



Law Council  
OF AUSTRALIA

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

Senate Legal and Constitutional Affairs References Committee

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# Table of Contents

<b>About the Law Council of Australia</b> .....	<b>3</b>
<b>Acknowledgement</b> .....	<b>4</b>
<b>Executive Summary</b> .....	<b>5</b>
<b>Context</b> .....	<b>7</b>
Expert Panel Review .....	7
<b>Relevant international obligations</b> .....	<b>8</b>
Addressing tensions .....	10
<b>Relevant legislation</b> .....	<b>12</b>
<b>Approach to reform</b> .....	<b>13</b>
<b>Sex Discrimination Act</b> .....	<b>15</b>
Existing structure and provisions .....	15
Exemptions - students.....	17
Existing exemption.....	17
Government proposal .....	18
Law Council position.....	18
Proposed paragraph 7B(2)(d).....	21
Expert Panel Review recommendations .....	22
Exemptions – employees and contractors .....	23
Existing exemptions.....	23
Law Council position.....	25
Expert Panel Review recommendations .....	26
Need for consistency .....	27

## About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2018 Executive as at 1 January 2018 are:

- Mr Morry Bailes, President
- Mr Arthur Moses SC, President-Elect
- Mr Konrad de Kerloy, Treasurer
- Mr Tass Liveris, Executive Member
- Ms Pauline Wright, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

## Acknowledgement

The Law Council is grateful for the assistance of its National Human Rights Committee, the New South Wales Bar Association (**NSW Bar**), the New South Wales Law Society (**NSW LS**), and the Law Society of South Australia (**LSSA**) in the preparation of this submission.

## Executive Summary

1. The Law Council welcomes the opportunity to respond to the Committee's inquiry. It is, however, concerned by the inquiry's truncated timeframes, and the fact that it is being held without the benefit of the report of the Expert Panel recently appointed by the former Prime Minister to examine whether Australian law adequately protects the human right to freedom of religion (**the Expert Panel Report**). It considers that the Expert Panel Report should be released, and an adequate period should be granted for the public to digest its findings, before any new legislation is introduced.
2. The Law Council considers that the Committee's inquiry must be based on an understanding of Australia's relevant international human rights obligations, particularly with respect to: the freedom to manifest one's religion; the right to equality and non-discrimination; and the obligation to ensure that in all actions concerning children, the best interest of the child is a primary consideration.
3. While some human rights are absolute, in other cases, limitations on human rights are possible provided that certain standards are met. In such cases, fundamental rights and freedoms will frequently need to be balanced against each other. In the current context, the right of a person to exercise his or her freedom of religion must be balanced against the rights and freedoms of persons who will be impacted by that exercise. While freedom of religion is a fundamental human right which should be protected under law, the manifestation of religion should not be protected at the expense of other rights and freedoms. In this respect, rights and freedoms should be protected and balanced in a coherent legal framework.
4. The Law Council considers that it is essential to approach any anti-discrimination legislative reforms in a comprehensive rather than piecemeal manner. It is important not only to have regard to the *Sex Discrimination Act 1984* (Cth) (**SDA**) provisions, but also to opportunities to consolidate and strengthen federal protections against discrimination on the basis of religion, and other relevant federal legislative provisions. The Law Council considers that in line with any reforms, an improved mechanism which provides for the enforcement of rights in accordance with international human rights law is needed, such as a national human rights act. This would also help to overcome the current fragmented approach to federal anti-discrimination legislation.
5. The Law Council supports the repeal of existing SDA exemptions which apply to religious educational institutions with respect to students. It considers that children should not be discriminated against. It does not support laws which add to lesbian, gay, bisexual and transgender (**LGBT**) children's trauma or stigmatise them by permitting discrimination by religious educational institutions. Such laws are not in the best interests of children, which must be a primary consideration which is given high priority and greater weight than other considerations. The Law Council does not support legislative alternatives which would limit the scope of existing SDA exemptions concerning students. Its Justice Project final report indicates that significant harm is done to LGBTI+ children who experience discrimination.
6. The Law Council considers that if discrimination of people who are employed or contracted by religious schools is to be maintained under relevant SDA exemptions, there needs to be consideration by Parliament as to whether this is justified, necessary and proportionate to what schools are trying to protect. It queries whether, in light of the harm and unfairness caused due to such exemptions – to both teachers and students – there is sufficient justification for that harm. The Law

Council further considers that a key concern is the need for consistency across the legislation in this area, noting the SDA exemptions' interactions with other relevant federal provisions – such as under the *Fair Work Act 2009* (Cth) (**the FWA**) and the *Australian Human Rights Commission Act 1986* (Cth) (**the AHRC Act**). Decisions to repeal or amend the SDA exemptions should, therefore, be only taken in the context of comprehensive consideration of the full suite of relevant legislation.

7. While its position should be considered preliminary given the limited inquiry timeframes, the Law Council recommends that:
  - Prior to the introduction of any amendments to the SDA regarding exemptions for religious educational bodies:
    - the Australian Government should release the full Expert Panel Report, along with its proposed response to its findings, including the full details of any proposed legislative amendments; and
    - an adequate timeframe should be allowed for the Australian public to digest the Expert Panel Report and the Australian Government's proposed legislative and policy response.
  - Amendments to the SDA's exemptions for religious institutions should be considered within a more comprehensive analysis of:
    - opportunities to consolidate and, in accordance with international human rights law, strengthen federal protections against discrimination on the basis of religion;
    - other anti-discrimination exemptions for religious bodies across a range of federal laws;
    - an improved mechanism to recognise and protect human rights in accordance with international human rights principles, such as a consolidation of federal anti-discrimination legislation or a national Human Rights Act.
  - At the very minimum, the Committee should avoid recommendations that would allow for the manifestation of forms of discrimination that are currently unlawful under federal anti-discrimination law.
  - Subsection 38(3) of the SDA should be abolished.
  - Section 37 of the SDA should be amended to clarify that paragraph 37(1)(d) does not apply to the treatment of students by religious schools.
  - If discrimination against people employed or contracted by religious schools is to be maintained under the relevant SDA provisions, there needs to be consideration by Parliament as to whether this is justified, necessary and proportionate to what schools are trying to protect.
  - Any amendments to SDA exemptions for employees and contractors of religious educational institutions should only be taken after careful consideration of their interaction with other relevant federal provisions, including under the FWA and the AHRC Act, and the possible need for broader amendments.

# Context

## Expert Panel Review

1. The Law Council highlights its concerns regarding the extremely truncated timeframes for the Committee's current inquiry. These are unlikely to enable many Australians to engage with the important questions being considered – which unfortunately, undermines the ability of the Parliament to make informed judgments taking into account the views held by civil society groups and the general public and also undermines the specific role of the Committee. They also increase the risks that any subsequent legislation introduced may have unintended consequences, including adverse legislative and social effects.
2. The Law Council is particularly concerned that the current inquiry is being held without the benefit of the Expert Panel Report. The Law Council provided a [submission](#) in response to the Expert Panel's inquiry and notes that the Expert Panel received 15,550 submissions,<sup>1</sup> demonstrating the strong level of public interest in such issues.
3. The Expert Panel Report was provided to the former Prime Minister in May 2018.<sup>2</sup> However, it has not been released publicly. While the media has set out its reported recommendations,<sup>3</sup> several of which are briefly discussed below, it is clearly far from ideal to comment on these without the benefit of the full report's analysis. The Law Council queries the value of the Senate instigating a further inquiry in these circumstances.
4. The Law Council considers that both the Expert Panel Report and the Australian Government's response should be released, and an adequate period for the Australian public to digest its findings should occur, prior to any new legislation being introduced.
5. Given these concerns, the Law Council position below should be considered preliminary, noting the difficulties in seeking the detailed views of its members within the current timeframes. In this context, some of its constituent bodies and committee members have reinforced that their response is either precluded or is unable to be as detailed as they would wish.

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<sup>1</sup> Australian Government Department of the Prime Minister and Cabinet, *Religious Freedoms Review* (undated), <https://pmc.gov.au/domestic-policy/religious-freedom-review>.

<sup>2</sup> Ibid.

<sup>3</sup> 'Read the full 20 recommendations from the religious freedom review', *Sydney Morning Herald* (online), 12 October 2018, <https://www.smh.com.au/politics/federal/read-the-full-20-recommendations-from-the-religious-freedom-review-20181011-p50918.html>.

## Recommendations:

- **Prior to the introduction of any amendments to the SDA regarding exemptions for religious educational bodies:**
  - **the Australian Government should release the full Expert Panel Report, along with its proposed response to its findings, including the full details of any proposed legislative amendments; and**
  - **an adequate timeframe should be allowed for the Australian public to digest the Expert Panel Report and the Australian Government's proposed legislative and policy response.**

## Relevant international obligations

6. The High Court has described freedom of religion as the 'essence of a free society', and the concept of religion as being 'of fundamental importance to the law'.<sup>4</sup> Freedom of religion has long been recognised as a fundamental human right.
7. Article 18(1) of the *International Covenant on Civil and Political Rights (ICCPR)*<sup>5</sup> recognises that the right to freedom of religion includes both freedom to have or to adopt a religion or belief, as well as freedom to manifest one's religion or belief in worship, observance, practice and teaching:

*Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*

8. The freedom to have or to adopt a religion or belief is not capable of being subject to limitation per article 18(2). Freedom to manifest one's religion or beliefs, on the other hand, may be subject to limitation. In this regard,
  - article 18(3) of the ICCPR provides:

*Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or **the fundamental rights and freedoms of others** [emphasis added]; and*
  - article 18(4) of the ICCPR provides that:

*The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.*
9. Australia is also a party to a number of international human rights instruments requiring State parties to take measures to protect religious freedom. These include

<sup>4</sup> *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)* (1983), 154 CLR 120, at 130.

<sup>5</sup> Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990). Australia ratified on 17 December 1990.



the *Convention relating to the Status of Refugees 1951*,<sup>6</sup> *International Labour Organization Convention 111: Discrimination (Employment and Occupation) Convention 1958*,<sup>7</sup> the ICCPR<sup>8</sup> and the *International Labour Organization Convention 158: Termination of Employment Convention 1982*.<sup>9</sup>

10. The *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) (the Religion Declaration)*<sup>10</sup> is not a treaty, but is a valuable tool for interpreting the scope of article 18 of the ICCPR. It prohibits unintentional and intentional acts of discrimination and defines discrimination in article 3 as:

*Any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.*

11. Article 6 of the **Religion Declaration** stipulates that the religious community's joint or shared expression of its beliefs is protected equally with the individual's right and protects manifestation of religion or belief including, but not limited to:

- worshipping and assembling, and maintaining places for this purpose;
- establishing and maintaining charitable or humanitarian institutions;
- practising religious rites and customs;
- writing and disseminating religious publications;
- teaching of religion and belief;
- soliciting voluntary financial support;
- training and appointment of religious leaders in accordance with the requirements and standards of the religion or belief;
- observing religious holidays and ceremonies; and
- communicating with individuals and communities on matters of religion and belief.

12. The right to equality and non-discrimination is also a fundamental human right that is essential to the protection and respect of all human rights. Article 26 of the ICCPR provides that all people 'are equal before the law and are entitled without any discrimination to the equal protection of the law'. It requires State Parties to prohibit and guarantee protection against discrimination on the basis of 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. The phrase 'other status' in article 26 of the ICCPR has been interpreted by human rights treaty bodies to include attributes including sexual orientation.<sup>11</sup>

13. Article 2(1) of the ICCPR further requires that State parties undertake to respect and ensure to individuals within its territory and subject to its jurisdiction the rights recognised in the ICCPR, without distinction of any kind, including on the basis of

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<sup>6</sup> Article 1.

<sup>7</sup> Article 1(a).

<sup>8</sup> Articles 18, 26 and 27.

<sup>9</sup> Article 5(d).

<sup>10</sup> Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, GA Res 36/55, UNGAOR, 36th sess, UN Doc A/36/684 (1981).

<sup>11</sup> Human Rights Committee, *Toonen v Australia*, Communication No 488/1992 (1992); Human Rights Committee, *Young v Australia*, Communication No 941/2000 (2003) [10.4].

sex, religion, or other status. The United Nations Human Rights Committee stresses that this obligation is both negative and positive in nature – State parties must refrain from the violation of the rights recognised by the ICCPR,<sup>12</sup> and have a positive duty to ensure these rights, including through legislation, judicial or administrative action and education.<sup>13</sup>

14. Children have special rights under human rights law, taking into account their particular vulnerabilities. Under a number of treaties, particularly the *Convention on the Rights of the Child*<sup>14</sup> (**CRC**), the core principles include that:

- rights are to be applied without discrimination;<sup>15</sup> and
- the best interests of the child are to be a primary consideration.<sup>16</sup>

15. As noted by the Parliamentary Joint Committee on Human Rights (**PJCHR**):

- Human rights law requires that in all actions concerning children the best interests of the child must be a primary consideration. This must be assessed from the child's perspective rather than that of their parents or the state.
- It not only requires that the rights of the child be taken as a primary consideration when different interests are being considered, it also provides that any laws that are open to interpretation are interpreted in a way which most effectively serves the child's best interest and any decision that will affect a specific child or children generally must evaluate any possible impact on the child.
- What is in the best interests of the child should be able to be adjusted according to the specific situation of the child or children affected and consider their personal context and needs.
- While the best interests of the child may not be the only relevant consideration, it is to be given high priority, and is not to be considered as just one of several considerations; larger weight should be given to what serves the child best.<sup>17</sup>

## Addressing tensions

16. Under international human rights law, certain human rights are absolute, and no limitation upon them is permissible.<sup>18</sup> For all other human rights, limitations may be imposed, provided certain standards are met. As noted above, the right 'to freedom of thought, conscience and religion' in article 18(1) of the ICCPR is absolute. On the other hand, the right 'either individually or in community with others and in public or private, to manifest [one's] religion or belief in worship, observance,

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<sup>12</sup> And any restrictions on any of those rights must be permissible under the relevant provisions of the ICCPR. Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of ICCPR rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of an ICCPR right: Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligations Imposed on States Parties of the Covenant*, UN Doc CCPR/C/21/Rev.1/Add. 13, 80<sup>th</sup> sess (29 March 2004), [6].

<sup>13</sup> *Ibid*, [7].

<sup>14</sup> Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (**CRC**).

<sup>15</sup> CRC, Art 2.

<sup>16</sup> CRC, Art 3(1).

<sup>17</sup> PJCHR, *Guide to Human Rights* (June 2015) (**PJCHR Guide**), 47.

<sup>18</sup> See the Law Council's *Policy statement on Human Rights and the Legal Profession: Key Principles and Commitments*, May 2017, paragraph 19.

practice and teaching' can be subject to limitations, as article 18(3) makes clear, 'as prescribed by law' and which 'are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.

17. Where limitations are permissible, as in the case of the manifestation of religious belief, fundamental rights and freedoms will frequently need to be balanced against each other. In the current context, the right of a person to exercise his or her freedom of religion must be balanced against the rights and freedoms of persons who will be impacted by that exercise. The Law Council notes that while freedom of religion is a fundamental human right and should be protected under law, the manifestation of religion should not be protected at the expense of other rights and freedoms. In this respect, rights and freedoms should be protected and balanced in a coherent legal framework.

18. If there is a tension or conflict between the exercise of the right to manifest one's religion and the rights and freedoms of others, protecting the exercise of the right to manifest one's religion may involve imposing limits upon or diminishing rights of others such as, for example, a person's right to freedom from discrimination on the ground of sexual orientation. The United Nations Human Rights Committee has provided some guidance as to the interpretation of article 18 in this context:

*In interpreting the scope of permissible limitation clauses [to Article 18], States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination.<sup>19</sup>*

19. In further considering when limitations on human rights may be permissible, the Law Council endorses the analytical framework adopted by the PJCHR. In general, where a provision appears to limit rights, the PJCHR considers whether and how:

- the limitation is prescribed by law;
- the limitation is aimed at achieving a legitimate objective;
- there is a rational connection between the limitation and the objective; and
- the limitation is proportionate to that objective.<sup>20</sup>

20. Consistent with this approach, proportionality plays an important role in human rights and anti-discrimination law. To be justified, a restriction or limitation must have a legitimate aim and the means used to achieve this aim must be necessary and proportionate.<sup>21</sup> Limitations must respond to a pressing public or social need, and be directly related, and proportionate, to the specific need on which they are based.<sup>22</sup>

21. In considering proportionality, factors which might be relevant include:

- whether there are other less restrictive ways to achieve the same aim;
- whether there are effective safeguards or controls over the measures;

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<sup>19</sup> Human Rights Committee (HRC), *CCPR General Comment No 22: Article 18 (Freedom of Thought, Conscience of Religion)*, UN Doc CCPR/C/21/Rev.1, 48<sup>th</sup> sess, (30 July 1993), [8].

<sup>20</sup> PJCHR Guide, 7-9. See the Law Council's *Policy statement on Human Rights and the Legal Profession: Key Principles and Commitments*, May 2017, paragraph 19.

<sup>21</sup> Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion*, 48<sup>th</sup> sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993), at [8].

<sup>22</sup> *Ibid.*

- the extent of any interference with human rights – the greater the interference the less likely it is to be considered proportionate;
- whether affected groups are particularly vulnerable; and
- whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of the individual case.<sup>23</sup>

22. While in the very brief time available for the current inquiry, the Law Council has not been able to conduct a full review of relevant caselaw in this area, a demonstration of a balancing approach is provided by the decision of *Catholic Care v The Charity Commission for England and Wales*<sup>24</sup> which applied s 193 of the *Equality Act 2010* (UK), requiring any restriction of the provision of benefits by charities to be in pursuit of a charitable instrument and a proportionate means of achieving a legitimate aim.<sup>25</sup> In that case, while the objectives of the religious institution were considered legitimate, it was ultimately determined, on the weight of evidence, that ‘religious conviction did not provide sufficient justification for the proposed discrimination in the context of a public activity such as adoption’.<sup>26</sup>

23. The NSW LS further notes the example of the 2013 case of *Eweida and others v The United Kingdom*, in which the ECtHR held that the national courts had struck the right balance between the the employer’s right to secure the rights of others and the applicants’ right to manifest their religion’ in finding that an employee’s refusal to carry out certain duties which they believed would condone homosexuality constituted appropriate grounds for dismissal.<sup>27</sup> It also raises the national example of *Bull & Bull v Hall & Preddy*, decided by the United Kingdom Court of Appeal in 2012, in which the Court held that laws prohibiting discrimination on the grounds of sexual orientation were a ‘necessary and proportionate intervention’ to protect the rights of others. The Court affirmed that:

*No individual is entitled to manifest his religious belief when and where he chooses so as to obtain exemption in all circumstances from some legislative provisions of general application.*<sup>28</sup>

## Relevant legislation

24. Certain exemptions from federal anti-discrimination legislation for religious bodies and educational institutions established for religious purposes seek to protect freedom of religion by balancing that right with the right to non-discrimination. There are also protections and exemptions in other federal legislation. Relevant statutes include the:

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<sup>23</sup> PJCHR Guide, 8.

<sup>24</sup> *Catholic Care (Diocese of Leeds) v Charity Commission of England and Wales* [2012] UKUT 395 (Upper Tribunal (Tax and Chancery), Sales J, 2 November 2012). For a further example of a recent judicial approach to resolving tensions with respect to rights (in this instance, freedom of religion and the right of patients to equal access to healthcare), see *The Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario* 2018 ONSC 579.

<sup>25</sup> This test reflects the jurisprudence of the European Court of Human Rights in determining whether differential treatment would be justified for the purposes of Article 14 (non-discrimination) of the European Charter of Human Rights (that is, in order to be justified, a differential treatment must have an objective and reasonable justification).

<sup>26</sup> [46] of the printed case.

<sup>27</sup> *Case of Eweida and Others v The United Kingdom* [2013] ECtHR Nos. 48420/10, 59842/10, 51671/10 and 3656/10.

<sup>28</sup> *Bull & Bull v Hall & Preddy* [2012] EWCA Civ 83, 65.

- SDA;
- *Age Discrimination Act 2004 (Cth)* (**ADA**);
- FWA; and
- AHRC Act.

25. At the State and Territory level, there are equal opportunity and anti-discrimination laws which protect freedom to express religion through various exemptions and protections. This is in addition to protections provided under section 14 of the *Human Rights Act 2004* (ACT) and section 14 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

26. The case of *Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors* [2014] VSCA 75 involved consideration of the interaction of the rights to freedom from discrimination on the basis of sexual orientation and freedom of religion, and in particular the operation of the exemption provisions in the *Equal Opportunity Act 1995* (Vic) (**EO Act**) concerning religious freedom. A majority of the Victorian Court of Appeal held that neither of the exemptions in sections 75(2) or 77 of the EO Act was available to render lawful the appellant's refusal to hire to the respondent a camp facility for the use of same sex attracted young people. The Law Council submits that this decision shows how an appropriate balance can be struck where there is an apparent conflict between the principle of non-discrimination and freedom to express one's religion.

## Approach to reform

27. The Law Council considers that it is essential to approach any anti-discrimination reforms in a comprehensive rather than piecemeal manner. It is important not only to have careful regard to the SDA exemptions, but also to:

- opportunities to consolidate and perhaps strengthen the protections against discrimination and vilification on the basis of religion at the federal level. In this context, the United Nations Human Rights Committee has noted its concerns regarding the 'lack of direct protection against discrimination on the basis of religion at the federal level'.<sup>29</sup> The current protections for religious freedom in Australia at the federal level are fragmented and inconsistent; and
- other relevant anti-discrimination prohibitions and exemptions which operate at the federal level.
  - For example, as discussed below, with respect to the field of employment, there is a need to consider the interaction of any proposed SDA reforms with other existing legislation.<sup>30</sup>
  - More broadly, anti-discrimination exemptions can be found in a raft of federal instruments including the SDA, FWA, AHRC Act and ADA. These exemptions provide scope for religious organisations – including, but not limited to, faith-based educational institutions – to discriminate, in certain circumstances, against individuals based on a range of attributes, from their age to their sexual orientation. If there is to be a review, and potentially reform, of the exemptions available to faith-based educational institutions, the exemptions for other religious bodies should similarly be reviewed. Concerns have been raised by some of the Law

<sup>29</sup> Human Rights Committee, Concluding observations on the sixth periodic report of Australia, 102nd session, UN Doc CCPR/C/AUS/CO/6 (9 November 2017), at [17].

<sup>30</sup> For example, FWA, ss351(1)-(2); ss772(1)-(2).

Council's constituent bodies and advisory groups that these existing exemptions are permanent, broad, and do not require analysis of reasonableness and proportionality.

- The NSW LS further draws attention to the appropriateness of current exemptions as they apply to religious organisations which receive public funding to conduct essential services in education, aged care, child welfare, adoption and employment services. While the SDA states that religious organisations that receive Commonwealth funding for aged care cannot discriminate against individuals,<sup>31</sup> there is no such prohibition on discrimination for the other services.

28. Any option for reform in this area should promote the understanding that human rights are 'universal, indivisible and interdependent and interrelated'.<sup>32</sup> The Law Council considers that if the protection of religious freedom is to be strengthened, it should be accompanied by an improved mechanism which provides for the enforcement of rights in accordance with international human rights principles through a consolidation of Australia's anti-discrimination legislation or a comprehensive legislative bill of rights that recognises and protects fundamental human rights. The Law Council submits that this an achievable outcome, which would help to overcome the current fragmented approach to federal anti-discrimination legislation.

29. As discussed above, while the freedom to have or adopt a religion or belief is absolute, the freedom to manifest one's religion may be subject to limits in accordance with international human rights principles. The Law Council cautions against any outcome that would allow for the manifestation of religious belief whilst permitting forms of discrimination that are currently unlawful under federal anti-discrimination law.

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<sup>31</sup> Under SDA, s 37(2). This provides that s 37(1)(d) does not apply to an act or practice of a body established for religious purposes if: (a) the act or practice is connected with the provision by the body of Commonwealth-funded aged care; and (b) the act or practice is not connected with the employment of persons to provide that aged care.

<sup>32</sup> Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights in Vienna on 25 June 1993, at [5].



## Recommendations:

- **Amendments to the SDA’s exemptions for religious institutions should be considered within a more comprehensive analysis of:**
  - **opportunities to consolidate and, in accordance with international human rights law, strengthen federal protections against discrimination on the basis of religion;**
  - **other anti-discrimination exemptions for religious bodies across a range of federal laws;**
  - **an improved mechanism to recognise and protect human rights in accordance with international human rights principles, such as a consolidation of federal anti-discrimination legislation or a National Human Rights Act.**
- **At the very minimum, the Committee should avoid recommendations that would allow for the manifestation of forms of discrimination that are currently unlawful under federal anti-discrimination law.**

30. If, however, Parliament wishes to pursue SDA amendments particularly at this time, the Law Council makes the following remarks.

## Sex Discrimination Act

### Existing structure and provisions

31. At the federal level, the SDA provides protection against the fundamental right to equality and non-discrimination on the grounds of sex;<sup>33</sup> sexual orientation;<sup>34</sup> gender identity;<sup>35</sup> intersex status;<sup>36</sup> marital or relationship status;<sup>37</sup> pregnancy or potential pregnancy;<sup>38</sup> breastfeeding;<sup>39</sup> and family responsibilities.<sup>40</sup>

32. The relevant definitions are set out in Part I and include both ‘direct’ and ‘indirect’ discrimination.<sup>41</sup> For example, with respect to discrimination on the ground of sexual orientation, subsection 5A(1) defines direct discrimination, and subsection 5A(2) defines indirect discrimination.

1) *For the purposes of this Act, a person (the **discriminator**) discriminates against another person (the **aggrieved person**) on the ground of the aggrieved person’s sexual orientation if, by reason of:*

(i) *the aggrieved person’s sexual orientation; or*

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<sup>33</sup> SDA s 5.

<sup>34</sup> SDA, defined s 4(1) and see s 5B.

<sup>35</sup> SDA, defined s 4(1) and see s 5B.

<sup>36</sup> SDA, defined s 4(1), see s 5C.

<sup>37</sup> SDA, defined s 4(1), see s 6.

<sup>38</sup> SDA, defined s 4B, see s 7.

<sup>39</sup> SDA, s 7AA.

<sup>40</sup> SDA, s4A, see s 7A.

<sup>41</sup> With the exception of the definition of discrimination on the ground of family responsibilities, which is limited to direct discrimination.

- (ii) *a characteristic that appertains generally to persons who have the same sexual orientation as the aggrieved person; or*
- (iii) *a characteristic that is generally imputed to persons who have the same sexual orientation as the aggrieved person;*

*the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person who has a different sexual orientation.*

- 2) *For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of the aggrieved person's sexual orientation if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons who have the same sexual orientation as the aggrieved person.*

*(3) This section has effect subject to sections 7B and 7D.*

33. The definitions provided with respect to other grounds are in similar terms.<sup>42</sup> Section 7B sets out the reasonableness test which applies to any consideration of indirect discrimination across the SDA, in any relevant area. It provides that a person does not discriminate against another person by imposing, or proposing to impose, a condition, requirement or practice that has, or has likely to have, the disadvantaging effect mentioned in, for example, subsection 5A(2)<sup>43</sup> if the condition, requirement or practice is reasonable in the circumstances.

34. The matters to be taken into account in deciding whether a condition, requirement or practice is reasonable in the circumstances include:

- the nature and extent of the disadvantage resulting from the imposition, or proposed imposition of the condition, requirement or practice; and
- the feasibility of overcoming or mitigating the disadvantage; and
- whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice.<sup>44</sup>

35. Under section 7C, the person who did the act bears the burden of proving that it does not constitute discrimination because of section 7B.

36. Part II of the SDA contains its prohibitions on discrimination. This makes it unlawful to discriminate against a person on the basis of the grounds listed above, in areas of public life including employment, education and the provision of goods and services.<sup>45</sup>

37. Particularly relevant provisions include:

- section 14 – prohibiting discrimination in employment or superannuation;
- section 16 – prohibiting discrimination against contract workers; and

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<sup>42</sup> SDA, ss 5-7A.

<sup>43</sup> As well as ss 5(2), 5B(2), 5C(2), 6(2), 7(2) or 7AA (2): SDA, s 7B(1).

<sup>44</sup> SDA, s 7B (2).

<sup>45</sup> SDA, ss 14-27.



- section 21 – prohibiting discrimination in the area of education.
38. Relevantly, the unlawful conduct comes from these sections and not from the definitions themselves.
39. Division 4 of Part II contains exemptions from the SDA provisions. These include section 38, relating to educational institutions established for religious purposes. This is also discussed below.

## Exemptions - students

### Existing exemption

40. The relevant SDA exemption is subsection 38(3) which provides that:

*Nothing in section 21 renders it unlawful for a person to discriminate against another person on the ground of the other person's sexual orientation, gender identity, marital or relationship status or pregnancy in connection with the provision of education or training by an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.*

41. The Law Council is not aware of any judicial consideration of this exemption.
42. Subsection 38(3) is not a blanket exception. An educational institution seeking to rely upon it must demonstrate that:
- it is conducted in accordance with the specific doctrines, tenets, belief or teachings of a religion or creed;
  - the relevant action (eg expelling a student, or refusing his or her admission) is in good faith; and
  - the relevant action is for the purpose of avoiding injury to the religious susceptibilities of adherents to the religion or creed.
43. The comments made below regarding the operation of the subsection 38(1) exemption by the former Human Rights and Equal Commission (**HREOC**) are also relevant to the operation of subsection 38(3).
44. However, subsection 38(3) is broad and generalised in its application. For example, it applies not only to students but 'any persons' in connection with the provision of education or training and applies to religious educational institutions from kindergartens to tertiary institutions.
45. Also relevant is paragraph 37(1)(d) below:

#### 37 Religious bodies

(1) *Nothing in Division 1 or 2 affects:...*

- (d) *any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs*

*of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.*

46. While the Law Council understands that this exemption is less commonly relied upon by educational institutions than subsection 38(3), as it is more onerous, it may still cover instances of discrimination by such institutions against LGBT<sup>46</sup> students.

### **Government proposal**

47. The Law Council understands that the Commonwealth Government is considering introducing the following amendments:<sup>47</sup>

#### **Schedule 1 – Amendments**

##### **Sex Discrimination Act 1984**

###### **1. At the end of subsection 7B(2)**

*Add: ‘; and (d)*

*if the condition, requirement or practice is imposed, or is proposed to be imposed, in relation to a student by an educational institution that is a primary school or a secondary school and that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed:*

- (i) Whether the condition, requirement or practice is imposed, or proposed to be imposed, in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed; and*
- (ii) Whether, in imposing, or proposing to impose, the condition, requirement or practice, the educational institution has regard to the best interests of the student.’*

###### **2. Subsection 38(3)**

*Repeal the subsection.*

48. If the Government is indeed considering these amendments, the Law Council considers that they must be released for public comment and debate.

### **Law Council position**

49. The Law Council supports repealing subsection 38(3) outright. It further considers that section 37 should be amended to clarify that paragraph 37(1)(d) does not apply to the treatment of students by religious schools. It does not support exemptions of this nature for religious educational institutions with respect to students within the SDA or federal legislation generally.

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<sup>46</sup> ‘LGBTI+’ refers to Lesbian, Gay, Bisexual, Transgender and Intersex. The ‘+’ can include other letters, including Q (Queer or Questioning), A (Asexual), or P (Pansexual). The acronym is intended to be inclusive of a diverse group of people based on sex characteristics, intersex status, gender expression and sexual orientation: Law Council of Australia, ‘Making your practice LGBTI+ friendly’ (online),

<<https://www.lawcouncil.asn.au/policy-agenda/advancing-the-profession/equal-opportunities-in-the-law/making-your-legal-practice-lgbti-friendly>>. Used above, ‘LGBT’ refers to Lesbian, Gay, Bisexual and Transgender.

<sup>47</sup> As also noted in Michael Koziol, ‘Talks on LGBTI students broken down over plans to allow ‘indirect discrimination’, *Sydney Morning Herald*, 25 October 2018.

50. The Law Council considers that children should not be discriminated against. It does not support laws which add to LGBT children's trauma or stigmatise them by permitting discrimination by religious educational institutions. Such laws are not in the best interests of children. As noted above, the best interests of children must be a primary consideration, which is given high priority and greater weight than other considerations.

51. In reaching this position, it is particularly concerned that LGBT students in religious educational institutions are highly vulnerable, having regard to its recent Justice Project findings<sup>48</sup> that:

- (a) *LGBTI+ people generally experience high rates of discrimination and harassment. For example, the 2012 Private Lives 2 survey report found that 25.5 per cent of survey respondents experienced homophobic abuse or harassment in the previous 12 months.<sup>49</sup> A further 8.7 per cent reported experiencing threats of violence or actual physical violence.<sup>50</sup> In the 2014 First Australian National Trans Mental Health Study 64.8 per cent of participants reported experiencing discrimination or harassment.<sup>51</sup> Private Lives 2 found that 44 per cent of LGBTI+ people in Australia hid their sexual orientation or gender identity in public.<sup>52</sup> In addition to outright attacks and discrimination, LGBTI+ people must deal with homophobia and/or transphobia in every facet of public life, and within their families and social groups.<sup>53</sup>*
- (b) *Experiences of discrimination and social exclusion contribute to LGBTI+ people facing a higher prevalence of a range of risk factors that increase disadvantage, a reality that is sometimes referred to as 'secondary victimisation';<sup>54</sup>*
- (c) *research indicates very poor levels of mental health amongst LGBTI+ groups generally,<sup>55</sup> including high rates of suicide. Studies have found that same-sex attracted Australians have up to 14 times higher rates of suicide attempts than their heterosexual peers,<sup>56</sup> and up to 50 per cent*

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<sup>48</sup> Law Council of Australia, *Justice Project – Final Report* (August 2018), LGBTI+ Chapter, 8-10; 14-17.

<sup>49</sup> AHRC, National Consultation Report, *Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights*, (2015), 15 (**Resilient Individuals**), citing William Leonard et al, 'Private Lives 2: The second national survey of the health and wellbeing of gay, lesbian, bisexual and transgender (GLBT) Australians' (Monograph Series Number 86, The Australian Research Centre in Sex, Health & Society, La Trobe University, 2012) (**Private Lives 2**).

<sup>50</sup> AHRC, *Resilient Individuals*, 15, citing William Leonard et al, *Private Lives 2*.

<sup>51</sup> Zoe Hyde et al, School of Public Health, Curtin University, *The First Australian National Trans Mental Health Study: Summary of Results* (2014), v.

<sup>52</sup> Leonard et al, *Private Lives 2*, 45-46.

<sup>53</sup> Michael Flood and Clive Hamilton, *Mapping homophobia in Australia*, Australia Institute Web Paper (2005), 3-13 <[http://www.glhv.org.au/files/aust\\_inst\\_homophobia\\_paper.pdf](http://www.glhv.org.au/files/aust_inst_homophobia_paper.pdf)>.

<sup>54</sup> Law Council, *Justice Project Final Report* (August 2018), LGBTI+ Chapter, 9 citing Angela Dwyer, 'Policing Lesbian, Gay, Bisexual and Transgender People: A Gap in the Research Literature' (2011) 22 *Current Issues in Criminal Justice* 3, 415.

<sup>55</sup> Law Council, *Justice Project Final Report* (August 2018), LGBTI+ Chapter, 9 citing Gabi Rosenstreich, National LGBTI Health Alliance, *LGBTI People: Mental Health and Suicide Revised 2<sup>nd</sup> Edition* (2013) (**LGBTI People: Mental Health**), 3 <[http://lgbtihealth.org.au/sites/default/files/Biefing\\_Paper\\_FINAL\\_19\\_Aug\\_2-11.pdf](http://lgbtihealth.org.au/sites/default/files/Biefing_Paper_FINAL_19_Aug_2-11.pdf)>.

<sup>56</sup> Rosenstreich, *LGBTI People: Mental Health*, 3 citing Commonwealth Department of Health and Aged Care, *LIFE – A framework for prevention of suicide and self-harm in Australia: Learnings about suicide* (2000).

*of transgender people have attempted suicide at least once in their lives.<sup>57</sup>*

- (d) *LGBTI+ young people are particularly affected by poor mental health.<sup>58</sup> Research has indicated that 55 per cent of young LGBTI+ women (aged 16–24) experienced high or very high psychological distress compared to 18 per cent in the national population. Additionally, 40 per cent of young LGBTI+ men experienced high psychological distress compared to seven per cent in the mainstream population.<sup>59</sup>*

52. In this context, the NSW Bar has noted that:

*Religion and religious belief is a choice. In contrast, a person's sex, sexual orientation, gender identity or intersex status is not a choice. Moreover, discrimination on any of those grounds in an educational context has the potential to cause lasting damage to the self-esteem, dignity and self-worth, and hence mental health, of children through the denial of their identity; the denial of an immutable characteristic fundamental to their identity. There is accordingly less justification for an exemption from the anti-discrimination provisions in an educational context, both in respect of the damage done to them directly and in respect of teachers/ staff on account of the transferred impact on students when teachers/staff are discriminated against, or when there are no teachers/staff like them; that is when there is a transferred denial of who they are, or the absence of any affirmation of who they are.*

53. The Law Council considers that, given the harm and unfairness caused as a result of subsection 38(3), there is insufficient justification for that harm in order to protect a right to freedom of religious expression by discriminating against students in faith-based schools. It considers that to accord a freedom to a person to manifest his or her religion in a way that breaches the rights of children to have their rights in international covenants ensured to them without distinction, Australia, as party to those covenants, would have to point to justifications that are profound, specific, strong and clear.

54. The Law Council notes arguments by religious schools that such exemptions should remain available, even though they are infrequently used.<sup>60</sup> However, it submits that such exemptions are, by their very nature, harmful, noting the important role played by legislation in norm-setting amongst the community.

55. It notes that members of the Law Council's Human Rights Committee have also questioned the precise extent to which discrimination against LGBT students is supported through existing religious doctrine, which is principally concerned with the definition of marriage.

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<sup>57</sup> Ibid citing Domenico Di Ceglie, 'Gender Identity Disorder in Young People', (2000) *Advances in Psychiatric Treatment* 6, 458-466; National Transgender HIV/AIDS Needs Assessment Project (Australia), University of New South Wales, *Transgender lifestyles and HIV/AIDS* (1994); Jay McNeil et al, *Trans Mental Health Study* (2012) <[www.scottishtrans.org](http://www.scottishtrans.org)>.

<sup>58</sup> Law Council, *Justice Project Final Report* (August 2018), LGBTI+ Chapter, 9.

<sup>59</sup> St Kilda Legal Service, *Submission to the Justice Project*, citing Rosenstreich, *LGBTI People: Mental Health*.

<sup>60</sup> Jordan Baker, 'Devastating': Anglican heads' letter prompts anger and division', *The Sydney Morning Herald* (online), 3 November 2018.

**Recommendations:**

- **Subsection 38(3) of the SDA should be abolished.**
- **Section 37 of the SDA should be amended to clarify that paragraph 37(1)(d) does not apply to the treatment of students by religious schools.**

*Proposed paragraph 7B(2)(d)*

56. If proposed paragraph 7B(2)(d) is under active consideration in place of subsection 38(3), the Law Council would not support such an amendment. It observes that:

- proposed paragraph 7B(2)(d) would provide an exemption in relation to indirect discrimination, rather than direct discrimination, against a student by a religious school;
- proposed paragraph 7B(2)(d) is in some respects more specific and targeted than subsection 38(3). It focuses on 'students' and religious primary or secondary schools, rather than educational institutions generally. This would remove tertiary institutions from the scope of the exemption; and
- the insertion of a requirement that schools must have regard to the best interests of the student in imposing a condition, requirement or practice is a positive step. However, this does not require regard to the best interests of the student to be 'a primary consideration', as required under the CRC above. Therefore, other considerations may be given larger weight despite the likelihood that a condition, requirement or practice which has the effect of, for example, barring a child from a school would have be harmful to the child.

57. However, the Law Council is concerned that:

- proposed paragraph 7B(2)(d) inserts specific matters concerning religious schools and students into general definition provisions – that is, into SDA's general test of reasonableness with respect to the definition of indirect discrimination. This test applies to a wide range of scenarios which may constitute indirect discrimination, well beyond schools and students. It is inappropriate that the general test should place specific emphasis on this one issue.
- indirect discrimination applies where a condition or requirement applies generally (in relation to all students), not *in relation to a student*.
  - The Law Council understands that the intention behind paragraph 7B(2)(d) is that it would be a law of general application, to be given life through school rules, rather than individually addressing the circumstances of a particular student.
  - However, as noted above, under international human rights law, limitations on rights should be: prescribed by law; pursue a legitimate aim; and be necessary to pursue that aim, which requires an assessment of their proportionality. Key factors relevant to whether a limitation is proportionate include whether the measure provides sufficient flexibility to treat different cases differently, or imposes a blanket policy without regards to the merits of the individual case.

- Proportionality must be considered in the particular circumstances of a case, on a case by case basis.
- Paragraph 7B(2)(d) may be problematic if it leads towards more blanket policies being imposed, through school rules, rather than an assessment of individual circumstances. While the Law Council acknowledges that subparagraphs 7(2)(b)(d)(i) and (ii) do require the circumstances in which rules by individual schools are imposed to be considered, and the broader proportionality test in subsection 7(2) would apply, it remains concerned that more blanket policies may nevertheless follow.
  - From a practical perspective, the inquiry will be about the reasonableness of the doctrines, tenets, beliefs of the particular religion. This raises issues about the role of the court in determining the reasonableness of these beliefs. Courts have traditionally indicated that they are not well placed to make such assessments,<sup>61</sup> and movements in this direction may become particularly problematic and divisive with respect to minority religions.
  - The existing exception in subsection 38(3) is limited to discrimination on the ground of a person's sexual orientation, gender identity, marital or relationship status or pregnancy, but proposed paragraph 7B(2)(d) would not be limited. It would introduce a religious consideration in respect of all attributes – sex, intersex status, and potential pregnancy.
  - While this approach may be thought preferable as it permits indirect discrimination only, the Law Council notes that both indirect discrimination and direct discrimination lead to disadvantageous outcomes for the individuals involved. In some ways, indirect discrimination may be considered a more 'insidious' form of discrimination.
  - The existing SDA provisions enable religious schools to impose reasonable conditions on students to promote the school's values, under the SDA's existing definition of indirect discrimination. That is, under existing law, a religious school can impose a reasonable condition, requirement or practice that has, or is likely to have the effect of disadvantaging LGBT students, provided that the existing proportionality test in subsection 7B(2) is met. Proposed paragraph 7B(2)(d) would add to existing complexity in this area of law.

### Expert Panel Review recommendations

58. The Expert Panel reportedly recommended with respect to religious exemptions for students and schools:

- **Recommendation 7:** The Commonwealth should amend the SDA to provide that religious schools may discriminate in relation to students on the basis of sexual orientation, gender identity or relationship status provided that:
  - The discrimination is founded in the precepts of the religion.

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<sup>61</sup> For example, the House of Lords of the United Kingdom has held that objective assessments of a person's/s' religious beliefs is impermissible: *Regina v Secretary of State for Education and Employment and others (Respondents) ex parte Williamson (Appellant) and others* 2 AC 246 at [22] and [23] per Lord Bingham. See also *Hozack v The Church of Jesus Christ of Latter-Day Saints* (1997) 79 FCR 441 at 450, where Madgwick J said it was 'not for any court to enter upon a prophetic or critical role in relation to any religious doctrine of the Church or its adherents'. He went on to note that a Court 'need not question the worth or wisdom of the religious doctrine (as distinct from its actuality) which might impel the church in question to raise such a claim. Likewise, here, it is not for the Court to question the worth or wisdom of any religious doctrine of the Church'.



- The school has a publicly available policy outlining its position in relation to the matter.
  - The school provides a copy of the policy in writing to prospective students and their parents at the time of enrolment and to existing students and their parents at any time the policy is updated.
  - The school has regard to the best interests of the child as the primary consideration in its conduct.
- **Recommendation 8** – Jurisdictions should abolish any exceptions to anti-discrimination laws that provide for discrimination by religious schools with respect to students on the basis of race, disability, pregnancy or intersex status.

59. The Law Council highlights the difficulty in responding to these reported recommendations, without the benefit of the full Expert Review Report, including the analysis behind them. However, it reiterates its position that there should be no anti-discrimination exemptions for religious educational institutions with respect to students.

## Exemptions – employees and contractors

### Existing exemptions

60. The most relevant existing exemptions in the SDA for religious educational institutions and employees and contractors are in subsections 38(1) and (2) as follows:

- (1) *Nothing in paragraph 14(1)(a) or (b) or 14(2)(c) renders it unlawful for a person to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, marital or relationship status or pregnancy in connection with employment as a member of the staff of an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.*
- (2) *Nothing in paragraph 16(b) renders it unlawful for a person to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, marital or relationship status or pregnancy in connection with a position as a contract worker that involves the doing of work in an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.*

61. The Law Council is not aware of any direct judicial consideration of this exemption.<sup>62</sup>

62. The former Human Rights and Equal Opportunity Commission (**HREOC**), now the Australian Human Rights Commission (**AHRC**), has previously remarked that there are three elements to this exception:

- *The employer institution is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed.*
- *The religious distinction, exclusion or preference is imposed in good faith.*
- *It is imposed to avoid injury to the religious susceptibilities of adherents of that religion or that creed.*

*In relation to the first element, the employer should be able to show that the institution is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed. The exception cannot be claimed merely on the basis that the organisation or persons associated with it have certain religious views or affiliations. The organisation must be one in which the religious doctrines, tenets, beliefs and teachings inform, or are required for, the day to day operation of the organisation. This is a question of fact and degree and will depend on the particular case under consideration.*

*In relation to the second element, the employer should show that the religious distinction was made in good faith. Clearly, a distinction made in bad faith does not gain the protection of the section. This would be the case where the distinction is applied capriciously, arbitrarily or randomly. It would also be the case where a distinction, ostensibly made on religious grounds, is really based on extraneous personal or other reasons that have no basis in religious doctrine or teaching.*

*The “good faith” element must be read in conjunction with the final element: the distinction should be made in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed. This is not an entirely subjective requirement. Religious organisations clearly can determine what would injure the religious susceptibilities of adherents of that religion or creed. However, there should be some objective evidence that the selection of an employee who is not of a particular religious persuasion would offend the doctrines, tenets, beliefs or teachings of that religion.*<sup>63</sup>

63. Also relevant is paragraph 37(1)(d), which provides that:

(1) *Nothing in Division 1 or 2 affects:*

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<sup>62</sup> Although the former HREOC's *Report of Inquiry into a Complaint of Discrimination in Employment and Occupation: Discrimination on the ground of sexual preference*, Report No 6, 1998, concerning a complaint made under s 32(1)(b) of the then *Human Rights and Equal Opportunity Commission Act 1986*(Cth) and the Commission's inquiry into the complaint pursuant to s 31(b) of the Act, is relevant.

<sup>63</sup> Former HREOC, 'The Human Rights and Equal Opportunity Commission Act 1986 (Cth): its application to religious freedom and the right to non-discrimination in employment' (undated), available at <<https://www.humanrights.gov.au/publications/hreoca-religious-freedom>>.



- (d) *Any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.*

### Law Council position

64. The Law Council is not aware of any specific Government proposals to introduce amendments to the above provisions.
65. The Law Council has previously submitted that there is scope to consider whether the current use of broad, permanent exemptions such as subsections 38(1)-(2), and paragraph 37(1)(d) strikes the appropriate balance between the freedom to manifest one's religion and protections for other rights.
66. If discrimination of people employed or contracted by religious schools is to be maintained, there needs to be consideration by Parliament as to whether this is justified, necessary and proportionate to what schools are trying to protect.
67. In this context, the Law Council again highlights its Justice Project findings regarding the harms experienced by LGBTI+ people – adults and children – who experience discrimination and harassment in the Australian community. These findings are highly concerning.
68. It is important to consider not only the harm caused to the LGBT school staff or contractors affected by such exemptions, but also to LGBT students who witness discrimination occurring against their teachers or other staff. In this context, the NSW Bar has reinforced that the lasting harm caused to LGBT children's self-esteem, dignity and self-worth, and hence their mental health, stems both from the damage done them directly and:

*... and in respect of teachers or staff on account of the transferred impact on students when teachers or staff are discriminated against, or when there are no teachers or staff like them; that is when there is a transferred denial of who they are, or the absence of any affirmation of who they are.*

69. The Law Council queries whether, in light of the harm and unfairness caused as a result of subsections 38(1)-(2), there is sufficient justification for that harm in order to protect religious freedom, noting again that this justification must be specific, strong and clear. In this context it:
- notes arguments by religious schools that such exemptions should remain available, even though they are infrequently used.<sup>64</sup> However, as noted above, it is concerned such exemptions are, by their very nature, harmful; and
  - notes that members of its National Human Rights Committee have queried the precise extent to which discriminatory conduct against LGBT staff is supported through existing religious doctrine, except with respect to the definition of marriage. In this context, it observes that compared to subsections 38(1)-(2), paragraph 37(1)(d) more closely requires any actions taken to be based in existing doctrine. That is, it must be an 'an act or practice that conforms to the

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<sup>64</sup> Jordan Baker, 'Devastating': Anglican heads' letter prompts anger and division', The Sydney Morning Herald (online), 3 November 2018.

doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.’

70. Given the concerns above, the Law Council’s National Human Rights Committee and the NSW Bar consider that subsections 38(1) and (2) should be repealed.
71. The LSSA agrees that if discrimination of people employed or contracted by religious schools is to be maintained, there needs to be consideration by Parliament as to whether this is justified, necessary and proportionate to what schools are trying to protect. It further considers that given the complexities in this area of law, further time and consultation is needed to properly consider the need and appropriateness of such exemptions, and how they will interact with existing legislation. These interactions are discussed further below.
72. While not commenting directly on subsections 38(1)-(2), the NSW LS raises its general concerns that exemptions from federal anti-discrimination legislation available to religious organisations in Australia are permanent, broad and do not require analysis of reasonableness and proportionality. It considers that this approach is arguably out of step with the approach in other jurisdictions and under international law.
73. At the absolute minimum, as noted in its submission to the Expert Panel, if Parliament does not accept the above, the Law Council cautions against any outcome with respect to subsections 38(1)-(2) and paragraph 37(1)(d) that would permit forms of discrimination that are currently unlawful under federal anti-discrimination law.
74. The Law Council further emphasises the need to consider carefully the ramifications of repealing or amending subsections 38(1)-(2) of the SDA in light of other existing federal provisions, as discussed below. For example, if these sections alone were repealed, paragraphs 351(2)(1)(a) and 351(3)(a)-(h) of the FWA would continue to import the defences in state and territory laws. This would result in inconsistent protections being available depending on where the ‘discrimination’ occurs.

### Expert Panel Review recommendations

75. The Expert Panel reportedly recommended with respect to religious exemptions for students and schools:
- **Recommendation 5** – The Commonwealth should amend the SDA to provide that religious schools can discriminate in relation to the employment of staff, and the engagement of contractors, on the basis of sexual orientation, gender identity or relationship status provided that:
    - the discrimination is founded in the precepts of the religion;
    - the school has a publicly available policy outlining its position in relation to the matter and explaining how the policy will be enforced.
    - the school provides a copy of the policy in writing to employees and contractors and prospective employees and contractors.
  - **Recommendation 6** – Jurisdictions should abolish any exceptions to anti-discrimination laws that provide for discrimination by religious schools in employment on the basis of race, disability, pregnancy or intersex status. Further, jurisdictions should ensure that any exceptions for religious schools

do not permit discrimination against an existing employee solely on the basis that the employee has entered into a marriage.

76. The Law Council again highlights the difficulty in responding to these reported recommendations, without the benefit of the full Expert Review Report, including the analysis behind them.

### Need for consistency

77. As noted above, in the field of employment, if amendments are contemplated to SDA exemptions in this area, there is a need to consider their interaction with existing FWA anti-discrimination provisions,<sup>65</sup> as well as those in the AHRC Act.

78. A key concern regarding any amendment to SDA exceptions in employment is the need for consistency in the relevant legislation. The exemption in subsection 38(1) of the SDA is narrower than other laws applying to employment. A key question is whether any amendment to subsection 38(1) SDA would make a difference if the comparable provisions in the FWA remained. The relevant provisions are briefly compared below.

79. The exception in subsection 38(1) of the SDA is limited to offering employment and dismissal only:

#### **s 38 Educational institutions established for religious purposes**

*(1) Nothing in paragraph 14(1)(a) [arrangements for who should be offered employment] or (b) [determining who should be offered employment] or 14(2)(c) [dismissing the employee] renders it unlawful for a person to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, marital or relationship status or pregnancy in connection with employment as a member of the staff of an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.*

80. This is narrower than the exceptions in other Commonwealth employment laws.

- **subsection 351(1) of the FWA** - prohibits 'adverse action' by employers (which includes dismissal, as well as altering an employee's position to his or her prejudice)<sup>66</sup> because of an employee's/prospective employee's *inter alia* sex, sexual orientation, marital status, pregnancy, religion.
  - The relevant exceptions under subsection 351(2) include:
    - subsection 38(1) of the SDA<sup>67</sup>;
    - actions which are not unlawful under anti-discrimination laws in force in the place where the action is taken, such as state and territory laws;<sup>68</sup> and

<sup>65</sup> For example, FWA, ss351(1)-(2); ss772(1)-(2).

<sup>66</sup> Under s 342 of the FWA, 'adverse action' includes dismissal of an employee, injuring them in their employment, prejudicially altering their position, discriminating between them and other employees, refusing to employ a prospective employee, or discriminating against them in the terms or conditions the employer offers.

<sup>67</sup> Under the FWA, ss 351(2)(a) and 351(3)(ad)).

<sup>68</sup> Under FWA, ss 351(2)(1)(a) and 351(3)(a)-(h).

- *paragraph 351(2)(c) if the person is a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed--the action is taken [eg employment is terminated or an employee's position is prejudicially altered etc]:*

*i. in good faith; and*

*ii. to avoid injury to the religious susceptibilities of adherents of that religion or creed.*

- **subsection 772(1) of the FWA** – prohibits termination by employers of an employee's employment because of *inter alia* sex, sexual orientation, marital status, pregnancy, religion.<sup>69</sup> The exception<sup>70</sup> is the same as subsection 351(2)(c).
- **subsection 32(1) of the AHRC Act**, which, with paragraph 31(b), enables the AHRC to inquire into complaints of discrimination in employment and occupation. The expression 'discrimination' is defined in section 3 of the AHRC Act and means any distinction, exclusion or preference made on the basis of e.g. sex or sexual orientation<sup>71</sup> that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. However, the section 3 definition excludes any distinction, exclusion or preference:

*... (d) in connection with employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, being a distinction, exclusion or preference made in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or that creed.<sup>72</sup>*

81. Decisions to repeal or amend subsections 38(1) and (2) of the SDA should, therefore, only be taken in the context of comprehensive consideration of the full suite of relevant federal legislation in this area.

#### **Recommendations:**

- **If discrimination against people employed or contracted by religious schools is to be maintained under the relevant SDA provisions, there needs to be consideration by Parliament as to whether this is justified, necessary and proportionate to what schools are trying to protect.**
- **Any amendments to SDA exemptions for employees and contractors of religious educational institutions should only be taken after careful consideration of their interaction with other relevant federal provisions, including under the FWA and the AHRC Act, and the possible need for broader amendments.**

<sup>69</sup> FWA, s 772(1)(f).

<sup>70</sup> Under s 772(2)(b).

<sup>71</sup> Under AHRC Act, s 3(b) and *Australian Human Rights Commission Regulations 1989* (Cth), reg 4, which extends the relevant grounds to sexual orientation.

<sup>72</sup> AHRC Act, s 3(d).