protect students' rights. Similar reforms in states such as Queensland and Tasmania over more than two decades appear to have been experienced positively. Religious educational institutions in those jurisdictions have continued to run successfully under the more restrictive regimes in place there, and staff and administrators associated with them have expressed support for such laws.

Further detail on the ALRC's preliminary analysis of the issues involved is set out in the Appendix at [A.30]–[A.38].

Reforms in relation to staff

50. Propositions B, C, and D relate to achieving the policy commitments set out in the Terms of Reference that religious educational institutions:

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

⁷⁰ *Sex Discrimination Act 1984* (Cth) s 42.

⁷¹ Given that discrimination against students or prospective students on the grounds of religion or belief is not currently prohibited under Commonwealth law.

- can continue to build a community of faith by giving preference, in good faith, to persons of the same religion as the educational institution in the selection of staff.

51. These Propositions interact — Proposition B (making discrimination on Sex Discrimination Act grounds unlawful) limits the operation of Propositions C and D (allowing for some differential treatment on the grounds of religion, but not where it is discriminatory under the *Sex Discrimination Act*). The ALRC’s preliminary view is that these policy commitments can be implemented in a way that is consistent with Australia’s international legal obligations, as follows.

PROPOSITION	
B	<p>Discrimination against staff on the grounds of sex, sexual orientation, gender identity, marital or relationships status, or pregnancy</p> <ol style="list-style-type: none"> 1. Religious educational institutions should not be allowed to discriminate against any staff (current or prospective) on the grounds of sex, sexual orientation, gender identity, marital or relationship status, or pregnancy.⁷² 2. Religious educational institutions should be able to select staff involved in the training of religious ministers and members of religious orders, and regulate participation in religious observances or practices, unfettered by sex discrimination laws. Where applicable, religious educational institutions should also continue to benefit from the exception available to charities in relation to the provision of accommodation. 3. Religious educational institutions should be able to require staff involved in the teaching of religious doctrine or belief to teach religious doctrine or belief on sex or sexuality as set out by that institution and in accordance with their duty of care to students and staff, and requirements of the curriculum.

Proposals 2, 3, 4, 5, and 7 are intended to achieve this position in Commonwealth anti-discrimination law.

52. Implementing laws in accordance with Proposition B would mean that, outside the remaining narrow exceptions, a religious educational institution could not treat staff members (prospective or current) less favourably because they were (among other things) of a particular sex, LGBTQ+, divorced or in a de facto relationship, or pregnant (direct discrimination).⁷³ It would also mean that a religious educational institution could not impose policies or practices that had the effect of disadvantaging prospective or current staff with those characteristics, unless the policy or practice was reasonable and proportionate in the circumstances (indirect discrimination).⁷⁴

53. Removal of exceptions for Sex Discrimination Act grounds in relation to staff is consistent with the law as it already applies in the ACT, Tasmania, and Victoria, and as enacted (but not yet in force) in the Northern Territory.⁷⁵ It is also generally consistent with reform proposals that are currently under consideration in Queensland and Western Australia, and recommendations for

⁷² Noting that they are already prohibited, with limited exceptions, from discriminating against staff on the grounds of intersex status, potential pregnancy, breastfeeding, or family responsibilities.

⁷³ *Sex Discrimination Act 1984* (Cth) ss 14, 16.

⁷⁴ *Ibid* s 7B.

⁷⁵ See [Table 1](#) and ALRC, ‘Cross-jurisdictional summary of exceptions for religious educational institutions’, available on the [ALRC’s website](#).

law reform in South Australia. The position set out in Proposition B is also consistent with the law in a number of overseas jurisdictions considered by the ALRC.⁷⁶

54. This would also be consistent with a recommendation that the ALRC made in 1994 that the exception for religious educational institutions under the *Sex Discrimination Act* should be removed.⁷⁷

Examples: What could it mean in practice?

As set out above at [53], the majority of states and territories have narrower exceptions for religious educational institutions than those that apply under the *Sex Discrimination Act*. As such, in a number of states and territories the effect of Proposition B would be limited or have no effect in practice.

Considering only the position under the *Sex Discrimination Act*, the ALRC expects that the effect of Proposition B would be, for instance:

- a school could no longer refuse to hire a teacher on the grounds that they are LGBTQ+;
- a university could not refuse to consider a lecturer's application for promotion because they were gay and in a same-sex relationship;
- a school could continue to segregate staff by sex for participation in prayers;
- a boarding school with charitable status could continue to provide accommodation solely for staff members of one relationship or marital status (as long as it did not make a distinction within those categories);
- a school could not refuse to consider a person's application for promotion to a leadership position because she was divorced and in a new relationship;
- a school could require a LGBTQ+ staff member involved in the teaching of religious doctrine or beliefs to teach the school's position on those religious doctrines or beliefs, as long as they were able to provide objective information about alternative viewpoints if they wished; and
- a theological college could continue to select staff on the basis of sex or sexual orientation where the staff member was to be involved in the training of ministers.

Proposition B: Consistency with Australia's international legal obligations

55. The ALRC's preliminary view is that reforming the law to achieve Proposition B would be consistent with Australia's international human rights obligations:

- The proposed reform has the potential to interfere with institutional autonomy connected to the right of individuals to manifest religion or belief in community with others, parents' freedoms in relation to their children's religious education, and freedoms of expression and

⁷⁶ See, eg, *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation* [2000] OJ L 303/16 art 4(2). This has been implemented across most EU jurisdictions: see Isabelle Chopin and Catharina Germaine, *A Comparative Analysis of Non-Discrimination Law in Europe 2021: The 27 EU Member States, Albania, Iceland, Liechtenstein, Montenegro, North Macedonia, Norway, Serbia, Turkey and the United Kingdom Compared* (European Commission, 2021) 72. In relation to Ireland, see *Employment Equality Act 1998* (Ireland) s 37(1A). Similarly, New Zealand does not provide exceptions on non-religious grounds, apart from a narrower exception on the basis of sex: *Human Rights Act 1993* (NZ) s 28(1). The *Equality Act 2010* (UK) does not provide specific exceptions in relation to staff on grounds other than religion, although in England this is subject to requirements of the *School Standards and Frameworks Act 1998* (UK), which has the potential to reintroduce discrimination, and has been the subject of reform recommendations: Equality and Human Rights Commission, *Religion of Belief: Is the Law Working?* (2016) 25–9.

⁷⁷ Australian Law Reform Commission, *Equality before the Law: Justice for Women* (Report No 69, 1994) rec 3.11. At that time, the exception applied to sex, marital status and pregnancy. The ALRC stated that (as a secondary option) if the exception in relation to marital status were to be retained, it should at least contain a requirement of reasonableness.

association of those connected with religious educational institutions. Given that staff may act as important role models in faith formation, the interference with institutional autonomy is likely to be greater than in relation to exceptions concerning students.

- However, Proposition B is **necessary**, in an educational setting, to protect the rights and freedoms of both students and staff. The suggestion that staff can seek employment at alternative institutions does not take away from the necessity of the reforms, given the significant burden on rights that exclusion puts on both staff and students.
- The proposed reforms are also **proportionate**. Although the burden on the institutional autonomy of the institution is significant, it does not burden the essence of the rights in the way that allowing discrimination on Sex Discrimination Act grounds would. Less restrictive measures considered by the ALRC, such as limiting discrimination to certain positions, or in relation to certain identified core doctrines, would not achieve the protection of rights required. Positive experiences of laws limiting discrimination against staff in states such as Queensland and Tasmania for more than two decades strengthen the view that the proposed reforms are proportionate.

Further detail on the ALRC’s preliminary analysis of the issues involved is set out in the Appendix at [A.39]–[A.47].

PROPOSITION

C Preferencing staff involved in the teaching, observance, or practice of religion on religious grounds

1. In relation to selection, appointment, and promotion, religious educational institutions should be able to preference staff based on the staff member’s religious belief or activity, where this is justified because:
 - participation of the person in the teaching, observance, or practice of the religion is a genuine requirement of the role;
 - the differential treatment is proportionate to the objective of upholding the religious ethos of the institution; and
 - the criteria for preferencing in relation to religion or belief would not amount to discrimination on another prohibited ground (such as sex, sexual orientation, gender identity, marital or relationship status, or pregnancy), if applied to a person with the relevant attribute.⁷⁸
2. The nature and religious ethos of the educational institution should be taken into account in determining whether participation of the person in the teaching, observance, or practice of the religion is a genuine requirement of the role.

Proposals 8 and 10 are intended to achieve this position in Commonwealth anti-discrimination law.

56. Proposition C relates to preferential treatment given on religious grounds in the selection, appointment, and promotion of staff. Implementing laws in accordance with Proposition C would allow religious educational institutions to continue to give preference to prospective staff on religious

⁷⁸ Although outside the Terms of Reference, consideration should be given to whether preferencing should exclude treatment amounting to discrimination under any other Commonwealth anti-discrimination law, noting that there may be particular implications concerning the *Racial Discrimination Act 1975* (Cth).

grounds, but only where the teaching, observance, or practice of religion is, genuinely, a part of the role and the criteria applied are proportionate. Because there is currently no Commonwealth religious anti-discrimination law, this would only be of limited practical implication — specifically in relation to the terms of enterprise agreements (and potentially modern awards) under the *Fair Work Act*.⁷⁹ The ALRC proposes that the same approach should be adopted in relation to selection, appointment, and promotion of staff of religious educational institutions under any future religious discrimination legislation.⁸⁰

57. Some stakeholders involved with religious educational institutions have suggested that it is important that they be able to preference individuals on religious grounds for all roles within their schools, in order to create a ‘community of faith’ or to maintain a ‘critical mass’ of co-religionists, where staff are seen as authentic role models for living a religious life. However, preferencing staff on the grounds of religion disadvantages those who are not of the same religion, and can have particular impacts on those from minority religious communities, so such preferencing must be justified as reasonable, entailing consideration of proportionality.⁸¹ In the context of employment by religious institutions, such preferencing is generally considered reasonable where a job has explicitly religious or doctrinal content.⁸² In these circumstances, the religious grounds for preferencing can be seen as a ‘genuine occupational qualification’ for the role.⁸³

58. The nature and religious ethos of the institution should be considered relevant to determining whether participation of the person in the teaching, observance, or practice of the religion is a genuine requirement of the role. For some educational institutions, religion is infused through all school life, for others it is taught and practised separately from the other aspects of education. The use of the word ‘genuine’ requires an objective inquiry into the actual nature of the role in light of the practices of the institution.

59. Finally, a key aspect of this proposition is that preferencing on the grounds of religion cannot be used to justify discrimination in relation to attributes protected under the *Sex Discrimination Act*. For example, a religious educational institution could not refuse to consider a person as a ‘practising’ member of its religion because the person was LGBTQ+ or in a same-sex relationship, where the person adhered to other religious criteria that the institution reasonably applied. Discrimination could be based on a person’s attributes, such as their sexual orientation or gender identity, or their beliefs about an attribute. As discussed further in the human rights analysis in Appendix [A.6]–[A.10] this is consistent with the way that the relevant rights have been interpreted by UN bodies, and is crucial to ensuring that Proposition B is not undermined in the implementation of Proposition C.

60. Limiting availability of the exception to particular staff is generally consistent with amendments to the law recently passed in the Northern Territory (where it will be necessary to rely on a general exception in relation to genuine occupational qualifications)⁸⁴ and in force in Victoria (which limits preferencing by reference to inherent requirements, and explicitly excludes discrimination on other grounds).⁸⁵ It is also consistent with proposals for reform in Queensland,

79 See Proposal 7.

80 See Proposal 10.

81 See the Appendix, [A.2]–[A.10]. See further Office of the United Nations High Commissioner for Human Rights, *Protecting Minority Rights: A Practice Guide to Developing Comprehensive Anti-Discrimination Legislation* (United Nations and Equal Rights Trust, 2022) 51–6.

82 Ibid 146.

83 ‘Genuine occupational qualifications’ have been described as a way of identifying the character of the work ‘such that it is better or preferably done by someone with a particular attribute, for reasons of, say, modesty, empathy, or authenticity’: Rees, Rice and Allen (n 44) 576.

84 *Anti-Discrimination Act 1992* (NT) s 35(1)(b). These amendments have not yet commenced.

85 *Equal Opportunity Act 2010* (Vic) s 83A. For a discussion about the distinction between genuine occupational qualifications and inherent requirements in Australian law, and different approaches taken in case law concerning the use of these terms in State legislation, see Rees, Rice and Allen (n 44) 576.

South Australia, and Western Australia,⁸⁶ and with the position in a number of overseas jurisdictions considered by the ALRC.⁸⁷

Examples: What could it mean in practice?

The ALRC expects that Proposition C would, for instance, have the effect under the *Fair Work Act* that:

- an enterprise agreement for a group of religious educational institutions could include selection criteria for senior leadership roles that give preference to practising members of the religion, if the staff in those positions are expected to play a role in religious practice and/or in shaping the religious ethos of the school; and
- an enterprise agreement for a group of religious primary schools could include selection criteria for classroom teachers that give preference to individuals who support the particular religious ethos of the school, because those teachers will be required to teach religion to their students.

The ALRC expects that Proposition C would, for instance, have the effect in any future religious anti-discrimination legislation that:

- in selecting teachers of religion, a school could preference members of the religion who adhered to particular dietary restrictions or forms of dress, where this was proportionate in all the circumstances;
- a school could not require, as a condition of appointment, any staff member or prospective staff member to sign a statement of belief by which they had to affirm that homosexuality is a sin (because this would be discriminatory against an LGBTQ+ applicant);⁸⁸
- a school where all teaching staff were required to lead home-rooms for students where acts of religious observance or practice were expected to be carried out could preference applicants on religious grounds, such as whether they supported the religious ethos of the school (and any particular requirement would need to be assessed for proportionality to the aim of maintaining the religious ethos of the particular school);
- a requirement for appointment or promotion that a staff member attend a particular temple, synagogue, mosque or church (for example) would need to be assessed on a case by case basis, by reference to the nature of the role and whether the requirement was proportionate to maintaining the religious ethos of the school; and
- it would be reasonable and proportionate for a school to preference an applicant for the position of religious education teacher who was willing to teach the school's particular beliefs around sexuality, as long as the teacher was permitted to objectively discuss the existence of alternative views about other lifestyles, relationships, or sexuality in a manner appropriate to the context.⁸⁹

86 See Table 1 and ALRC, 'Cross-jurisdictional summary of exceptions for religious educational institutions', available on the ALRC's website.

87 For example, under *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation* [2000] OJ L 303/16 art 4(2), preferencing by religious bodies on the grounds of religion or belief can only be done where religion or belief is a 'genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos'. This has been implemented across most EU jurisdictions: see Chopin and Germaine (n 76) 72. In relation to Ireland, see *Employment Equality Act 1998* (Ireland) s 37(1A).

88 Proposition C would make unlawful any criteria for preferencing that would, if applied to a person with a protected attribute, be discriminatory. This is intended to ensure that a criteria that would be discriminatory in relation to someone with a protected attribute cannot be applied, even to people without that protected attribute.

89 Without the caveat, it could be argued that the criteria are indirectly discriminatory on Sex Discrimination Act grounds.

D Ongoing requirements on all staff to respect the religious ethos of the educational institution

1. Religious educational institutions should be able to expect all staff to respect their institutional ethos. A religious educational institution should be able to take action to prevent any staff member from actively undermining the institutional ethos of their employer.
2. Religious educational institutions should be able to impose reasonable and proportionate codes of staff conduct and behaviour relating to respect for the institution's ethos, subject to ordinary principles of employment law and prohibitions of discrimination on other grounds.
3. Respect for an educational institution's ethos and codes of conduct or behaviour should not require employees to hide their own sex, sexual orientation, gender identity, marital or relationship status, or pregnancy in connection with work or in private life, or to refrain from supporting another person with these attributes.

Proposals 9 and 10 are intended to achieve this position in Commonwealth anti-discrimination law.

61. Proposition D relates to the mechanisms in place to ensure that religious educational institutions can expect that all staff members will respect their religious ethos. This involves the interaction of anti-discrimination law with ordinary principles of employment law and fiduciary duties.

62. Proposition D complements Proposition C: if religious educational institutions are to be limited in the extent to which they can preference members of the same religion on anti-discrimination grounds, they would benefit from assurance that anti-discrimination law will not prevent them from ensuring that all staff members appropriately respect the religious ethos of the educational institution.

63. Proposition D is relevant where the law prohibits discrimination on the grounds of religion or belief. Currently, this is of limited relevance at the Commonwealth level: protections under the *Fair Work Act* are confined to the terms of modern awards and enterprise agreements, and protection of employees from termination on the grounds of religion.⁹⁰ The ALRC suggests that the same principles should be applied in drafting any future religious anti-discrimination legislation.

64. Proposition D is intended to clarify the extent to which the general law duties of loyalty and fidelity to an employer can be imposed in a way that is reasonable and proportionate in the context of regulating the behaviour of staff in religious educational institutions, and the extent

⁹⁰ For modern awards see *Fair Work Act 2009* (Cth) s 153(1), and enterprise agreements, s 195(1). In relation to termination, s 772(1)(f) protects employees from termination on the grounds of religion, unless they are otherwise protected under Part 3-1. Part 3-1 does prohibit adverse action being taken against an employee on the grounds of religion (s 351(1)), but this does not add to protections already existing under the anti-discrimination laws in force in the relevant jurisdiction (s 351(2)(a)). See further above at [40].

to which interference with an individual employee's individual rights to non-discrimination in the exercise of their freedom of thought, conscience, and religion may be justified.

65. In relation to any future religious anti-discrimination law, the normal principles of indirect discrimination could apply to issues such as staff codes of conduct and other policies that govern matters of respect for and adherence to a religion. Policies having a disadvantaging impact for individuals who did not hold a relevant religion or belief would not be unlawful if it could be shown that they were reasonable and proportionate in all the circumstances. Their application would nevertheless need to be consistent with employment law, as is currently the case.

66. Taken together, Propositions C and D adopt a different approach to current state and territory laws.⁹¹ However, the ALRC considers that there is merit in maintaining a distinction between preferencing in respect of certain staff where religious considerations are a genuine occupational qualification, and action that can be taken in relation to all staff to maintain the ethos of the institution. In this respect, Irish law, as amended in 2015 to bring it into line with European law and recommendations of the Human Rights Committee, provides a helpful comparative example of how employment law duties can be adapted to the anti-discrimination regime in this context.⁹²

Examples: What could it mean in practice?

The ALRC expects that Proposition D would, for instance, have the effect under the *Fair Work Act* that:

- a university would not be prevented by the religious discrimination provisions of the *Fair Work Act* from terminating the employment of a social work lecturer who publicly denigrated the religion of the educational institution, if this was proportionate in the circumstances; and
- a school could not terminate the employment of a lesbian teacher on the grounds that she was actively undermining the religious ethos of the institution merely by entering into a marriage with a woman.

The ALRC expects that Proposition D would, for instance, have the effect under any future religious anti-discrimination legislation that:

- a religious school could not take action against a staff member for supporting an LGBTQ+ student, or attending a Pride rally, on the grounds that it undermined the religious ethos of the school; and
- a kindergarten could terminate the employment of a staff member who actively tried to convert parents of students to another religion, if this was proportionate in the circumstances (subject to the requirements of employment law).

⁹¹ It is similar, but different to the current law in Queensland (subject to current recommendations for reform), which allows employers to impose genuine occupational requirements in selection, and which allows employers to take otherwise discriminatory action if an employee openly acts contrary to the employer's religious beliefs. The difference is in the limits on what can be considered in relation to employee conduct, with Proposition D not countenancing any consideration of matters protected by the *Sex Discrimination Act*.

⁹² See *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation* [2000] OJ L 303/16 art 4; Human Rights Committee, *Concluding observations on the fourth periodic report of Ireland*, UN Doc CCPR/C/IRL/CO/4 (19 August 2014) [21]; *Equality (Miscellaneous Provisions) Act 2015* (Ireland) s 11.

The ALRC expects that under any future religious anti-discrimination legislation, for instance, provisions on indirect discrimination would operate so that:

- a school could impose reasonable and proportionate requirements for all staff in a code of conduct that staff cannot publicly denigrate or ridicule the religion of the institution (as practised in that institution); and
- a school could impose reasonable and proportionate requirements for all staff in a code of conduct that appropriate respect be given by staff to religious observances and practices within the school.

Propositions C and D: Consistency with Australia’s international obligations

67. The ALRC’s preliminary view is that reforming the law to achieve the substantive position set out in Propositions C and D would be consistent with Australia’s international human rights obligations.

68. **Proposition C** is framed so that it allows for differential treatment of prospective staff on legitimate grounds — preferencing in relation to religion where it is a genuine requirement of the role to be involved in the teaching, observance, or practice of religion. In such a case, religious affiliation, belief, or adherence can be considered a genuine occupational qualification.⁹³ This is justified because this is a reasonable and objective criterion that pursues the legitimate aim of allowing a school to maintain its religious ethos and teach its religious doctrine, as long as such criteria are used in a proportionate way.

69. However, this justification will not extend to differential treatment or detriment on Sex Discrimination Act grounds, because it ‘is established law that there is no legitimacy in maintaining rules, policies or practices enacted with reference to religious or affiliated cultural doctrines or sensitivities that discriminate on the basis of sex, sexual orientation, gender identity or other characteristics’.⁹⁴ While Proposition B permits discrimination on Sex Discrimination Act grounds in the context of some manifestations of religious belief (such as in relation to training ministers of the religion and in religious observance and practice), it is (for the reasons discussed in relation to Proposition B) necessary and proportionate to prohibit such discrimination more generally in the context of religious educational institutions (see further Appendix, [A.36]–[A.47]).

70. **Proposition D** has the potential to interfere with institutional autonomy connected to the right to manifest religion or belief in community with others and parents’ freedoms in relation to their children’s religious education, in that it limits the extent to which schools can demand compliance of their staff with particular religious beliefs, observances or practices. It does, however, allow an institution to maintain its religious ethos by allowing reasonable and proportionate policies and practices that ensure staff respect that ethos, and by allowing action to be taken to prevent staff from actively undermining the ethos. This, in turn involves interference with the rights of employees to freedom of thought, conscience and religion, non-discrimination in employment, privacy, and freedom of expression. However, such interference is limited to that which is necessary and proportionate to achieve the aim of maintaining the religious ethos, and which does not involve discrimination on Sex Discrimination Act grounds.

71. Taken together, these propositions impose some burden on the autonomy of religious educational institutions to exclude members whose beliefs or conduct do not align with their

93 See further Appendix, [A.2]–[A.6]; Human Rights Committee, *General Comment No 18: Non-discrimination*, 39th sess, UN Doc HRI/GEN/1/Rev.9 (Vol I) (10 November 1989) 197 [13].

94 Office of the United Nations High Commissioner for Human Rights (n 81) 149. See further Appendix, [A.1]–[A.10].

own, but allow reasonable and proportionate action to be taken to ensure that the religious ethos of the school can be continued, that religious belief can be manifested through teaching and practice, and that action can be taken to ensure that all staff appropriately respect the religious ethos of the school. On the other hand, these propositions interfere with employees' freedom to manifest religious belief, and freedom of expression, but this interference is imposed in a way that has significantly less potential for serious impacts on those rights, or the right to health, than if institutions were permitted to insist on adherence to particular beliefs or practices to a greater extent than proposed.

72. The fact that similar approaches are already taken in other comparative jurisdictions supports the view that these reforms can be achieved in a way that does not unduly burden the ability of religious educational institutions to operate in accordance with their religious ethos, and that they are consistent with Australia's international legal obligations.

TECHNICAL CONSULTATION PROPOSALS

73. The following technical proposals are intended to introduce reforms to achieve the substantive propositions set out in the previous section.

Remove exception in Sex Discrimination Act in relation to students

CONSULTATION PROPOSAL

1 Subsection 38(3) of the *Sex Discrimination Act 1984* (Cth) should be repealed.

74. **Proposal 1** would implement **Proposition A**, by removing the specific exception available to religious educational institutions that allows discrimination against students and prospective students on the grounds of sexual orientation, gender identity, marital or relationship status, and pregnancy.

75. Educational institutions (including non-religious educational institutions) would still be able to discriminate against prospective students on the grounds of sex in relation to enrolment at single sex schools,⁹⁵ and to discriminate in relation to the provision of accommodation where it is solely provided for students of one sex.⁹⁶

Remove exceptions in Sex Discrimination Act in relation to staff

CONSULTATION PROPOSAL

2 Subsections 38(1) and (2) of the *Sex Discrimination Act 1984* (Cth) should be repealed.

76. **Proposal 2** would implement **Proposition B**, by removing specific exceptions applicable to religious educational institutions that allow discrimination against current and prospective employees and contract workers on the grounds of sex, sexual orientation, gender identity, marital or relationship status, and pregnancy.

77. Exceptions in relation to accommodation are dealt with by **Proposal 4**.

Narrow the general religious bodies exceptions to specify that they do not apply in the context of educational institutions

CONSULTATION PROPOSAL

3 The *Sex Discrimination Act 1984* (Cth) should be amended to specify that the exception for religious bodies in s 37(1)(d) does not apply to educational institutions.

⁹⁵ *Sex Discrimination Act 1984* (Cth) s 21(3).

⁹⁶ *Ibid* s 34(2).

78. **Proposal 3** would implement **Propositions A and B** by ensuring that the exception in s 37(1)(d) of the *Sex Discrimination Act* would not, in the absence of s 38, be read to apply to religious educational institutions (which would effectively make the proposed reforms in Proposals 1 and 2 redundant).

79. This would preserve the existing exceptions most closely associated with religious observance and practice, so that it would not be unlawful under the *Sex Discrimination Act* for students and staff to be discriminated against on any of the prohibited grounds under the *Sex Discrimination Act*, even in educational contexts, where the differential treatment was in relation to:

- the ordination or appointment of priests, ministers of religion, or members of any religious order;
- the training or education of persons seeking ordination or appointment as priests, ministers of religion, or members of a religious order; and
- the selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice.

80. The amendment could be implemented by inserting an exception for educational authorities into s 37(1)(d), or by including an additional subsection (3).

81. Implementing this proposed reform would mean that stricter anti-discrimination requirements are in place in relation to religious educational institutions than in relation to other religious service providers, such as hospitals and social welfare organisations — this issue is addressed by **Proposal 14**.

CONSULTATION PROPOSAL

- 4** The *Sex Discrimination Act 1984* (Cth) should be amended to specify that the exception for religious bodies in s 23(3)(b) does not apply to accommodation provided by an educational institution.

82. **Proposal 4** would implement **Propositions A and B**, by excluding religious educational institutions from the broad religious bodies exception in s 23(3)(b) that allows discrimination in the provision of accommodation on Sex Discrimination Act grounds.

83. Educational institutions with charitable status would still be able to rely on a general exception for charities contained in s 23(c) of the Act in relation to sex or marital status. This allows charities to provide accommodation solely for persons of one sex or solely for persons of one or more particular marital or relationship statuses. A boarding school administered by a charity could therefore restrict the provision of accommodation, for example, to only staff members who are single.

84. Again, this would result in inconsistency between the anti-discrimination requirements in place for educational institutions and other religiously-affiliated service providers. This inconsistency is dealt with by **Proposal 14**.

CONSULTATION PROPOSAL

- 5** The *Fair Work Act 2009* (Cth) should be amended to specify that the exceptions for religious bodies in ss 153(2)(b), 195(2)(b), 351(2)(c) and 772(1)(f) do not apply to educational institutions except as otherwise provided in the *Sex Discrimination Act 1984* (Cth) and *Age Discrimination Act 2004* (Cth).

85. **Proposal 5** would implement **Proposition B** by clarifying that the general religious bodies exceptions to the prohibitions of discrimination contained in the *Fair Work Act* do not apply to religious educational institutions except as specified in Commonwealth anti-discrimination laws. This would mean that religious educational institutions would be subject to the non-discrimination requirements in relation to modern awards, enterprise agreements, adverse action (s 351), and termination (s 772).⁹⁷ However, it is the intention that exceptions applying in s 37(1)(a)–(c) of the *Sex Discrimination Act* would still apply.

86. **Proposals 8 to 10** would apply narrower exceptions for religious educational institutions specifically in relation to discrimination on the grounds of religion.

87. **Proposal 5** would also remove exceptions for religious educational institutions to the prohibition of discrimination on grounds not covered by the *Sex Discrimination Act*, including race, colour, age, physical or mental disability, political opinion, national extraction or social origin. However, this has limited practical effect, as age is the only other attribute affected by a religious bodies exception in Commonwealth anti-discrimination law.⁹⁸ If it was considered necessary to retain the exception in relation to age, this could be maintained in a new separate subsection in each provision.

Ensure protection in relation to family members

CONSULTATION PROPOSAL

- 6** The *Sex Discrimination Act 1984* (Cth) should be amended to extend anti-discrimination protections to prohibit discrimination against students and prospective students on the grounds that a family member or carer of the student has a protected attribute.

88. The *Sex Discrimination Act* does not clearly protect a student in relation to discrimination on the basis of their family member's or carer's protected attributes.⁹⁹ **Proposal 6** would implement **Proposition A** by extending that protection.

89. In addition, there is merit in considering broader reform to extend protection to any person discriminated against because of their association with another person having protected attributes (such provisions already exist in a number of other Commonwealth, state, territory, and overseas anti-discrimination laws). This is important in the context of this Inquiry, as a number of stakeholders have raised concerns about a lack of protection from discrimination against those who support individuals with protected attributes. However, given the complexity of introducing

⁹⁷ Note that s 40(1)(g)(i) of the *Sex Discrimination Act* provides that anything done in direct compliance with a modern award or enterprise agreement is excepted from the operation of the Act.

⁹⁸ *Age Discrimination Act 2004* (Cth) s 35.

⁹⁹ Although there is an argument that a family member could be covered in relation to discrimination in the provision of services (if education is seen to come within the definition of 'services of the kind provided by the members of any profession or trade'): *Sex Discrimination Act 1984* (Cth) s 4. This could indirectly protect a student.

such a change more broadly within the existing architecture of the *Sex Discrimination Act*, this is an issue that should be considered as part of reforms put forward in **Proposal 14**.

Clarify a school's ability to teach religious doctrine

CONSULTATION PROPOSAL

- 7** Amend the *Sex Discrimination Act 1984* (Cth) to clarify that the content of the curriculum is not subject to the Act.

90. **Proposal 7** responds to concerns that have been raised by some stakeholders about the potential consequences **Proposal 1** could have on the ability of religious schools to teach their religious beliefs. Some stakeholders are concerned that teaching of their doctrine or beliefs on human sexuality and relationships could be held to be discriminatory to, for example, LGBTQ+ students.

91. This does not, in practice, appear to have been an issue in states and territories that have long-standing protection on Sex Discrimination Act grounds for students and staff, such as Queensland and Tasmania. Guidance from the Human Rights Commission in Queensland on discrimination in education specifically clarifies that the *Anti-Discrimination Act 1991* (Qld) does not apply to the curriculum, even though there is no specific exclusion of this from the Act.¹⁰⁰

92. However, given the importance of the right to manifest religious belief, and the potential for uncertainty, there may be benefit in an explicit provision in the *Sex Discrimination Act* that the content of the curriculum (as opposed to the way it is delivered) is not affected by the *Sex Discrimination Act*. The content of the curriculum will still be subject to requirements of state and territory educational authorities, which may include requirements around how curriculum in relation to sexuality or protected attributes is taught. Schools will also remain bound by their duty of care to students and staff, and other accreditation requirements.

93. This proposal adopts a model from the *Equality Act 2010* (UK), which explicitly excludes the content of the curriculum from the scope of the Act, but includes the way it is taught.¹⁰¹ Departmental Guidance explains:

Excluding the content of the curriculum ensures that schools are free to include a full range of issues, ideas and materials in their syllabus, and to expose pupils to thoughts and ideas of all kinds, however challenging or controversial, without fear of legal challenge based on a protected characteristic. But schools will need to ensure that the way in which issues are taught does not subject individual pupils to discrimination.

...

Schools with a religious character, like all schools, have a responsibility for the welfare of the children in their care and to adhere to curriculum guidance. It is not the intention of the Equality Act to undermine their position as long as they continue to uphold their responsibilities in these areas. If their beliefs are explained in an appropriate way in an educational context that takes into account existing guidance on the delivery of Sex and Relationships Education (SRE) and Religious Education (RE), then schools should not be acting unlawfully. However, if a school conveyed its belief in a way that involved haranguing, harassing or berating a particular pupil or group of pupils then this would be unacceptable in any circumstances and is likely to constitute unlawful discrimination¹⁰²

100 Queensland Human Rights Commission, *Fact Sheet: Discrimination in Education* <www.qhrc.qld.gov.au/resources/fact-sheets>.

101 *Equality Act 2010* (UK) ss 89(2), 94(2).

102 Department for Education (UK), *The Equality Act 2010 and Schools: Departmental Advice for School Leaders, School Staff, Governing Bodies and Local Authorities* (May 2014) [2.9], [3.30], [3.31].

CONSULTATION PROPOSAL

- 8** The *Fair Work Act 2009* (Cth) should be amended such that a term of a modern award or enterprise agreement (as applicable) does not discriminate merely because it gives more favourable treatment on the ground of religion to an employee of an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed where:
- the treatment relates to the selection of employees;
 - participation of the employee in the teaching, observance or practice of religion is a genuine occupational requirement, having regard to the nature and ethos of the institution;
 - the treatment does not constitute discrimination on any other ground prohibited by ss 153(1) or 195(1), respectively; and
 - the treatment is proportionate in all the circumstances.

94. **Proposal 8** would implement **Proposition C**. This would apply a narrower exception for religious educational institutions to the prohibition on discrimination on religious grounds in the terms of a modern award or enterprise agreement to allow for preferential treatment of a candidate for appointment or promotion at a religious educational institution.

95. In this proposal, ‘selection of employees’ is intended to cover selection criteria for employment or promotion, and the criteria for determining who should be offered employment or promotion.

96. It would be possible to frame the criteria for allowing preferencing more generally such that preferencing would be allowed simply when the person’s religion or belief was a genuine occupational qualification for the role¹⁰³ (or in a similar, but not identical vein, when adherence to religious belief or practice was an inherent requirement of the role).¹⁰⁴ However, the ALRC’s preliminary view is that there may be benefit in providing greater clarity about the operation of the exception.¹⁰⁵

97. This proposal would introduce greater complexity into what is already a complex relationship between anti-discrimination laws and the *Fair Work Act*, and introduce inconsistency between the treatment of religious educational institutions and other religiously-affiliated service providers. **Proposal 14** addresses the need for further reform in this area to promote consistency.

103 See, eg, *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation* [2000] OJ L 303/16 art 4(2); *Employment Equality Act 1998* (Ireland) s 37(2).

104 See, eg, *Equal Opportunity Act 2010* (Vic) s 83A.

105 This adopts a position similar to that recommended by the Queensland Human Rights Commission in its recent review of the state’s anti-discrimination laws: Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (July 2022) rec 39.2.

Allow termination related to religion in some circumstances in *Fair Work Act*

CONSULTATION PROPOSAL

- 9** The *Fair Work Act 2009* (Cth) should be amended such that a term of a modern award or enterprise agreement (as applicable) does not discriminate merely because it allows an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed to terminate an employee's employment where:
- the termination is necessary to prevent an employee from actively undermining the ethos of the institution;
 - the treatment does not constitute discrimination on any other ground prohibited by ss 153(1) or 195(1), respectively; and
 - the termination is proportionate to the conduct of the employee — including by reference to:
 - the damage caused to the ethos of the educational institution;
 - the genuine occupational requirements of the role, having regard to the nature and ethos of the educational institution;
 - alternative action the employer could instead reasonably take in the circumstances;
 - the consequences of termination for the employee; and
 - the employee's right to privacy.

The *Fair Work Act 2009* (Cth) should be further amended such that religion is a permissible ground of termination, despite s 772(1)(f), in the circumstances set out above.

98. **Proposal 9** would implement **Proposition D** by allowing religious educational institutions to take action (the relevant action under the *Fair Work Act* being termination) on religious grounds to prevent an employee from actively undermining the ethos of the educational institution.

99. The ALRC does not propose inserting a similar exception on religious grounds in relation to the adverse action provisions of s 351. This is because (unlike s 772) s 351 is specifically limited to discrimination that is already unlawful in the relevant jurisdiction. Given that discrimination on the grounds of religion is not otherwise unlawful under Commonwealth law, there is no need (until enactment of future religious anti-discrimination legislation) for a narrower exception for religious educational institutions to allow them to discriminate on religious grounds, except as otherwise regulated by the *Fair Work Act*.

Exceptions for religious educational institutions in future legislation

CONSULTATION PROPOSAL

10 The Australian Government should ensure that any future legislation to prohibit discrimination on the basis of religious belief or activity contains exceptions in relation to employment and engagement of contract workers that allow an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed to:

- give more favourable treatment to an employee or prospective employee (and contract worker or prospective contract worker) on the ground of religion in relation to selection; and
- take action that is reasonably necessary to prevent an employee or contract worker from actively undermining the ethos of the institution;

consistent with the limitations on such exceptions contained in **Proposals 8 and 9**.

100. **Proposal 10** would implement **Propositions C and D** in a future religious anti-discrimination law.

Consequential reforms

CONSULTATION PROPOSAL

11 The *Australian Human Rights Commission Act 1986* (Cth) should be amended so that religious educational institutions are subject to the Act.

101. The Australian Human Rights Commission ('AHRC') has certain powers under the *Australian Human Rights Commission Act 1986* (Cth) in relation to discrimination. For example, under s 31(b), the Commission has the power, in the context of employment, to inquire into any act or practice that may constitute discrimination and attempt to settle the inquiry by conciliation. Similarly, under s 35L the Commission has the power to inquire into systemic unlawful discrimination. Religious institutions are carved out from the definition of discrimination in s 3 and thus not subject to the powers of the AHRC in relation to discrimination (note, however, that this definition does not apply, and so the exception is not relevant, for the complaints procedure under Part IIB of the Act). This proposal would remove the carve-out for religious educational institutions, making them subject to the Commission's inquiry powers.

102. See **Proposal 14** in relation to the inconsistency this would introduce between religious educational institutions and other religiously-affiliated service providers.

CONSULTATION PROPOSAL

12 The Australian Human Rights Commission should review the 'Commission Guidelines' for 'Temporary exemptions under the *Sex Discrimination Act 1984* (Cth)' in light of the legislative changes proposed.

103. Under s 44 of the *Sex Discrimination Act*, the AHRC may temporarily exempt an individual or organisation from application of obligations under the Act. The Commission has published Guidelines that explain how the AHRC will exercise its powers to provide individual exemptions. Those guidelines do not contemplate religious educational institutions because those institutions currently benefit from the very broad exceptions under s 38. Individual exemption may be an important safety net to assist particularly vulnerable minority groups by providing additional time to comply with the proposed *Sex Discrimination Act* reforms. Accordingly, the AHRC should review the current guidelines to ensure that they can be appropriately applied in this context if necessary.

Detailed guidance

CONSULTATION PROPOSAL

13 The Australian Human Rights Commission, in consultation with the Attorney-General's Department, should develop detailed guidance to assist educational institution administrators to understand and comply with the *Sex Discrimination Act 1984* (Cth) and anti-discrimination provisions in the *Fair Work Act 2009* (Cth), and for the public to understand the relevant protections.

104. A wide range of stakeholders have raised concerns around the difficulty of understanding and complying with discrimination and employment law, and have noted the useful purpose served by concrete examples. Guidance would assist schools and their communities to understand the implications of any reforms implemented as a result of this Inquiry. Helpful examples of similar guidance produced by departmental bodies exist in relation to obligations on schools under the *Equality Act 2010* (UK).¹⁰⁶

Future staged reforms

CONSULTATION PROPOSAL

14 Following implementation of **Proposals 1 to 11**, the Australian Government should consider and consult on further reforms to simplify and strengthen Commonwealth anti-discrimination law, including by addressing inconsistencies arising from reforms proposed in this Inquiry.

105. This proposal is intended to address:

- reforms that are beyond the scope of this Inquiry but relevant to the effectiveness of anti-discrimination law, the interactions between anti-discrimination laws and the *Fair Work Act*, and the interaction of religious freedom and anti-discrimination in a broader context; and
- concerns that the targeted reforms proposed by the ALRC, while necessary to enact without delay, would add to existing complexity, inconsistency and incoherence within and between the *Sex Discrimination Act* and the *Fair Work Act*.

¹⁰⁶ See, eg, Department for Education (UK) (n 102). See also, for example, guidance prepared by the Department of Education (Qld) for state school principals about their equality obligations in relation to students: Department of Education (Qld), *Diversity in Queensland Schools: Information for Principals* <<https://education.qld.gov.au/student/Documents/diversity-information-for-principals.pdf>> and Catholic Education Diocese of Cairns, *Guideline/Procedure: Inclusion of Students Who Identify as Gender Diverse and/or Intersex* (2022) <<https://www.cns.catholic.edu.au/wp-content/uploads/2022/05/Inclusion-of-students-who-identify-as-gender-diverse-and-or-intersex.pdf>>.

106. As part of broader law reform in this area,¹⁰⁷ potential areas for further reform relevant to this Inquiry could include:

Stage 1

- enactment of a religious discrimination Act; and
- a wider review of the protections and exceptions in the *Sex Discrimination Act* and anti-discrimination provisions in the *Fair Work Act*, including in relation to associates.

Stage 2

- a review of the *Age Discrimination Act 2004* (Cth), *Disability Discrimination Act 1992* (Cth), *Racial Discrimination Act 1975* (Cth) and *Sex Discrimination Act* ('*Anti-Discrimination Acts*') for consistency in application, terminology, burdens of proof, and scope with a view to potential consolidation in a single Act;
- a review of the interactions between the *Fair Work Act* and the *Anti-Discrimination Acts*; and
- options for the enactment of a Human Rights Act that comprehensively implements the seven core human rights treaties to which Australia has agreed, to protect human rights and provide a more comprehensive and effective way of managing the interactions between individual human rights.

¹⁰⁷ See, for example, Australian Human Rights Commission, *Free & Equal: A Reform Agenda for Federal Discrimination Laws* (2021).

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APPENDIX A: FURTHER HUMAN RIGHTS ANALYSIS

A.1 This Appendix gives further high-level detail in relation to the human rights analysis applied to reach the preliminary propositions set out in the Consultation Paper. The first part sets out some particularly relevant issues of international human rights law in this area, while the second applies a human rights analysis to the substantive reform Propositions A and B.

Preferencing and discrimination

A.2 UN Treaty Bodies have generally adopted a ‘pragmatic’ approach to the concept of discrimination that recognises its limits by reference to how and why people are being treated differently.¹⁰⁸ As the Human Rights Committee explained in its General Comment No. 18, adopted in 1989,

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.¹⁰⁹

A.3 The converse of this is that not all preferencing is considered legitimate. As the Committee on the Elimination of Racial Discrimination has explained, in the context of the CERD:

Discrimination is constituted not simply by an unjustifiable ‘distinction, exclusion or restriction’ but also by an unjustifiable ‘preference’, making it especially important that States parties distinguish ‘special measures’ from unjustifiable preferences.¹¹⁰

A.4 This general understanding of discrimination has been elaborated on by a number of other UN Treaty bodies in respect of their relevant conventions.¹¹¹ For example, in General Comment No 20, adopted in 2009, the Committee on Economic, Social and Cultural Rights explained, in relation to economic, social and cultural rights:

Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects.¹¹²

A.5 This General Comment clarifies that a proportionality analysis is relevant to determining whether particular preferencing is justified under international law. The Human Rights Committee has also explicitly adopted a proportionality analysis consistent with this approach.¹¹³

108 Sándor Gurbai, ‘Beyond the Pragmatic Definition? The Right to Non-Discrimination of Persons with Disabilities in the Context of Coercive Interventions’ (2020) 22(1) *Health and Human Rights* 279, citing Wouter Vandenhoe, *Non-discrimination and equality in the view of the UN human rights treaty bodies* (Intersentia, 2005) 71.

109 Human Rights Committee, *General Comment No 18: Non-discrimination*, 39th sess, UN Doc HRI/GEN/1/Rev.9 (Vol I) (10 November 1989) 197 [13].

110 Committee on the Elimination of Racial Discrimination, *General recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination*, 75th session, UN Doc CERD/C/GC/32 (24 September 2009) [7].

111 See Sándor Gurbai (n 108) 281–3. Gurbai notes, however, that other treaty bodies, including the Committee on the Rights of the Child, the Committee on the Elimination of Discrimination against Women, and the Committee on the Rights of Persons with Disabilities have neither explicitly rejected this approach to the definition, nor explicitly relied on it (at 283). See further Office of the United Nations High Commissioner for Human Rights (n 81) 52–3.

112 Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)* [13].

113 See, eg, Human Rights Committee *Views: Communication No 2747/2016*, UN Doc CCPR/C/123/D/2747/2016 (17 July 2018) (*Yaker v France*) [8.17]. See further Office of the United Nations High Commissioner for Human Rights (n 81) 55.

A.6 In addition, this General Comment clarifies that an objective will only be considered legitimate if its aim and effects are compatible with the nature of Covenant rights. This is particularly relevant where the criteria for preferencing in relation to one protected attribute, such as religion, is based on differential treatment in relation to another protected attribute, such as sex. In relation to differential treatment grounded in religious belief, the Office of the High Commissioner for Human Rights ('OHCHR') has recently stated in guidance for States that it is:

established law that there is no legitimacy in maintaining rules, policies or practices enacted with reference to religious or affiliated cultural doctrines or sensitivities that discriminate on the basis of sex, sexual orientation, gender identity or other characteristics.¹¹⁴

A.7 This reflects views expressed by both the Human Rights Committee and a series of reports by UN Special Rapporteurs on the Freedom of Religion or Belief ('FRoB').¹¹⁵ In General Comment No 28, adopted in 2000, the Human Rights Committee said:

States parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant rights.¹¹⁶

A.8 Consistently, previous UN Special Rapporteur on FRoB, Professor Ahmed Shaheed, recently emphasised that religious beliefs cannot be a legitimate justification for 'violence or discrimination against women and girls or against people on the basis of their sexual orientation or gender identity'.¹¹⁷

A.9 This means that, where the aim or effect of criteria for preferencing on the grounds of religion is differential treatment in relation to (at least) sex, sexual orientation, or gender identity, such preferencing will engage equality and non-discrimination rights under the relevant treaty. It is a separate question whether that discrimination is nevertheless to be permitted, which is to be considered in line with the limitation criteria set out in Article 18(3) of the ICCPR. As previous UN Special Rapporteur on FRoB, Professor Heiner Bielefeldt explained:

The reasonable assumption that promoting equality between men and women always constitutes a legitimate purpose does not in itself suffice to justify restrictions; such restrictions must also have a legal basis, they must actually be conducive to pursuing the said purpose and one has to demonstrate that less restrictive means are not available. Finally, freedom of religion or belief strictly prohibits any restrictions in the *forum internum*, that is to say, the freedom to have or to adopt a religion or belief of one's choice.¹¹⁸

A.10 Before imposing restrictions on the freedom to manifest one's religious belief, UN Special Rapporteur Bielefeldt emphasised that 'legislators or representatives of the judiciary should always analyse the respective cases with empirical and normative precision'.¹¹⁹

Institutional autonomy

A.11 An important aspect of the individual's right to manifest religious belief is communal in nature. The right recognises the importance of people and groups of people being able to 'establish

114 Office of the United Nations High Commissioner for Human Rights (n 81) 55.

115 The UN Special Rapporteur is an independent expert appointed by the UN Human Rights Council for a set period. Their role is to monitor, advise, and report on the right to freedom of religion or belief. Although their views on interpretation of the law are not binding, they are informed by widespread consultation across country experiences, and are considered persuasive.

116 Human Rights Committee, *General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, 68th sess, UN Doc CCPR/C/21/Rev.1/Add.10 (29 March 2000) [5].

117 Shaheed (n 14) [69]. See also Heiner Bielefeldt, *Elimination of All Forms of Religious Intolerance*, UN Doc A/68/290 (7 August 2013) [30]; Asma Jahangir, *Asma Jahangir Elimination of all forms of religious intolerance* UN Doc A/65/207 (29 July 2010) [69].

118 Bielefeldt (n 117) [31].

119 *Ibid* [47].

religious institutions that function in conformity with their religious self-understanding'.¹²⁰ The role of religious institutional autonomy is recognised at international law, including with respect to 'freedom to teach the substantive tenets of one's religion or belief to others'.¹²¹ In his 2013 report on the intersection between religious freedom and gender equality, UN Special Rapporteur Bielefeldt explained:

This is not just an 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.¹²²

A.12 The Human Rights Committee has indicated, however, that this autonomy is qualified with respect to all forms of discrimination in employment in the field of education.¹²³

A.13 This autonomy can be seen to apply most directly to questions such as 'the appointment of religious leaders or the rules governing monastic life'.¹²⁴ These positions can influence binding interpretations of religious doctrine, and States are prohibited 'from imposing beliefs on individuals and communities'.¹²⁵ Interference with the selection of religious leaders such as bishops, imams, preachers, priests, rabbis, or reverends, on equality grounds, will impose a significant burden on the right to religious freedom, by 'significantly affect[ing] the religious self-understanding of a community'.¹²⁶ It is therefore important to generally respect the autonomy of religious institutions in this regard.¹²⁷

A.14 On the other hand, as UN Special Rapporteur Bielefeldt also noted, the autonomy of religious institutions 'falls within the *forum externum* dimension of freedom of religion or belief which, if the need arises, can be restricted in conformity with [Article 18(3) of the ICCPR]'.¹²⁸

A.15 In considering religious autonomy, two recent UN Special Rapporteurs have emphasised that it is also important to consider the religious freedom of dissidents within a religion 'to come up with alternative views, provide new readings of religious sources and try to exercise influence on a community's religious self-understanding, which may change over time'.¹²⁹

A.16 UN Special Rapporteur Shaheed considered the interaction of institutional autonomy and discrimination further in his 2020 report on gender-based violence and discrimination in the name of religion or belief. He reported that consultations underlined the social and economic factors that may be relevant to considering the deference that should be given to institutional autonomy. This questioned the idea that 'religion should be "all or nothing" — either you choose to take part in a religion and must accept its inequalities, or you must cease to belong to that religion'.¹³⁰ The report noted that consultees had explained how:

the ability of women, girls and LGBT+ persons to belong to a faith of their choice, or, more often, a faith into which they were born that comprises their social and cultural connections, without being

120 Ibid [57].

121 Heiner Bielefeldt, Nazila Ghanea and Michael Wiener, *Freedom of Religion or Belief: An International Law Commentary* (Oxford University Press, 2016) 191. See also Human Rights Committee, *General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 48th sess, UN Doc CCPR/C/Rev.1/Add.4 (20 July 1993) [4].

122 Bielefeldt (n 117) [57].

123 Human Rights Committee, *Concluding observations on the fourth periodic report of Ireland*, UN Doc CCPR/C/IRL/CO/4 (19 August 2014) [21].

124 Bielefeldt (n 117) [57].

125 Shaheed (n 14) [48].

126 Bielefeldt (n 117) [59].

127 Ibid. As an example of such a factual scenario, see *Hasan and Chaush v Bulgaria* (2000) 34 EHRR 55.

128 Bielefeldt (n 117) [60]. See also jurisprudence from the European Court of Human Rights which stated that religious institutional autonomy 'is not absolute and cannot be exercised in a manner affecting the substance of protected rights' in *Travaš v Croatia* (European Court of Human Rights, Chamber, Application No 75581/13, 4 October 2016) [102].

129 Bielefeldt (n 117) [60]. See also Shaheed (n 14) [48].

130 Shaheed (n 14) [50]. See also Bielefeldt (n 117) [35].

discriminated against, is vital to realizing myriad human rights, including the right to freedom of religion or belief. ...

[W]omen and LGBT+ persons often have little influence over the rules of the community in which they live. They noted that those who pursue gender equality, including gender equal beliefs, can risk violence, shunning and stigma from their religious communities.

These consequences are particularly stark for those who often cannot leave, or do not want to leave, their religious community due to economic reasons. Furthermore, the response, that one has the 'option to leave', they asserted, can fail to appreciate that many individuals are born into a religion and their religious community, and that membership of a religious community can become part of one's identity, family, social and economic structure before choice in beliefs is introduced and developed.¹³¹

A.17 With these considerations in mind, the Special Rapporteur emphasised that the

overlap between freedom of religion or belief and the right to non-discrimination needs to be addressed not by trade-offs or a hierarchy, but by producing 'practical concordance' of all human rights involved, to the maximum degree possible, based on reasons accessible to all. ... Anchoring freedom of religion or belief in a principle that demands non-discrimination requires legal protection of the equality of opportunity in the enjoyment by all of this right, as well as all the other rights on which freedom of religion or belief depends. This means that the rights of individuals should be protected even within groups, by creating an enabling environment where dissenters are protected against incitement to violence, and are able to assert their agency through the exercise of their fundamental human rights, including freedom of expression, right to information, freedom of religion or belief, the right to education, the right work, freedom from coercion and equality before the law, among others. Equal liberties and protections in society, such as the right to equality and non-discrimination or the right to physical integrity, can only be maintained if individuals are never deemed as having waived said rights and liberties, even by voluntarily joining an organization.¹³²

Institutional autonomy and educational institutions

A.18 Religious autonomy is central to 'ecclesiastical'-type employees. What is less clear is the extent to which institutional autonomy should apply to educational institutions more broadly, given the very different educational settings across countries and the range of additional rights that may be involved in a particular case. In the very limited number of individual cases considered by the Human Rights Committee and European Court of Human Rights concerning schools, the schools at issue were state-run schools that had teachers employed specifically to teach religion, who were required under relevant legislation to be endorsed by the applicable religious body (such as a bishop).

A.19 These cases can be divided into two categories: (i) those raising issues of different treatment because of a disagreement over doctrine that did not involve Sex Discrimination Act-type grounds; and, (ii) those raising issues of interference in private life because of a person's relationship status that arguably did involve Sex Discrimination Act-type grounds. None of these cases have involved alleged direct discrimination on the grounds of sex, sexual orientation, or gender identity.

A.20 The only directly relevant individual communication identified by the ALRC considered by the Human Rights Committee under the ICCPR falls into the first category. There, the issue was whether there was discrimination on the grounds of religion because a religion teacher was prevented from teaching after complaints from ecclesiastical authorities that he taught 'liberation theology', contrary to their interpretation of doctrine. The Committee did not find any violation on the grounds of religious discrimination, finding that the state 'may, without violating [Article 18], allow the Church authorities to decide who may teach religion and in what manner it should be

¹³¹ Shaheed (n 14) [51]-[52].

¹³² Ibid [52] (internal citations omitted).

taught'.¹³³ Another case decided by the European Court of Human Rights found that a kindergarten teacher could be dismissed because her membership of, and teaching for, another religious denomination (again, not involving Sex Discrimination Act-type grounds) was incompatible with her position in the kindergarten.¹³⁴

A.21 Two other cases decided under the European Convention on Human Rights fall into the second category. Both involved male religion teachers in state-run schools who required endorsement by Catholic Church authorities to teach (one of whom was still technically a Catholic priest), and who were disendorsed on the basis of their marriage or relationship status.¹³⁵ The cases were analysed by reference to interference with the right to private life, and discrimination issues were not considered separately. In both cases the European Court of Human Rights held the interference with private life was justified, given that religious education teachers can be expected to owe a heightened degree of loyalty to religious ethos because they can be regarded as representatives of a church or religious community, and in light of the state's margin of appreciation in this area.¹³⁶ On the other hand, more recent decisions by the Court of Justice of the European Union have (in other employment contexts) adopted a more restrictive view of institutional autonomy, including concerning marital status, and the state's margin of appreciation in relation to it.¹³⁷

A.22 Although the ALRC is not aware of any individual communications where the second type of case has been considered by a UN treaty body directly, at least two UN treaty bodies have given strong indications that they would not consider institutional autonomy considerations to permit discrimination against students or staff on Sex Discrimination Act-type grounds in educational institutions. For example, in its periodic review of Germany's compliance with the International Covenant on Economic, Social and Cultural Rights in 2018, the Committee on Economic, Social and Cultural Rights expressed its concern at

the repeated reports of discrimination on grounds of religious belief, sexual orientation or gender identity in employment in non-ecclesiastical positions in church-run institutions, such as schools and hospitals (arts 2 (2) and 6).¹³⁸

A.23 The Committee recommended that Germany review its General Equal Treatment Act, 'to ensure that no discrimination is permitted against non-ecclesiastical employees on grounds of religious belief, sexual orientation or gender identity'.¹³⁹

A.24 Similarly, in its periodic review of Ireland's compliance with the ICCPR in 2014 (prior to amendments to significantly restrict the operation of the relevant section of its Employment Equality Acts), the Human Rights Committee expressed

concern that under section 37(1) of the Employment Equality Acts, religious-owned institutions, including in the fields of education and health, can discriminate against employees or prospective

133 Human Rights Committee, *Views: Communication No 195/1985*, 39th sess, UN Doc CCPR /C/39/D/195/1985 (23 October 1990) (*Delgado Páez v Colombia*) [5.7]. But see the discussion on further soft law developments taking a contrary approach in relation to teachers of religion in public schools in Bielefeldt, Ghanea and Wiener (n 121) 195–6.

134 *Siebenhaar v Germany* (European Court of Human Rights, Chamber, Application No. 18136/02, 3 February 2011).

135 And for the priest, advocacy in relation to the ability of priests to marry.

136 *Fernández Martínez v Spain* (European Court of Human Rights, Grand Chamber, Application No 56030/07, 12 June 2014) [78], [89] (noting that the decision of the Grand Chamber was split nine to eight); *Travaš v Croatia* (European Court of Human Rights, Chamber, Application No 75581/13, 4 October 2016) [97]. On the margin of appreciation see *Travaš v Croatia* (European Court of Human Rights, Chamber, Application No 75581/13, 4 October 2016) [67]. On the margin of appreciation in relation to religion more generally, see *Case of Osmanoglu and Kocabaş v Switzerland* (European Court of Human Rights, Chamber, Application No 29086/12, 10 January 2017) [92].

137 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* (Court of Justice of the European Union, Grand Chamber, C-414/16, ECLI:EU:C:2018:257, 17 April 2018); *IR v JQ* (Court of Justice of the European Union, Grand Chamber, C-68/17, ECLI:EU:C:2018:696, 11 September 2018).

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

139 *Ibid* [23].

employees to protect the religious ethos of the institution (arts 2, 18, 25 and 27).¹⁴⁰

A.25 The Committee recommended that Ireland amend the relevant section ‘in a way that bars all forms of discrimination in employment in the fields of education and health’.¹⁴¹

Parents’ liberty to ensure moral and religious education

A.26 Article 18(4) of the ICCPR requires 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’. Much of the focus of Article 18(4) is on ensuring that state-provided education is delivered to students in a way that is not inconsistent with the convictions of their parents.¹⁴² Article 18(4) does not require the state to fund religious educational institutions, but if funding is provided it should be done so without discrimination between religions.¹⁴³

A.27 Article 18(4) does not prevent the state from imposing minimum standards on religious educational institutions, for example, in relation to the curriculum. In his 2013 report on the intersection between freedom of religion and equality of men and women, Bielefeldt explained that, from a normative perspective, school education engages ‘a number of human rights, including the right to education, minority rights, equality between men and women, and freedom of religion or belief’.¹⁴⁴ He emphasised that Article 18(4) should not be interpreted in isolation, but

should be read in conjunction with article 5 and article 14, paragraph 2, of the Convention on the Rights of the Child, which require parents and legal guardians to provide appropriate direction and guidance “in a manner consistent with the evolving capacities of the child”. With regard to adolescents, the Committee on the Rights of the Child emphasizes that States parties should provide them “with access to sexual and reproductive information, including on family planning and contraceptives, the dangers of early pregnancy, the prevention of HIV/AIDS and the prevention and treatment of sexually transmitted diseases”. The Committee furthermore insists that adolescents should “have access to appropriate information, regardless of [...] whether their parents or guardians consent”.¹⁴⁵

A.28 Education, even in relation to equality issues, must however be delivered in a way that does not amount to a violation of the student’s right to hold or not hold a relevant belief (their *forum internum*), which receives unconditional protection under the ICCPR.¹⁴⁶

140 Human Rights Committee, *Concluding observations on the fourth periodic report of Ireland*, UN Doc CCPR/C/IRL/CO/4 (19 August 2014) [21].

141 Ibid.

142 Paul Taylor, *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee’s Monitoring of ICCPR Rights* (Cambridge University Press, 2020) 530–3.

143 Human Rights Committee, *Views: Communication No 694/1996*, 67th sess, UN Doc CCPR/C/67/D/694/1996 (*Waldman v Canada*) [10.6].

144 Bielefeldt (n 117) [54].

145 Ibid [54] (internal citations omitted).

146 Ibid [56].

Proposition A: Students – Sex Discrimination Act Grounds

A.29 This section sets out briefly rights and issues considered in the ALRC’s preliminary human rights analysis underlying Proposition A, which would, broadly, make discrimination against students on Sex Discrimination Act grounds unlawful in religious educational institutions. Exceptions would remain in relation to the appointment, selection and training of religious leaders, and participation in religious observances or practices.

Relevant rights at issue

A.30 Proposition A may require a religious educational institution to accept and support students whose views or conduct on sexual orientation or gender identity do not align with, and may directly challenge, certain religious beliefs promoted by a particular institution. Such a requirement potentially interferes with institutional autonomy connected to the right to manifest religious belief in community with others, parents’ liberties in relation to their children’s religious and moral education, freedom of expression, and freedom of association.

A.31 On the other hand, allowing discrimination against students or their families on Sex Discrimination Act grounds has the potential to impact students’ rights to equality and non-discrimination in education, health, privacy, freedom of conscience, belief and religion, freedom of expression, and (except in the context of higher education institutions) the rights of the child. States’ duties to promote non-discrimination and equality through education are also relevant to consideration of the proposed reform.

Necessary to achieve a legitimate aim

A.32 The proposed reforms envisaged under Proposition A aim to protect the fundamental rights and freedoms of students: in particular, the rights to equality and non-discrimination, to health, to education, and to freedom of thought, conscience and religion.¹⁴⁷

A.33 Such reforms are necessary to achieve this aim:

- because exclusion from any area of public life on Sex Discrimination Act grounds is a serious interference with a person’s dignity, particularly where it relates to exclusion from something as personal and fundamental as a faith community; and
- in light of the particular vulnerability of students with the protected attributes to significant mental health harms from exclusion and discrimination. For example, an Australian study published in 2021 reported that ‘one in four LGBTQ+ young people have attempted suicide and one in two trans young people’.¹⁴⁸ There is evidence that this vulnerability can be compounded for students who are themselves religious.¹⁴⁹ Australia’s largest national study into the experiences of transgender students found that a large proportion (68.9%) reported

147 Some stakeholders have argued that they would also have the secondary aim of protecting public health (which is another permissible ground for limitation referred to in Article 18(3)), because of the impacts that discrimination and stigma in educational institutions can have on the mental and physical health of students and other members of the community, and the costs this involves to the community.

148 Adam O Hill et al, *Writing Themselves In 4: The Health and Wellbeing of LGBTQA+ Young People in Australia* (Australian Research Centre in Sex, Health and Society, La Trobe University, 2021) 16. See also, Penelope Strauss et al, *Trans Pathways: The Mental Health Experiences and Care Pathways of Trans Young People. Summary of Results*. (Telethon Kids Institute, 2017) 34; Douglas Ezzy et al, ‘LGBTQ+ Non-Discrimination and Religious Freedom in the Context of Government-Funded Faith-Based Education, Social Welfare, Health Care, and Aged Care’ (2022) 58(3) *Journal of Sociology* 1, 6–7.

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

experiencing discrimination, which is a key driver of mental health concerns, including depression, anxiety, post-traumatic stress disorder, eating disorders, self-harm and suicidal ideation.¹⁵⁰ The study found that factors associated with schooling were major drivers of mental health problems for transgender students.¹⁵¹

A.34 Some stakeholders have suggested that such reforms (in whole or in part) are not necessary because students and their families can access education at other types of educational institutions. However, others have argued that this does not abrogate the necessity of the reforms because:

- the fact of exclusion is in itself a significant burden on the person's rights, with the potential for mental health impacts and impacts on the individual's freedom of religion, particularly where membership of a religious community is part of a person's family and social identity;¹⁵²
- students do not necessarily exercise choice in where they are to be educated;
- students may only develop awareness of their own identity while already part of the school or college community, and the disruption of a student's education and social relationships by needing to move to another school can be very significant;¹⁵³ and
- students may not have other suitable or comparable education options nearby.

A.35 On the other hand, there is a strong argument that retention of the existing broad exception is not necessary to allow those involved with religious educational institutions to manifest religion within their institutions. While prohibiting discrimination may require inclusion and support of individuals with different beliefs or conduct that is not in compliance with religious beliefs, it does not significantly burden the ability to teach doctrine or to manifest religious belief through worship and practice in community.

Proportionality

A.36 The following considerations are relevant in relation to the ALRC's proportionality analysis:

- Interference with institutional autonomy can be intensely uncomfortable and disorientating for those within an educational institution, and can expose the student population to different ideas about personal conduct and/or religious belief. However, given the potential vulnerability of students affected, those impacts are likely to be significantly more limited than the impact on the rights of the students discriminated against if such discrimination is allowed.
- Proposition A does not interfere with the essence of the right to manifest belief through practice in community, or to teach religious doctrine, even if there is a potentially greater impact on freedom of association and the way religious doctrine is taught.
- The proposed reforms would reflect the legal position that has existed in Queensland and Tasmania for a number of decades. This indicates that such reforms would not significantly undermine the ability of religious schools to maintain their religious ethos — in fact, in preliminary consultations a number of individuals associated with administering a broad range of religious schools in those states indicated that they viewed such laws as appropriate and positive.¹⁵⁴

¹⁵⁰ Penelope Strauss et al (n 148) 60.

¹⁵¹ Ibid 45, 51–5.

¹⁵² See Shaheed (n 14) [50]–[51].

¹⁵³ Particularly where they were enrolled at a young age, which is particularly the case in relation to P–12 schools where a student may attend from the ages of five to 18. However, this can happen at any stage of a person's education.

¹⁵⁴ See also Douglas Ezzy et al, *Summary of Findings – LGBTIQ+ Employees of Religiously Affiliated Schools and Welfare Organisations: Pilot Study* (University of Tasmania, 2018) <<https://lgbtandreligiousfreedom.com.au/religious-freedom-and-lgbt-rights-pilot-project/>>.

- The approach is consistent with the commitments made by Australian governments at all levels in the *Mparntwe Declaration* and Australia's obligations in relation to addressing discrimination through education.

A.37 A number of other potentially less restrictive measures have been suggested to the ALRC. However, the ALRC's preliminary view is that they will not achieve the aims sought by the Terms of Reference:

- **Allowing discrimination on enrolment, as long as the school's policies on this are clear, to enable parents and students to make a choice about whether or not to attend the school.** For the reasons set out in [33], there is a strong argument that this would not achieve the aim of protecting student's rights. It could, instead, be argued to have the perverse impact of requiring anti-discrimination law to entrench discriminatory beliefs by requiring schools to explicitly write them down and have prospective students and parents agree to them. Such measures go beyond merely making prospective students aware of the school's policies: they compound stigma and may also impact on the rights of existing students and teachers who may have the protected characteristics (or who are associated with those with protected characteristics, such as a teacher with a gay child) by creating an atmosphere of exclusion in relation to them. In addition, policies or the expression of policies can change, and impact existing students and staff.
- **Carving out certain other aspects of the operation of the law, so that the educational institution can define its policies (for example in relation to school captains, clubs, and school formals) by reference to its beliefs.** There is a strong argument that the appropriate approach here is already provided for by the *Sex Discrimination Act* as the definition of indirect discrimination allows differential treatment where it can be shown to be reasonable, and proportionate.

Consistency with overseas practice

A.38 These reforms are consistent with practice in a number of overseas jurisdictions considered, including New Zealand, England, and Ireland.¹⁵⁵

Proposition B: Staff – Sex Discrimination Act Grounds

Relevant rights at issue

A.39 Not allowing religious educational institutions to exclude staff members who do not adhere to or personally endorse particular beliefs of the religion around sexuality and relationships has the potential to interfere with institutional autonomy connected to the right to manifest religious belief in community with others, parents' freedoms in relation to their children's religious and moral education, and freedoms of expression and association. Restricting religious educational institutions from excluding staff members who do not adhere to particular beliefs of the religion may arguably impact the authenticity or credibility of the institution's delivery of faith-based education, in the eyes of their religious (and parental) community. Given the role that staff may play in providing role models as part of faith formation, the interference with religious autonomy is likely to be greater than in relation to exceptions concerning students.

A.40 On the other hand, exclusion of and other discrimination against staff on Sex Discrimination Act grounds can impact on the rights of both staff and students. In relation to staff, discrimination on Sex Discrimination Act grounds may impact on their rights to equality and non-discrimination, employment, health, privacy, and freedom of thought, conscience and religion. However,

¹⁵⁵ In England, under the *Equality Act 2010* (UK) (subject to some specific exceptions in relation to harassment); Ireland, under the *Equal Status Act 2000* (Ireland); and New Zealand, under the *Human Rights Act 1993* (NZ).

discrimination against staff can also impact on the rights of students within the school with the same protected characteristics (including the rights to equality and non-discrimination, education, health, freedom of thought, conscience and religion, and, for institutions attended by children, the rights of the child).

Necessary to achieve a legitimate aim

A.41 The proposed reforms envisaged under Proposition B aim to protect the rights and freedoms of both staff and students outlined above.

A.42 It can be argued that, broadly, such reforms are necessary in the educational context to achieve this aim:

- because exclusion from any area of public life on Sex Discrimination Act grounds is a serious interference with a person's dignity, particularly where it relates to exclusion from something as personal and fundamental as a faith community;
- in relation to marital status, because the potential economic and social cost of separation or divorce may act as a barrier to a staff member leaving an abusive relationship; and
- because students are acutely sensitive to the treatment of staff, and exclusion or poor treatment of LGBTQ+ staff may deprive students of important support mechanisms and entrench feelings of exclusion and associated mental health impacts. A number of stakeholders have suggested that, even without revealing personal details, LGBTQ+ staff can play an important role in supporting LGBTQ+ students and ameliorating some of the mental health risks they disproportionately face.

A.43 The argument that these reforms are not necessary because staff may simply seek employment at a different kind of institution is stronger than the similar argument in relation to students given the greater element of free choice. However, others have argued that this nevertheless does not abrogate the need for the reform:

- because of the particular vulnerability of LGBTQ+ students, and the impact on students of exclusionary policies in relation to staff;
- because the expression or approach to enforcement of an educational institution's religious ethos may change over time, meaning that existing staff did not necessarily 'sign up to' a particular approach;
- because alternative employment may not be a realistic or reasonable option; and
- because of the potential social cost and impact on mental health of requiring dislocation from a faith community in which the staff member is a part.¹⁵⁶

A.44 Some stakeholders have suggested that reforms along the lines of Proposition B are not necessary because educational institutions already deal with these issues in a pastoral way that incorporates considerations of the facts of the particular case. However, the law currently does not require any such consideration, leaving staff vulnerable to the approach their institution adopts at a particular time.

Proportionality

A.45 The proportionality analysis for these proposed reforms is essentially the same as for students, outlined above at [A.36]. This view is strengthened by positive experiences of laws with no specific exemption, such as Tasmania, and narrower specific exceptions, such as Queensland, over the previous two decades.

¹⁵⁶ Shaheed (n 14) [50]–[51].

A.46 A number of other potentially less restrictive measures have been suggested to the ALRC. However, the ALRC's preliminary view is that they would not achieve the aims sought by the Terms of Reference:

- **Restricting discrimination to selection and appointment on grounds set out in a public policy** raises the same issues as outlined above at [A.37].
- **Don't ask don't tell policies**, which only allow discrimination where a person is open about their protected attributes in a work context, can also lead to significant harm.¹⁵⁷ The impact of hiding one's protected characteristics requires ongoing vigilance that negatively impacts not only the health and wellbeing of the staff member,¹⁵⁸ but also the productivity of the institution.¹⁵⁹
- **Policies that will accept gay or lesbian staff, or married staff who are separated**, as long as they remain celibate amount to a very significant, and disproportionate, burden on a person's right to equality and non-discrimination, private life, right to family life, and right to health.
- **Restricting the exception to marital or relationship status** leaves room for significant discrimination on the grounds of sex and sexual orientation and amounts to a very significant, and disproportionate, burden on a person's right to private life and family life.
- **Narrower exceptions that allow discrimination on Sex Discrimination Act grounds where they are an inherent requirement of the role, and reasonable and proportionate, or in relation to 'core' doctrines** leave room for ambiguity that favours the duty holder, so that even if a person were to be protected there are significant disincentives for being open about the protected attributes or challenging discrimination when it occurs.
- **Restriction of the ability to discriminate on Sex Discrimination Act grounds to particular positions (such as the most senior position in the institution)** provides potentially the narrowest approach, but raises the same issues in relation to the effect on students and the affected staff member. It could also lead to situations where, for example, a lesbian principal is threatened with being 'outed' by a staff member who is being disciplined, with significant risks to the principal's livelihood and career.

Consistency with overseas practice

A.47 Proposition B reflects practice in a number of overseas jurisdictions considered, including the European Union framework law, implemented across most European countries¹⁶⁰ including (from the jurisdictions specifically considered) Ireland¹⁶¹ and (although somewhat less clearly) England.¹⁶² It is also consistent with the position in New Zealand law, subject to a more limited exception in relation to sex.¹⁶³

157 Ezzy et al (n 148) 6–7; Queensland Human Rights Commission (n 105) 380–1.

158 Ezzy et al (n 154) 4.

159 Ezzy et al (n 148) 7.

160 *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation* [2000] OJ L 303/16 art 4(2). This has been implemented across most EU jurisdictions: see Chopin and Germaine (n 76) 72.

161 *Employment Equality Act 1998* (Ireland) s 37(1A).

162 The *Equality Act 2010* (UK) does not provide specific exceptions in relation to staff on grounds other than religion, although in England this is subject to requirements of the *School Standards and Frameworks Act 1998* (UK), which has the potential to reintroduce discrimination, and has been the subject of reform recommendations: Equality and Human Rights Commission (n 76) 25–9.

163 The exception applies 'where the position is for the purposes of an organised religion and is limited to one sex so as to comply with the doctrines or rules or established customs of the religion': see, eg, *Human Rights Act 1993* (NZ) s 28(1). This would be relevant, for example, to practices of some religious communities where students over a certain age are segregated by gender and taught by a teacher of the same gender.

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