

Chapter 5

Religious educational institutions

5.1 This chapter outlines the key issues raised by submitters and witnesses in relation to the provisions that deal with religious educational institutions. The issues raised are similar to those raised in Chapter 4 on religious bodies more broadly. A number of faith-based organisations were strongly supportive of ensuring that religious educational institutions should not be considered to be discriminating on the basis of religion if acting in accordance with their faith, and considered it integral to ensuring the religious ethos of a school. Conversely, a number of other groups strongly opposed these provisions. This Chapter considers:

- clause 7 (within Part 2), which makes it 'not discrimination' for religious bodies, including educational institutions, to act in accordance with their faith;
- the effect of Part 2 on employment by religious educational institutions;
- subclause 7(6) and the requirement for conduct to be in accordance with a publicly available policy in relation to employment;
- clause 11, which provides that the conduct of a religious educational institution does not contravene a prescribed state or territory law in certain circumstances; and
- the proposed amendment to allow religious educational institutions to refuse to provide facilities, goods or services for the purposes of, or incidental to, the solemnisation of a marriage in accordance with their religious belief.

5.2 The Chapter concludes with an assessment of the application of international human rights law to these provisions and provides the committee's view and recommendations.

Preserving an educational institution's religious ethos

5.3 As discussed in Chapter 4 of this report, Part 2 of the bill sets out conduct that will not constitute discrimination under the bill. Clause 7 (within Part 2) sets out the circumstances in which a religious body may generally act in accordance with their faith such that it will not be discrimination on the grounds of religion. Specifically, clause 7 provides that a religious body does not discriminate against a person on the ground of religious belief or activity by engaging, in good faith:

- (a) in conduct that a person of the same religion as the religious body could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion; and/or

(b) in conduct to avoid injury to the religious susceptibilities of adherents of the same religion as the religious body.¹

5.4 Conduct in this context includes making employment decisions (including giving preference to persons of the same religion as the religious body).

5.5 A number of submitters and witnesses were in favour of these provisions, arguing that they are essential to preserving the general ethos and values of religious educational institutions by allowing them to favour the employment of people holding a particular faith.² It was considered that it was necessary for schools to broadly be able to determine who they employ across all their staff rather than just particular positions, as preserving the general ethos of a school was about the broader infusion of a particular faith and values.³ Pastor Michael Worker, General Secretary and Director of Public Affairs and Religious Liberty, Seventh-day Adventist Church in Australia, stated:

values are often more caught than taught. Ensuring that there are those protections in place is important, so that we can recruit people who will be able to not just deliver the curriculum with excellence but also model values and beliefs in teachings in their interactions with students and with their families.⁴

5.6 Mr Mark Spencer, Director of Public Policy of Christian Schools Australia Limited explained:

If we don't maintain the ethos of the schools, we cease to be the schools we claim to be. Schools are an education business. Schools are a people business. It's about the staff we have who can share our faith and beliefs and model those to the students and to the community, and reflect that in all we do and all we are.⁵

5.7 The Australian Catholic Bishops' Conference also submitted:

The ability of Catholic institutions to uphold their ethos through employment and enrolment policies is more appropriately described as the manifestation of the freedoms of religion and association of the individuals who use the services of these institutions. People often seek services provided by Catholic institutions because of their Catholic culture

1 Religious Discrimination Bill 2021, subclauses 7(2) and (4).

2 Reverend Christopher Duke, Presbyterian Church of Australia, *Committee Hansard*, 13 January 2022, p. 40; Mr Gregory Bondar, Family Voice Australia, *Hansard*, 21 December 2021, p. 82.

3 Christian Schools Australia & Adventist Schools Australia, *Submission 24*, p. 2.

4 Pastor Michael Worker, Seventh-day Adventist Church in Australia, *Committee Hansard*, 13 January 2022, p. 27.

5 Mr Mark Spencer, Christian Schools Australia Limited, *Committee Hansard*, 21 December 2021, p. 36.

and failing to protect institutional freedoms results in an undermining of the rights of individuals.⁶

5.8 The Executive Council of Australian Jewry Inc. submitted that it was necessary to be able to employ teachers who share the school's religious ethos, and that this should not be contingent on the subject matter of what they teach:

Teachers are role models and moral examples, in addition to being educators. A religious school may wish to operate not only as a strictly educational facility but also as a community of faith, with daily prayer meetings and other religious observances, so that students have before them the example of the religion as a way of life.⁷

5.9 Additionally, the Hon Jacinta Collins, Executive Director of the National Catholic Education Commission, commented that it is an issue of choice and freedom of association: '[i]t's associating around our faith so that we can meet our mission about the transference of faith at the same time as delivering a high-quality education'.⁸

5.10 Many submitters were of the view that these religious exemptions have nothing to do with discriminating against individuals based on particular characteristics, like their sexuality, gender identity or marital status. Instead, these submitters were of the view that the bill was about protecting against religious discrimination, and allowing religious schools to preserve their ethos in accordance with their teachings.⁹

5.11 The Attorney-General's Department submitted that the 'Government considers that ensuring religious schools can continue to make employment choices that maintain the religious ethos of the school enables parents of faith to confidently make choices for the education of their children'.¹⁰

Impact on employment for staff of schools

5.12 Many in favour of the provisions commented that, like other areas of employment, religious or not, employers hire staff whose values align with the organisation.¹¹ They submitted that staff employed by religious institutions know the terms on which they are entering those institutions and agree to abide by the

6 Australian Catholic Bishops' Conference, *Submission 185*, p. 3.

7 Executive Council of Australian Jewry Inc, *Submission 19*, p. 4.

8 The Hon Jacinta Collins, National Catholic Education Commission, *Committee Hansard*, 21 December 2021, p. 61.

9 Seventh-day Adventist Church in Australia, *Submission 82*, p. 4.

10 Attorney-General's Department, *Submission 191*, p. 10.

11 Archbishop Peter Andrew Comensoli, Australian Catholic Bishops' Conference, *Committee Hansard*, 13 January 2022, p. 19; Seventh-day Adventist Church in Australia, *Submission 82*, p. 4.

particular values of that workplace.¹² The Hon Jacinta Collins, Executive Director of the National Catholic Education Commission, emphasised that employees have a choice as to whether they work at a religious school, stating:

If people don't want to work in an environment which is operating within a faith based ethos, they can work in a public school or a school of another ethos or faith. It is an issue of choice, or, in my view, it's actually freedom of association...It's associating around our faith so that we can meet our mission about the transference of faith at the same time as delivering a high-quality education.¹³

5.13 A number of submitters and witnesses stated that while they did not have a general ban on employing staff with particular characteristics, issues were dealt with on a case-by-case basis and in a 'pastoral' way, considering whether the individual was able to still conduct themselves in alignment with, and share the views of, the values of the institution.¹⁴ Mr Mark Spencer, Director of Public Policy of Christian Schools Association Limited stated: '[i]n the context of the school, we see a school as a learning community—a community of believers who hold a particular view. When someone ceases to have that view, they cease to share those beliefs of that community'.¹⁵

5.14 Some submitters held that even if the schools or bodies did not choose to dismiss staff based on some of these issues, they were of the view that schools should have the ability to do this if staff did not align with the values of the school.¹⁶ The Australian Christian Higher Education Alliance, for instance, submitted that:

The fundamental missions of FBHEI [faith-based higher educational institutions] require that staff and academics maintain the institution's specific religious culture and ethos. Without the ability to select and maintain according to belief in employment, the institution could not exist as a distinctive religious entity.¹⁷

...

12 Archbishop Peter Andrew Comensoli, Australian Catholic Bishops' Conference, *Committee Hansard*, 13 January 2022, p. 19.

13 The Hon Jacinta Collins, National Catholic Education Commission, *Committee Hansard*, 21 December 2021, p. 61.

14 Reverend Doctor Ross Clifford, Morling Theological College, *Committee Hansard*, 21 December 2021, p. 40; The Hon Jacinta Collins, National Catholic Education Commission, *Committee Hansard*, 21 December 2021, p. 63; Pastor Michael Worker, Seventh-day Adventist Church in Australia, *Committee Hansard*, 13 January 2022, p. 24.

15 Mr Mark Spencer, Christian Schools Association Limited, *Committee Hansard*, 21 December 2021, p. 43.

16 The Hon Jacinta Collins, National Catholic Education Commission, *Committee Hansard*, 21 December 2021, p. 40.

17 Australian Christian Higher Education Alliance, *Submission 25*, p. 8.

Community codes of conduct, publicly available, allow FBHEI to hold clear expectations based on their statements of belief and the integrity of their staff to upholding those beliefs. An example of where this is necessary is a hypothetical case where a College President was found to be committing adultery. This act itself is not illegal, nor would necessarily be an issue affecting one's employment role in a secular institution. However, in a FBHEI which held a belief in marriage as a fundamental sacrament, their continued employment in that role would likely be untenable (unless the faith community were satisfied the person was repentant). If not legally allowed to act upon, the FBHEI would potentially experience significant damage across their stakeholders, staff, student body, and wider religious community.¹⁸

5.15 Additionally, the Australian Christian Higher Education Alliance were of the view that as there is no 'clear vocational separation of faith and work', it is important that all employees uphold the ethos of the institution. They stated:

from dishwashing to directing, all tasks within an institution can be viewed as service to God and to community – done in an intentional spirit of worship and dedication. This can be demonstrated by vast swathes of biblical evidence, but 1 Corinthians 10:31 captures the position adequately when stating, 'So whether you eat or drink or whatever you do, do it all for the glory of God'.¹⁹

5.16 Conversely, other witnesses and submitters commented that it was not necessary for teachers to follow a particular faith in order to be able to teach.²⁰ Some submitters stated that educational institutions should only be able to selectively employ people on religious grounds where this is an inherent requirement of the specific position or in specific leadership or governance roles.²¹ As Rainbow Families submitted, '[i]t matters whether a maths teacher knows trigonometry and calculus, not who the maths teacher loves'.²² Ms Jessica Munday, Secretary of Unions Tasmania said that what matters when selecting staff is their suitability for the job, and not their sexuality.²³

18 Australian Christian Higher Education Alliance, *Submission 25*, p. 11.

19 Australian Christian Higher Education Alliance, *Submission 25*, p. 8.

20 Dr Terri MacDonald, National Tertiary Education Union, *Committee Hansard*, 14 January 2022, pp. 5 and 8.

21 See e.g., ACT Government, *Submission 192*, p. 18; Uniting Network Australia, *Submission 152*, p. 6.

22 Rainbow Families, *Submission 182*, pp. 3-4.

23 Ms Jessica Munday, Unions Tasmania, *Committee Hansard*, 14 January 2022, p. 44.

5.17 Further, it was raised that these provisions did not just apply to hiring new staff, but also applied to staff who were already working in the school, and therefore went beyond the ability to preference staff.²⁴

5.18 Concerns were also raised regarding additional negative implications for staff once employed, including the possibility of teachers being denied promotion or advancement on the basis of religious grounds if the teacher becomes pregnant, gets married or enters a de facto relationship, or transitions gender.²⁵ Submitters stated that concern regarding the treatment of teachers has led to some individuals avoiding employment at religious educational institutions or seeking advice about their employment status.²⁶ Parents for Transgender Youth Equity submitted that one of their parents of a transgender child, 'has already rejected a senior role offer by a religious organisation, as they could be terminated immediately for supporting their child if these bills are enacted'.²⁷

5.19 Examples were also provided of teachers who had been fired after it came to light they were in same-sex relationships, and of teachers who had been fired for not signing statements pertaining to the values of the school.²⁸ Submitters commented that the potential for LGBTIQ+ teachers to be sacked increases stigma and poor mental health outcomes.²⁹

Requirement for publicly available policy

5.20 Subclause 7(6) provides that a religious educational institution, in engaging in conduct under subclauses 7(2) and (4) in relation to employment, must do so in accordance with a publicly available policy. This policy must also comply with any requirements set out by the minister in a legislative instrument. A requirement for a publicly available policy also applies if an educational institution is not to contravene state or territory laws (clause 11) and to religious hospitals, aged care facilities,

24 Australian Human Rights Commission, *Submission 97*, p. 47. See also Mr Graeme Edgerton, Australian Human Right Commission, *Committee Hansard*, 14 January 2021, p. 28.

25 Dr Terri MacDonald, National Tertiary Education Union, *Committee Hansard*, 14 January 2022, p. 5; Australian Education Union Federal Office, *Submission 21*, p. 7; Independent Education Union, *Submission 127*, p. 6.

26 Parents for Transgender Youth Equity, *Submission 73*, p. 2; Tasmanian Council of Social Services, *Submission 36*, p. 9.

27 Parents for Transgender Youth Equity, *Submission 73*, p. 2.

28 Equality Australia, *Submission 31*, pp. 29-32; Equal Voices, *Submission 32*, pp. 13-18; Tasmanian Council of Social Services, *Submission 36*, p. 9; Dr Sean Mulcahy, *Submission 126*, p. 6; Independent Education Union, *Submission 127*, pp. 10-16; COTA SA, *Submission 144*, pp. 4-7; Independent Education Union, *Submission 127*, pp. 39-44; Mr Graeme Edgerton, Deputy General Counsel, Australian Human Rights Commission, *Committee Hansard*, Friday, 14 January 2022, p. 28-29.

29 Australian Education Union Federal Office, *Submission 21*, p. 7; Mental Health Australia, *Submission 67*, p. 2.

accommodation providers and disability service providers in the context of employment (see subclause 9(3) and Chapter 4). The explanatory memorandum states:

A policy must be available to prospective and existing employees or partners. It may be issued publicly through a variety of means, such as being provided online at the point of application or by a copy being provided upon request or as part of the recruitment package. The publicly available policy requirements do not affect the employment arrangements for existing staff, but are intended to provide information for current and prospective employees on the position of the school in relation to the use of these exceptions.³⁰

5.21 The Attorney-General's Department submitted that this policy requirement: increases certainty and transparency and ensures that prospective or existing employees as well as the general public would be able to ascertain and understand the position of a religious body in relation to the particular matter dealt with in the relevant provision of the Bill (i.e., employment, partnerships, or accommodation facilities).³¹

5.22 A number of submitters expressed support for this provision, praising the requirement for such a policy as a proportionate approach to protecting the ethos of faith-based institutions.³² The Australian Association of Christian Schools commented that the policy is a necessary mechanism for fostering transparency, and submitted:

Although this is a novel proposal for Commonwealth anti-discrimination law, it is one that is welcomed by AACCS, as it will provide transparency and certainty for schools and their staff and volunteers about the school's religious beliefs.³³

5.23 Freedom for Faith also echoed this support for the provision, stating that public policies will assist in preserving the values of religious schools in a predominately secular system. They submitted:

This means that those approaching schools for employment will be able to determine beforehand whether the school has a policy of preference for

30 Religious Discrimination Bill 2021, explanatory memorandum, p. 44.

31 Attorney-General's Department, *Submission 191*, p. 11.

32 See Freedom for Faith, *Submission 10*, p. 6; Executive Council of Australian Jewry, *Submission 19*, p. 4; Australian Association of Christian Schools, *Submission 23*, p. 10; Christian Education National, *Submission 41*, p. 2; Association of Heads of Independent Schools of Australia, *Submission 41*, p. 6; Presbyterian Church of Australia, *Submission 94*, p. 7; Association for Reformed Political Action, p. 3; Australian Christian Lobby, *Submission 16*, p. 4 and Mrs Wendy Francis, Australian Christian Lobby *Committee Hansard*, 21 December 2021, p. 19; Seventh-day Adventist Church in Australia, *Submission 82*, p. 7; Institute for Civil Society, *Submission 131*, p. 6.

33 Australian Association of Christian Schools, *Submission 23*, p. 10.

fellow believers, and so avoid the embarrassment of being turned down on that basis if they don't meet the requirement.³⁴

5.24 Other submitters and witnesses, while generally supportive of the provision, raised concerns about subclauses 7(6) and (7), which would grant the minister expansive power to 'determine requirements' for 'the policy, including in relation to its availability'.³⁵

5.25 For example, the Executive Council of Australian Jewry stated:

Sub-clauses 7(6)(b) and 7(7) of the Bill, whilst apparently intended to empower the relevant Minister to determine the kinds of matters that must be addressed in such a policy, and how it is to be made available, are expressed in such broad terms that they might empower the Minister to determine the content of the school's policy. We believe this should be ruled out in the Explanatory Memorandum.³⁶

5.26 Similarly, the Australian Association of Christian Schools submitted:

AACS is concerned that this expansive power could be exercised to limit the scope of the exception provided to schools by a Minister in the absence of sufficient Parliamentary scrutiny. There is no equivalent delegated power given under any other Commonwealth discrimination law that could so substantively affect the operation of an exception or exemption applying to religious institutions or schools. The comments made in the Explanatory Memorandum at paragraph 129 do not provide adequate protection against such an exercise of that power.³⁷

5.27 Reverend Doctor John McClean, Convenor, Church and Nation Committee, Presbyterian Church of Australia, gave evidence that the minister should not be granted power to make requirements about the employment policies of religious institutions:

It seems to open the door for arbitrary or unexpected and unreviewed requirements which don't go through the scrutiny of the parliament...It's easier to support a bill where you know what it's going to contain than these possibilities where I'm not quite sure how it could be used.³⁸

5.28 However, a number of other submitters argued that the requirement for a publicly available policy does not alleviate their concerns with clause 7 or 11 in

34 Freedom for Faith, *Submission 10*, p. 6.

35 Religious Discrimination Bill 2021, explanatory memorandum, p. 44.

36 Executive Council of Australian Jewry, *Submission 19*, p. 4.

37 Australian Association of Christian Schools, *Submission 23*, p. 11.

38 Reverend Doctor John McClean, Presbyterian Church of Australia, *Committee Hansard*, 13 January 2022, p. 39.

allowing religious bodies to act in ways that would not constitute discrimination.³⁹ The Law Council of Australia, for example, stated that:

it does not consider that the requirement for an institution to have a policy in place provides a sufficient safeguard. While this would increase transparency, it may nevertheless enable blanket discrimination against individuals on the basis of their 'particular religious belief or activity' in the context of employment preferences.⁴⁰

Overriding certain state and territory laws

5.29 Clause 11 provides that a religious educational institution does not contravene a prescribed state or territory law in certain circumstances. It further provides that the minister may prescribe one or more laws of a state or territory where satisfied the law to be prescribed prohibits discrimination based on religious belief or activity and prevents religious educational bodies from giving preference, in good faith, to persons who hold or engage in a particular religious belief or activity when engaging in employment decisions.

5.30 Further, the Religious Discrimination (Consequential Amendments) Bill 2021 provides that a 'prescribed state or territory law' includes the Victorian *Equal Opportunity Act 2010*. The explanatory memorandum to the Religious Discrimination (Consequential Amendments) Bill 2021 states that the Equal Opportunity (Religious Exceptions) Amendment Bill 2021 (Vic) amends the existing religious exemptions 'in a manner which interferes with an educational institution's ability to preference people in employment decisions'.⁴¹

5.31 A number of submitters and witnesses commented on the ability of the minister to prescribe state and territory laws. A number of submitters stated that this was necessary in order to achieve the purposes of the bill, namely, to recognise the freedom of all people to have or adopt a religion or belief of their choice and the freedom to manifest this religion or belief. For example, the Islamic Council of Victoria submitted that the overriding of state and territory laws is crucial to the bill's efficacy and that '[e]mploying teachers and staff who model the moral codes of the

39 See Buddhist Council of NSW, *Submission 51*, p. 6; Australian Council of Trade Unions, *Submission 44*, p. 18; Australian Medical Association, *Submission 96*, p. 3; Queensland Advocacy Incorporated, *Submission 115*, p. 6; Equality Australia, *Submission 31*, pp. 34; Public Interest Advocacy Centre, *Submission 40*, p. 24; Banyule City Council, *Submission 76*, p. 2; Australian GLBTIQ Multicultural Council, *Submission 80*, p. 3; Just Equal Australia, *Submission 69*, p. 7; Legal Aid Queensland, *Submission 92*, p. 2; Children by Choice, *Submission 150*, p. 4; Uniting Network Australia, *Submission 153*, p. 4; Amnesty International, *Submission 157*, p. 6; NSW Council for Civil Liberties, *Submission 181*, p. 4; Commissioner for Children and Young People, *Submission 120*, p. 5; Kingsford Legal Centre, *Submission 110*, p. 7.

40 Law Council of Australia, *Submission 28*, p. 32.

41 Religious Discrimination (Consequential Amendments) Bill 2021, explanatory memorandum, p. 20.

faith is the key to a school being able to live and implement its ethos'.⁴² Further, Pastor Michael Worker, General Secretary and Director of Public Affairs and Religious Liberty, Seventh-day Adventist Church in Australia, when asked whether he supported overriding state and territory laws, stated:

One of the tensions I think we face is, as a nation, we've given assent to the incorporation of ICCPR article 18 into our legislative framework, and have done for a very long time, but we actually haven't practically implemented it in tangible ways. What I would see as the role of the Commonwealth ... is to ensure that the Commonwealth does fulfil its responsibility to ensure that we are aligned with those international covenants. If one of the mechanisms in order to ensure that we are discharging our responsibilities with those covenants is to include some override provisions, if that's the best way to do it, then we would be happy to see those provisions included, understanding that that has the potential to create some challenges...⁴³

5.32 Likewise, Freedom of Faith supported clause 11 and the power to override certain state and territory laws. It submitted:

This provision is necessary because some States and Territories have imposed very restrictive rules which interfere with the religious freedom of faith-based schools (which as noted above are a key mechanism to implement parental rights under art 18(4) of the ICCPR).⁴⁴

5.33 Freedom of Faith were of the view that amendments to the *Fair Work Act 2009* would be more appropriate to achieve the federal override power, stating:

Our view is that this would best be achieved by amendments to the Fair Work Act, which already deals with employment by faith-based institutions, to establish a nationally consistent principle, consistent with that contained in clause 7 of this Bill, to the effect that religious faith-based organisations may prefer to select staff who adhere to its faith and mission, and may require adherence to codes of conduct consistent with that faith. However, the Government has chosen the s.11 mechanism instead.

We support s.11 as a step forward in protecting the religious rights of schools even if it is not as satisfactory a mechanism as clarifying the position in the Fair Work Act. Under s.11, the Minister will be able to apply the over-ride by regulation to other State and Territory legislation which seeks to restrict the religious freedom of faith-based schools in the employment of staff.⁴⁵

42 Islamic Council of Victoria, *Submission 111*, p. 2.

43 Pastor Michael Worker, Seventh-day Adventist Church in Australia, *Committee Hansard*, 13 January 2022, p. 26.

44 Freedom of Faith, *Submission 10*, p. 7.

45 Freedom of Faith, *Submission 10*, p. 9.

5.34 The Australian Discrimination Law Experts Group stated that this bill is the first time in forty years of discrimination laws in Australia where federal discrimination law has been drafted specifically to override other federal, state and territory discrimination law.⁴⁶ The ACT Government raised concern that this would undermine anti-discrimination law that had been considered appropriate in various jurisdictions.⁴⁷ The Australia Council of Trade Unions stated that clause 11 'purports to allow these carefully considered State protections to be completely overridden. The way in which this 'override' will work in practice is extremely unclear'.⁴⁸ Reverend Christopher Duke, Member, Church and Nation Committee, Presbyterian Church of Australia also queried whether this bill would give a clear exemption from the Victorian legislation.⁴⁹

5.35 Some submitters also stated that a religious body relying on clause 11 would be raising a federal defence, which would need to be heard in a Chapter III-invested court and not in the low-cost and quicker state and territory tribunals. It was argued that this would likely limit the ability of complainants to access timely and efficient mechanisms to resolve complaints of unlawful discrimination.⁵⁰ Access to the resolution of procedural complaints is discussed further in Chapter 6 in relation to clause 12.

5.36 Regarding the purpose of clause 11, the Attorney-General's Department submitted that it was intended to preserve state and territory exemptions that allow religious educational institutions to make employment decisions that preference people of faith. They stated that:

it would only be necessary to prescribe a state or territory law if a jurisdiction enacted a law that removed or limited an existing religious exception that permits religious educational institutions to preference in employment. The criteria by which the power to prescribe a state or territory law would be exercised is clearly laid out in clause 11(3) of the Bill.⁵¹

5.37 With the exception of the Victorian *Equal Opportunity Act 2010*, the Attorney-General's Department were not aware of any state or territory law that would otherwise satisfy the criteria in subclause 11(3).⁵²

46 Australian Discrimination Law Experts Group, *Submission 33*, p. 5.

47 ACT Government, *Submission 192*, pp. 17-18.

48 Australia Council of Trade Unions, *Submission 64*, p. 17.

49 Reverend Christopher Duke, Presbyterian Church of Australia, *Committee Hansard*, 13 January 2022, p. 41.

50 See, e.g., Australian Discrimination Law Experts Group, *Submission 33*, pp. 11-12.

51 Attorney-General's Department, *Submission 191*, p. 10.

52 Attorney-General's Department, *Submission 191*, p. 10.

Victorian Equal Opportunity Act 2010

5.38 There was considerable commentary in relation to the Victorian *Equal Opportunity Act 2010* being specified as a prescribed law. The *Equal Opportunity (Religious Exceptions) Amendment Act 2021* (Vic) (which amends the *Equal Opportunity Act 2010* (Vic)) provides that religious educational institutions may only discriminate in relation to employment if:

- (a) conformity with the doctrines, beliefs or principles of the religion in accordance with which the educational institution is to be conducted is an inherent requirement of the position; and
- (b) the other person cannot meet that inherent requirement because of their religious belief or activity; and
- (c) the discrimination is reasonable and proportionate in the circumstances.⁵³

5.39 A number of submitters and witnesses noted their support for prescribing this law, arguing that the Victorian law was too restrictive in that it required religious schools to demonstrate the intrinsic characteristics of a role if they are to employ staff on the basis of religious belief. Many felt this negatively impacted the ability of the school to ensure the appropriate religious ethos.⁵⁴ Some felt that the Victorian legislation was targeting religious schools and asking of them higher standards in relation to who they chose to employ,⁵⁵ and is 'a level of interference by the state that is unnecessary and unjustified in our operations'.⁵⁶ As the Hon Jacinta Collins, Executive Director of the National Catholic Education Commission, commented:

our schools operate on the basis that we would want a critical mass of staff that are in sympathy with the religious ethos; but, if we need to demonstrate that staff have such sympathy as an inherent requirement of their roles, then that's quite a difficult challenge.⁵⁷

53 *Equal Opportunity (Religious Exceptions) Amendment Act 2021* (Vic), section 8, new section 83A of the *Equal Opportunity Act 2010* (Vic).

54 The Hon Jacinta Collins, National Catholic Education Commission, *Committee Hansard*, 21 December 2021, pp. 62 and 65; Mr John Steenhof, Human Rights Law Alliance, *Committee Hansard*, 21 December 2021, p. 86; Pastor Michael Worker, Seventh-day Adventist Church in Australia, *Committee Hansard*, 13 January 2022, pp. 25-26; Mr Mark Sneddon, Institute for Civil Society, *Committee Hansard*, 14 January 2022, p. 14; Lutheran Education Australia, *Submission 86*, p. 4; Islamic Council of Victoria, *Submission 111*, p. 3.

55 The Hon Jacinta Collins, National Catholic Education Commission, *Committee Hansard*, 21 December 2021, p. 62.

56 Mr Mark Spencer, Christian Schools Australia Limited, *Committee Hansard*, 21 December 2021, p. 39; Anglican Church Diocese of Sydney, *Submission 158*, pp. 9-10.

57 The Hon Jacinta Collins, National Catholic Education Commission, *Committee Hansard*, 21 December 2021, p. 62.

5.40 Reverend Christopher Duke of the Presbyterian Church of Australia stated:

Recent legislation argues that maybe you just need your board of management, your principal and maybe your chaplain to hold to our tenets of belief and that it's not important for your maths teacher, your science teacher or your sports teacher to hold to them. We argue that all the staff should not only believe in and agree with our tenets but also live them out in their conduct. That's vitally important for our mission, because we want to present a Christian world view in our education environments.⁵⁸

5.41 Mr Mark Spencer, Director of Public Policy, Christian Schools Australia Limited stated:

Amendments have been passed to the Equal Opportunity Act down there which impose quite draconian, quite onerous requirements on faith based schools in Victoria and allow the government there to really reach into faith based schools. That's particularly from our perspective, but also religious bodies more broadly. The legislation and the second reading speech on the amendments to the Equal Opportunity Act down there talk about affecting the employment of religious bodies themselves. So that legislation really goes to the heart, to the core, of who we are as Christian Schools. It would affect tertiary bodies in Victoria and also religious bodies more broadly in Victoria.⁵⁹

5.42 Conversely, other submitters argued that the Victorian law was an appropriate limit on religious schools and should not be overridden by these federal bills.⁶⁰ For example, Mr Ghassan Kassisieh, Legal Director, Equality Australia, said that the Victorian law sets out that the employer can decide what a role involves as to whether the role is inherently religious.⁶¹ The Australian Education Union Federal Office stated:

The [Religious Discrimination Bill], in purporting to override and remove the protection of...[the Victorian] legislation, would re-permit the discriminatory dismissals of teachers and expulsion of teachers. The extreme harms caused to a teacher sacked or student expelled on discriminatory grounds cannot be overstated.⁶²

58 Reverend Christopher Duke, Presbyterian Church of Australia, *Committee Hansard*, 13 January 2022, p. 40.

59 Mr Mark Spencer, Christian Schools Australia Limited, *Committee Hansard*, 13 January 2022, p. 39.

60 Australian Education Union Federal Office, *Submission 21*, p. 9; People With Disability Australia, *Submission 79*, p. 3; Dr Sean Mulcahy, *Submission 126*, p. 5; Human Rights Law Centre, *Submission 190*, p. 10.

61 Mr Ghassan Kassisieh, Equality Australia, *Committee Hansard*, 21 December 2021, p. 73.

62 Australian Education Union Federal Office, *Submission 21*, p. 9.

5.43 The Victorian Government also raised concerns that the bill would override reforms consulted on and passed in the Victorian Parliament:

The Victorian Government has significant concerns about clause 11, given it would directly undermine recent reforms in Victoria. The Victorian Government considers that the RD Bill is an inappropriate and unwarranted intervention by the Commonwealth, which seeks to undermine a policy position that reflects a longstanding Victorian Government election commitment. The EO Amendment Act reflects a clear mandate from the Victorian people, received strong support in the Victorian Parliament and was developed in close consultation with key stakeholders in Victoria. The Victorian Government consulted with faith groups, LGBTIQ+ groups, education peak bodies and other members of our community on the development of these reforms to ensure that they struck an appropriate balance.⁶³

5.44 However, the statement of compatibility accompanying the Religious Discrimination (Consequential Amendments) Bill 2021 explained that prescribing the Victorian law promotes the right to freedom of religion:

by ensuring that the right is not unduly limited by Victorian legislation which could restrict or interfere with the ability of religious educational institutions to maintain the religious ethos of their institution by preferencing people on the basis of their religious belief or activity in relation to employment.⁶⁴

Students of religious educational institutions

5.45 Maintaining a particular ethos or value system in a religious education institution was considered by many submitters to be important to ensuring that specific values and beliefs are instilled in the children who attend those schools. 98.5 per cent of respondents to the committee's survey believed that parents should be able to choose to send their children to a school of their choice which aligns with their religious values.⁶⁵ A number of submitters were similarly of the view that parents have a right for their children to be educated in accordance with their religious and moral convictions, and parents choose to send their children to religious schools to receive this kind of education.⁶⁶ As such, some submitters said that it was essential to choose staff willing to uphold the ethos of the school. Mrs Vanessa Cheng, Executive Officer, Australian Association of Christian Schools said:

63 Victorian State Government, *Submission 195*, p. 4.

64 Religious Discrimination (Consequential Amendments) Bill 2021, statement of compatibility, pp. 4–5.

65 Appendix 4, Survey questions and sample of responses, answers to question 4.

66 See, e.g., Dr Alex Deagon, *Submission 3*, p. 7; Freedom for Faith, *Submission 10*, p. 3; Australian Association of Christian Schools, *Submission 23*, pp. 5-6; Christian Schools Australia & Adventist Schools Australia, *Submission 24*, pp. 4-5.

From our school's perspective, we take the role and the responsibility of parents really seriously to ensure the education and religious education of their children... We believe this bill would deliver on protecting the right of parents to choose a school that reflects their values and beliefs—Christian values and beliefs—that they would like their children to be taught.

The way schools deliver on that protection—that international standard, so to speak—is through choosing staff that are willing to uphold the ethos and the mission and the values of the schools. That's why our schools were established. In many cases our schools were started by parents who put money into starting a school that was going to deliver a holistic Christian education. Christianity was not going to be taught as a separate subject but was going to be imbued and embedded in all parts of the Australian Curriculum and taught through that perspective.⁶⁷

5.46 Some submitters stated that religious educational institutions do not expel students based on their sexuality or gender identity. They argued that the focus on religious schools' treatment of LGBTIQA+ students was misleading when the purpose of the bill is to protect religious educational institutions from religious discrimination by allowing them to practice and teach their faith.⁶⁸ The Australian Catholic Bishops' Conference submitted:

Catholic schools want to continue to be able to teach the Catholic faith. This faith-based education is a vital part of the identity and mission of Catholic schools. Catholic schools do not expel students or sack staff simply on the grounds of sexual orientation, gender identity or any other protected status. Suggestions that they do have gravely misrepresented and undermined the good work of Catholic schools and unnecessarily caused anxiety in the community. Where there is a discipline issue or a disagreement, principals or other senior members of staff will work to try to resolve the issue pastorally.⁶⁹

5.47 Mrs Wendy Francis, National Director of the Australian Christian Lobby also commented:

Expelling students on the basis of their sexuality is just not something that we do, both of the major Christian organisations that run Christian schools. We have been in conversations with the Islamic Council as well. It is just not something that happens at all.⁷⁰

5.48 However, a number of other submitters and witnesses raised concerns that a religious educational institution being able to act in accordance with their faith could

67 Mrs Vanessa Cheng, Executive Officer, Australian Association of Christian Schools, *Committee Hansard*, 21 December 2021, p. 37.

68 Anglican Church Diocese of Sydney, *Submission 158*, p. 9; FamilyVoice Australia, *Submission 22*, pp. 2-3.

69 Australian Catholic Bishops' Conference, *Submission 185*, p. 2.

70 Mrs Wendy Francis, Australian Christian Lobby, *Committee Hansard*, 21 December 2021, p. 22.

have negative implications for some students, including students whose faith changed over the course of their schooling, and in particular, LGBTIQ+ young people.⁷¹ Submitters noted that for some religions, aspects of an individual's personal life or inherent characteristics may be relevant to whether the religion considers the person is acting in accordance with the doctrines, tenets or beliefs of the religion, and this may raise questions as to indirect discrimination on other protected grounds. By characterising conduct of religious educational institutions based on their faith as not constituting discrimination, this could indirectly impact young LGBTIQ+ people and suppress their ability to explore and be open about who they are. A number of submitters and witnesses argued that the implications of the bill package will likely increase the bullying and mental health distress experienced by LGBTIQ+ students and could result in expulsion from school.⁷²

5.49 Mental Health Australia commented:

the Religious Discrimination Bill has the potential to further increase the stigma and discrimination experienced by LGBTIQ+ people resulting directly in further deterioration of their mental health. The potential of students and teachers being expelled from a religious school has increased under the Bill with no protection for LGBTQ+ students and teachers from being discriminated against by religious schools. Increase in stigma is also likely to have a direct impact on the willingness of LGBTIQ+ people experiencing mental health difficulties to seek help. Without appropriate treatment, mental health conditions are likely to deteriorate.⁷³

5.50 Child Wise further commented that there is a risk the bill package 'would lead to discrimination of children and young people based on their sexuality' and the bill does not align with the National Principles For Child Safe Organisations.⁷⁴

Enrolment and expulsion of students

5.51 The Australian Human Rights Commission submitted that, while religious educational institutions are required under the bill to have a publicly available policy

71 Equal Voices, *Submission 32*, pp. 9-12; Aleph Melbourne, *Submission 4*, p. 1; A Gender Agenda, *Submission 81*, p. 3; Rainbodhi LGBTQIA+ Buddhist Community, *Submission 8*, p. 8.

72 Equal Voices, *Submission 32*, pp. 9-12; Prof Tiffany Jones, *Submission 44*, pp. 12-15; Parents for Transgender Youth Equity, *Submission 73*, pp. 1-3; Ms Sharon Hollis, President, Uniting Church in Australia Assembly, *Hansard*, 14 January 2022, p. 57; Commissioner of Children and Young People, *Submission 120*, pp. 1-2; Public Health Association, *Submission 123*, p. 6; Youth Pride Network, *Submission 124*, pp. 7-8; Amnesty International Australia, *Submission 157*, p. 19; Ms Elise Christian, Equal Voices, Committee Hansard, 21 December 2021 p. 75, 76 and 79; Child Wise, *Submission 48*, p. 3.

73 Mental Health Australia, *Submission 67*, p. 2.

74 Child Wise, *Submission 48*, p. 3.

in relation to employment, there is no similar requirement in relation to the admission and expulsion of students on religious grounds.⁷⁵

5.52 Some submitters raised it was not appropriate to prohibit the enrolment of a child on the basis of their personal characteristics.⁷⁶ Others submitted that currently in some jurisdictions students could be denied enrolment, but that once a child is enrolled in a school, schools should not then be able to discriminate on the grounds of religion.⁷⁷ In addition to LGBTIQ+ students who may be expelled for not living in accordance with a particular faith, submitters noted that students who change or reject faith over the course of their studies may be expelled.⁷⁸

5.53 Ms Sharon Hollis, President, Uniting Church in Australia Assembly, gave evidence that once a student is enrolled at a school, they should be able and free to explore the range of their faith and world view as an educational process:

In any good education system, exploring your world view, your faith and all that you're being taught should lead you to question, to disagree and to discern how you as a young adult growing into adulthood view the world. If we start to allow discrimination throughout the education process it actually hinders the capacity for students to engage fully in the education that they're meant to be getting. They may enter a school with one position and their parents may enter a school with one position and that may change for a variety of reasons. It may have to do with an awareness of their sexuality. It may have to do with the fact that they no longer hold to a key tenet of the faith of the school their parents enrolled them in. But their education should not be cut short or disadvantaged, as a result almost of participating in the education process, because they come to a view different from the school they're enrolled in. It just seems very unfair to young people.⁷⁹

5.54 The Australia Discrimination Law Experts Group noted that a student's faith may change as they progress through school and subclause 7(2) 'would allow the school to expel that student or treat that student differently than other students on the basis that they do not share the same religious beliefs as required by the school'. They submitted that 'rather than protecting a child's right to religious belief in accordance with article 14 of the UN Convention on the Rights of the Child', the bill

75 Australian Human Rights Commission, *Submission 97*, p. 48.

76 See, e.g., Mr Jason Masters, Uniting Network Australia, *Committee Hansard*, 14 January 2022, p. 53.

77 Australian Discrimination Law Experts Group, *Submission 33*, p. 17; Australian Human Rights Commission, *Submission 97*, p. 49; ACT Government, *Submission 192*, pp. 15-16; Ms Sharon Hollis, Uniting Church in Australia Assembly, *Hansard*, 14 January 2022, p. 55.

78 Law Council Australia, *Submission 28*, p. 23; Australian Discrimination Law Experts Group, *Submission 33*, p. 16.

79 Ms Sharon Hollis, Uniting Church in Australia Assembly, *Committee Hansard*, 14 January 2022, p. 55.

would limit 'their rights by privileging the rights of religious educational institutions over and above the rights of children'.⁸⁰

5.55 Additionally, numerous submitters and witnesses were of the view that treatment of students or staff on the basis of sexual orientation or gender identity was an issue relevant to subsection 38(3) of the *Sex Discrimination Act 1984* (Cth). The Australian Law Reform Commission is tasked with reviewing this provision as part of its review of all religious exemptions in federal anti-discrimination legislation. The reporting deadline for this review is to be one year after the passage of the Religious Discrimination Bill 2021.⁸¹

5.56 A number of submitters were of the view that the issue of students being discriminated against on grounds other than religion was not directly relevant to the discussion of this bill, which focuses on religious discrimination.⁸² Some submitters noted that their support for these bills was contingent on whether proposed amendments to the *Sex Discrimination Act* (Cth) were made.⁸³

5.57 The Attorney-General's Department submitted:

The Bill does not affect the operation of the current religious exemptions in the Sex Discrimination Act. As part of the Government's response to the report of the Religious Freedom Review, the Government asked the Australian Law Reform Commission (ALRC) to inquire into religious exceptions in all Australian laws. The Government's position was made very clear at the time and in the terms of reference for the inquiry that it does not support discrimination. The Government is concerned to get the balance right between ensuring religious schools can maintain their religious ethos and ensuring people are free from discrimination. More recently, the Attorney-General wrote to the ALRC President, the Hon. Justice Sarah Derrington, to ask that the ALRC report with detailed drafting for legislative reform that will strike the right balance.⁸⁴

Refusal to provide facilities, goods or services for solemnisation of marriage

5.58 The Human Rights Legislation Amendment Bill 2021 seeks to amend the *Marriage Act 1961* to allow religious educational institutions to refuse to provide facilities, goods or services for the purposes of, or incidental to, the solemnisation of

80 Australian Discrimination Law Experts Group, *Submission 33*, p. 16.

81 See <https://www.alrc.gov.au/inquiry/review-into-the-framework-of-religious-exemptions-in-anti-discrimination-legislation/>.

82 Mr Gregory Bondar, Family Voice Australia, *Committee Hansard*, 21 December 2021, p. 82; Mr Mark Sneddon, Australian Christian Higher Education Alliance, *Committee Hansard*, 21 December 2021, p. 38; Anglican Church Diocese of Sydney, *Submission 158*, p. 6.

83 Australian Christian Lobby, *Submission 16*, p. 8; Australian Association of Christian Schools, *Submission 23*, pp. 3-4.

84 Attorney-General's Department, *Submission 191*, p. 5.

a marriage in accordance with their religious beliefs.⁸⁵ This would apply whether the facilities, goods or services are made for payment or not. The *Marriage Act 1961* already provides that a body established for religious purposes may refuse to make facilities available or provide goods or services in such circumstances.⁸⁶

5.59 The explanatory memorandum states that the Religious Freedom Review noted the possible ambiguity around whether this existing protection applied to religious educational institutions, and as such explains that this provision mirrors the existing provision but applies it to educational institutions. The explanatory memorandum states that this provision 'requires a close nexus between the facilities, goods or services and the solemnisation of marriage.'⁸⁷ This ensures that people are not unfairly discriminated against where there is only a distant or tenuous connection between the facilities, goods or services and the solemnisation of marriage'.⁸⁸

5.60 A number of submitters supported this amendment.⁸⁹ For example, the Australian Christian Churches noted that the same protection needs to be given to:

educational institutions established for religious purposes, particularly where the educational institution has been established by a specific religious body. To omit these institutions leaves a gaping hole for religious bodies with educational arms and will require them to act in a manner contrary to their beliefs.⁹⁰

5.61 Freedom for Faith considered the impact of the amendment stating that:

It seems a good recognition of the religious freedom rights of schools where many other venues for solemnisation of marriages will be available.⁹¹

5.62 However, a number of other submitters raised concerns with this amendment, a common one being that existing protections were sufficient, and that

85 Human Rights Legislation Amendment Bill 2021, Schedule 1, items 3 and 6.

86 *Marriage Act 1961* (Cth), section 47B.

87 Human Rights Legislation Amendment Bill 2021, explanatory memorandum, p. 17.

88 Human Rights Legislation Amendment Bill 2021, explanatory memorandum, p. 18.

89 Freedom for Faith, *Submission 10*, p. 13; Christian Schools Australia & Adventist Schools Australia, *Submission 24*, p.13; Australian Christian Churches, *Submission 63*, p. 8; Associated Christian Schools, *Submission 74*, p. 3.

90 Australian Christian Churches, *Submission 63*, p. 7.

91 Freedom for Faith, *Submission 10*, p. 13.

this amendment would lead to adverse consequences.⁹² The Public Interest Advocacy Centre stated no 'compelling argument has been provided to justify permitting organisations operating commercial services in this area to discriminate against LGBTI-inclusive couples'.⁹³ Dr Sean Mulcahy, La Trobe University, also submitted:

The Bills stipulate that religious schools and universities may refuse to make facilities available, or provide goods and services, for same-sex marriages if doing so would not conform to their religious beliefs or would injure the religious feelings of adherents of their religion...⁹⁴ On the other hand, a secular organisation, such as a pride centre, could not refuse to rent its venue to a religious group.⁹⁵ This creates unevenness in the law.⁹⁶

5.63 Noting that the broader issue of religious school exemptions remain, Equality Australia submitted that this proposed amendment 'highlights a lack of balance in the approach to exemptions generally and a prioritisation of religious privilege over and above the interests of LGBTIQ+ people'.⁹⁷

International human rights law

Rights to freedom of religion or belief, freedom of expression, equality and non-discrimination, work, private and family life, education and rights of the child

5.64 By affording religious educational institutions greater protection to act in accordance with their faith, this measure promotes the rights to freedom of religion and freedom of expression. As outlined in Chapter 2, the right to freedom of religion includes the freedom to have or to adopt a religion or belief, and freedom, either individually or in community with others and in public or private, to manifest one's religion or belief in worship, observance, practice and teaching.⁹⁸ The right includes the right of religious institutions to establish religious infrastructure, such as religious

92 Equality Australia, *Submission 31*, p. 7; Equal Voices *Submission 32*, p. 9; Australian Discrimination Law Experts Group, *Submission 33*, p. 20; ACON, *Submission 34*, p. 11; National Tertiary Education Union, *Submission 35*, p. 4; Tasmanian Council of Social Services, *Submission 36*, p. 2; Public Interest Advocacy Centre, *Submission 40*, p. 27; Professor Tiffany Jones, *Submission 44*, p. 15; Humanists Victoria, *Submission 52*, p. 2; Australian Human Rights Commission, *Submission 97*, p. 74; Dr Sean Mulcahy, *Submission 126*, p. 9; Children and Young People with Disability Australia, *Submission 139*, p. 6; LGBTIQ+ Health Australia, *Submission 156*, p. 8; Amnesty International, *Submission 157*, pp. 24–25; Planet Ally, *Submission 160*, p. 3; LGBTI Legal Service Inc, *Submission 161*, p. 6; NSW Council for Civil Liberties, *Submission 181*, pp. 3-4, 14; Just Equal Australia, *Submission 69*, p. 3.

93 Public Interest Advocacy Centre, *Submission 40*, p. 27.

94 Human Rights Legislation Amendment Bill 2021, clause 6.

95 Religious Discrimination Bill 2021, clause 25.

96 Dr Sean Mulcahy, *Submission 126*, p. 9.

97 Equality Australia, *Submission 31*, p. 44.

98 International Covenant on Civil and Political Rights, article 18(1).

schools, and to decide who may teach religion and in what manner it should be taught.⁹⁹ The right to freedom of religion also requires Australia to respect the convictions of parents and guardians of children in the provision of education, and respect the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions.¹⁰⁰ The right to freedom to manifest religion, including in the workplace, intersects with, and has a mutually reinforcing relationship with, the right to freedom of expression.¹⁰¹

5.65 However, by allowing religious educational institutions to treat persons differentially on the basis of their religious belief or activity (including in relation to employment decisions, restricting access to schools for students of certain religions and treating students differently based on their religion or beliefs, including in relation to admission and expulsion decisions), this measure also necessarily engages and limits the rights to freedom of religion or belief, freedom of expression and equality and non-discrimination for others (see Chapters 2 and 4 for an overview of the content of these rights and Australia's obligations under international human rights law).

5.66 The right to equality encompasses both 'direct' discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a discriminatory effect on the enjoyment of rights).¹⁰² This measure not only permits differential treatment on the basis of religion or belief, but it may also have the effect of allowing indirect discrimination against persons on the basis of other protected attributes, such as gender and sexuality.¹⁰³

5.67 Differential treatment on the basis of a protected attribute, such as religion, gender or sexuality, will not constitute *unlawful* discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate

99 UN General Assembly, *Elimination of all forms of religious intolerance: Interim report of the Special Rapporteur on freedom of religion or belief*, A/69/261 (2014) [41]; *William Eduardo Delgado Páez v. Colombia*, UN Human Rights Committee Communication No. 195/1985 (1990) [5.7]–[5.8]. See also Associate Professor Mark Fowler, *Submission 20*, p. 13.

100 International Covenant on Civil and Political Rights, article 18(4). See also International Covenant on Economic, Social and Cultural Rights, article 13(3).

101 International Covenant on Civil and Political Rights, article 19. See also UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [9], [11].

102 UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989).

103 See Attorney-General's Department, *Submission 191*, p. 8, regarding the extent to which religious educational institutions may consider issues of sexuality.

means of achieving that objective.¹⁰⁴ As discussed in Chapter 2 (at paragraph [2.50]), in assessing the permissibility under international human rights law of possible indirect discrimination under this bill, it is not relevant whether such differential treatment may be lawful or unlawful under other federal anti-discrimination laws, such as the *Sex Discrimination Act 1984*.¹⁰⁵

5.68 The measure may also limit the rights to work, education, privacy and family life to the extent that it would deprive persons of certain religious belief of employment opportunities at religious educational institutions; restrict access to education for certain students, noting that in some remote locations in Australia the only available school may be a religious school;¹⁰⁶ and permit arbitrary interference with a person's private and family life.¹⁰⁷ The content of these rights are discussed in Chapter 2.

5.69 Noting its application to students, the measure may also engage and limit the rights of the child, particularly the rights to education, equality and non-discrimination and freedom of religion or belief. Under the Convention on the Rights of the Child, children themselves hold the right to freedom of religion or belief.

104 UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2]. Under international human rights law, where a person possesses characteristics which make them particularly vulnerable to intersectional discrimination, such as on the grounds of both gender or sex and religion or other belief, the UN Committee on Economic, Social and Cultural Rights has highlighted that 'particularly special or strict scrutiny is required in considering the question of possible discrimination'. See *Marcia Cecilia Trujillo Calero v. Ecuador*, UN Committee on Economic, Social and Cultural Rights, Communication No. 10/2015, E/C.12/63/D/10/2015 (26 March 2018) [19.2]. See also *Rodriguez v Spain*, UN Committee on Economic, Social and Cultural Rights, Communication No. 1/2013 E/C.12/57/D/1/2013 (20 April 2016) [14.1]; UN Committee on Economic, Social and Cultural Rights, *General Comment 20: non-discrimination in economic, social and cultural rights* (2009) [17] and *General Comment 16: the equal right of men and women to the enjoyment of all economic, social and cultural rights* (2005) [5]; and Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28: The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GS/28 (16 December 2010) [28].

105 See *Sex Discrimination Act 1984*, paragraph 23(3)(b) and subsection 38(1).

106 See Northern Territory Anti-Discrimination Commission, *Submission 69*, p. 5. The Northern Territory Anti-Discrimination Commission stated that in the Northern Territory, 'there are a number of locations where there are no options but religious schools'. They were concerned that the 'reforms will impact on Aboriginal people whose communities this occurs in, by limiting employment opportunities in communities that already have very limited employment opportunities, and impacting on teaching a diverse curriculum, that reflects the need of maturing students, particularly in relation to sexuality and gender identity'.

107 See UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [33], [37], which noted that the rights to education, expression and other human rights can be limited by institutions in the name of religion or on the basis of a person's religion.

Associated with this right are the rights and duties of a child's parents or legal guardians to provide direction to their child in the exercise of this right in a manner consistent with the evolving capacities of the child.¹⁰⁸ While the rights of the child and parental rights in the area of freedom of religion or belief may, at times, be in tension, these rights 'should generally be interpreted as being positively interrelated'.¹⁰⁹

5.70 Further, when considering the rights of the child in the area of freedom of religion, it is necessary to apply the principle of the best interests of the child. Australia has obligations to ensure that the best interests of the child are taken as a primary consideration in all actions concerning children, including in the area of freedom of religion or belief.¹¹⁰ This requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.¹¹¹ A child's best interests and their enjoyment of their Convention rights 'must be assessed and determined in light of the specific circumstances of the particular child'.¹¹²

5.71 In addition, to the extent that the measure removes existing protections against discrimination in the area of work under state and territory laws (noting clause 11 overrides certain state and territory laws to allow religious educational institutions to preference people in employment), it may constitute a retrogressive measure under international human rights law. This is because clause 11 would have the effect of making otherwise discriminatory conduct under state or territory laws lawful under this bill, thus removing protections against discrimination for certain employees.¹¹³

5.72 Australia has obligations to progressively realise economic, social and cultural rights (such as the rights to work and education) using the maximum of resources available,¹¹⁴ and has a corresponding duty to refrain from taking retrogressive measures, or backwards steps with respect to their realisation.¹¹⁵

108 Convention on the Rights of the Child, article 14.

109 United Nations General Assembly, *Interim report of the Special Rapporteur on freedom of religion or belief*, A/70/286 (2015) [76].

110 Convention on the Rights of the Child, article 3(1).

111 UN Committee on the Rights of Children, *General Comment 14 on the right of the child to have his or her best interest taken as primary consideration* (2013). See also *IAM v Denmark*, UN Committee on the Rights of the Child Communication No.3/2016 (2018) [11.8].

112 UN Committee on the Rights of the Child, *General comment 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013), p. 3.

113 On this issue, see, e.g. Australian Discrimination Law Experts Group, *Submission 33*, pp. 10–11.

114 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The nature of States parties obligations (Art. 2, par. 1)* (1990) [9]. The obligation to progressively realise the rights recognised in the ICESCR imposes an obligation on States to move 'as expeditiously and effectively as possible' towards the goal of fully realising those rights.

115 International Covenant on Economic, Social and Cultural Rights, article 2.

Retrogressive measures, a type of limitation, may be permissible under international human rights law providing that they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective. In this context, the UN Committee on Economic, Social and Cultural Rights has stated that:

There is a strong presumption of impermissibility of any retrogressive measures taken in relation to the right to education, as well as other rights enunciated in the Covenant. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the State party's maximum available resources.¹¹⁶

5.73 The statement of compatibility acknowledges that conduct permitted under Part 2 of the bill could limit a person's right to equality and non-discrimination by preventing the person accessing education or employment opportunities from the religious body in question on the basis of the person's religious belief or activity.¹¹⁷ The statement of compatibility notes that the rights to work, education and freedom of expression are engaged by the bill but does not acknowledge that this specific measure may limit these rights.¹¹⁸ The statement of compatibility does not address the rights to private and family life or the rights of the child.

Limitation criteria

5.74 The above rights may be subject to permissible limitations where the limitation is prescribed by law, pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective. As discussed in Chapters 2 and 4, this general test is further qualified by specific requirements that apply to the rights to freedom of religion and freedom of expression.

5.75 Relevantly in the context of this measure, the freedom to manifest one's religion or beliefs may be subject only to specific limitations set out in the limitation clause (article 18(3)), including, where necessary, to protect the fundamental rights and freedoms of others.¹¹⁹ Limitations are to be strictly interpreted and 'may be applied only for those purposes for which they were prescribed and must be directly

116 UN Committee on Economic, Social and Cultural Rights, *General Comment 13: the Right to education* (1999) [45].

117 Religious Discrimination Bill 2021, statement of compatibility, pp. 10–12.

118 Religious Discrimination Bill 2021, statement of compatibility, p. 28.

119 See International Covenant on Civil and Political Rights, article 18(3); UN Human Rights Committee, *General Comment No. 22: Article 18 (Freedom of thought, conscience or religion)* (1993) [8] and UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [32].

related and proportionate to the specific need on which they are predicated'.¹²⁰ The necessity of the measure is also relevant in assessing the permissibility of a restriction on the right to freedom of religion.¹²¹

5.76 Further, where the manifestation of religion or the expression of a religious opinion or belief limits the rights or freedoms of others, each right must be balanced against each other.¹²² Noting that there is no hierarchy of human rights, where limitable rights clash, 'the focus should be on ensuring that all human rights are protected, including through reasonable accommodation'.¹²³

5.77 In the context of this measure, the rights of religious educational institutions to manifest their religion must be balanced against the rights of others (particularly staff and students). Under international human rights law jurisprudence, a balancing exercise is undertaken to resolve conflicts between competing limitable human

120 UN Human Rights Committee, *General Comment No. 22: Article 18 (Freedom of thought, conscience or religion)* (1993) [8]. See also UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief, A/HRC/37/49* (2018) [31], [44], [45].

121 See *Yaker v France*, UN Human Rights Committee Communication No.2747/2016 (2018) at [8.5] where the Committee stated that it needed to 'assess whether the restriction, which is prescribed by law, pursues a legitimate objective, is necessary for achieving that objective, and is proportionate and non-discriminatory'. See also UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [21]-[36]. Likewise, the Special rapporteur has stated that limitations on the rights to freedom of religion and freedom of expression must: '(a) be imposed for permissible reasons; (b) be clearly articulated in law so that individuals can know with certainty what conduct is prohibited; (c) be demonstrably necessary and be the least intrusive measure possible to achieve the aim pursued; and (d) be neither discriminatory nor destructive of the right itself, which must continue to be protected with a guarantee of due process rights, including access to remedy': UN Human Rights Council, *Freedom of religion or belief: Report of the Special Rapporteur on freedom of religion or belief, A/HRC/40/58* (2019) [17]. See also Associate Professor Mark Fowler, *Submission 20*.

122 See, e.g., *Ross v Canada*, United Nations Human Rights Committee Communication No. 736/1997 (2000) [11.5]–[11.8]; United Nations Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion* (1993) [8]; UN Human Rights Council, *Freedom of religion or belief: Report of the Special Rapporteur on freedom of religion or belief, A/HRC/40/58* (2019) [16].

123 UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief, A/HRC/37/49* (2018), [81].

rights – often applied as part of a broader proportionality assessment in which the necessity of the measure is also considered.¹²⁴

5.78 For instance, in the case of *Fernández Martínez v Spain*, the European Court of Human Rights balanced the right of religious institutional autonomy against the right to private and family life. The case involved the non-renewal of a teaching contract of a married Catholic priest, who taught Catholic religion and ethics at a state high school in Spain, after he had been granted dispensation from celibacy and attended a public event displaying his active commitment to a movement opposing church doctrine. The court held that the right to private and family life was applicable because the non-renewal of the applicant's contract, which had seriously affected his chances of carrying on his specific professional activity, was based on events mainly relating to personal choices he had made in the context of his private and family life.¹²⁵ Noting the positive obligation to adopt measures to secure respect for private life, the court found the conduct of the public authorities had interfered with the applicant's right, although as noted below, this interference was considered not to be disproportionate.¹²⁶ In relation to the balancing exercise undertaken, the court reiterated that:

when it is called upon to rule on a conflict between two rights that are equally protected by the Convention, it must weigh up the interests at stake...In the present case, this balancing exercise concerns the applicant's right to his private and family life, on the one hand, and the right of religious organisations to autonomy, on the other. The State is called upon to guarantee both rights and if the protection of one leads to an interference with the other, to choose adequate means to make this interference proportionate to the aim pursued.¹²⁷

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- 124 See Susanna Mancini and Michel Rosenfeld, *The Conscience Wars: rethinking the balance between religion, identity and equality*, Cambridge University Press, Cambridge, 2018, p. 314. In addressing the conflict between the rights to freedom of religion and equality and non-discrimination, the authors state that the European Court of Human Rights 'employs three tools of proportionality review – the necessity test, the balancing exercise, and the margins of appreciation – to resolve conflicts between limitable rights'. See also Ms Anja Hilgemeijer, *Submission 5*, p. 2 and Anja Hilgemeijer and Amy Maguire, 'Religious Schools and Discrimination against Staff on the basis of Sexual Orientation: Lessons from European Human Rights Jurisprudence', *ALJ*, 93, 2019, pp. 752–765.
- 125 *Fernández Martínez v Spain*, European Court of Human Rights (Grand Chamber), Application No. 56030/07 (2014) [109]–[113].
- 126 *Fernández Martínez v Spain*, European Court of Human Rights (Grand Chamber), Application No. 56030/07 (2014) [114]–[116].
- 127 *Fernández Martínez v Spain*, European Court of Human Rights (Grand Chamber), Application No. 56030/07 (2014) [123].

5.79 In balancing these rights, the court ultimately found there had been no violation of the right to private and family life as the interference with this right was not disproportionate.¹²⁸

5.80 As evidenced in the above case, international human rights law jurisprudence has considered the specific circumstances of the case, the competing rights in question and the vulnerability of the persons involved in undertaking this balancing exercise.¹²⁹ Regarding the latter, international human rights law jurisprudence has held that:

it is not permissible for individuals or groups to invoke “religious liberty” to perpetuate discrimination against groups in vulnerable situations, including lesbian, gay, bisexual, transgender and intersex persons, when it comes to the provision of goods or services in the public sphere.¹³⁰

5.81 International human rights law has also recognised the 'special category' of religious institutions, particularly in the context of employment. While religious institutions 'must be accorded a broader margin of discretion when imposing religious norms of behaviour at the workplace', the circumstances of the specific case are still relevant in assessing whether the conduct of religious institutions constitutes a permissible limitation on the rights of others.¹³¹

Prescribed by law

5.82 Human rights standards require that interferences with rights must have a clear basis in law (that is, they must be prescribed by law). This principle includes the requirement that laws must satisfy the 'quality of law' test, which means that any measures which interfere with human rights must be sufficiently certain and

128 *Fernández Martínez v Spain*, European Court of Human Rights (Grand Chamber), Application No. 56030/07 (2014) [152]–[153].

129 See, e.g., *Black and Morgan v Wilkinson*, Court of Appeal of England and Wales [2013] EWCA Civ 820, [35], [37]; *Staatkundig Gereformeerde Partij v the Netherlands*, European Court of Human Rights, Application No. 58369/10 (2012) [72]; *Travas v Croatia*, European Court of Human Rights, Application No 75581/13 (2017) [75]–[113]; UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [40]; UN Economic and Social Council, *Civil and political rights, including the question of religious intolerance: Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir*, E/CN.4/2006/5 (2006) [51]–[52].

130 UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [40]. At [39], the Special Rapporteur noted 'with concern the increasing trend by some States, groups and individuals, to invoke “religious liberty” concerns in order to justify differential treatment against particular individuals or groups, including women and members of the lesbian, gay, bisexual, transgender and intersex community. This trend is most often seen within the context of conscientious objection, including of government officials, regarding the provision of certain goods or services to members of the public'.

131 UN General Assembly, *Elimination of all forms of religious intolerance: Interim report of the Special Rapporteur on freedom of religion or belief*, A/69/261 (2014) [41].

accessible, such that people understand the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.¹³² While the measure clearly has basis in domestic law, namely the religious discrimination legislative package, there are questions as to whether the quality of law test is met.

5.83 In assessing whether the quality of law test is met, it is necessary to consider whether the circumstances in which an individual's rights may be limited by the conduct of a religious educational institution are sufficiently clear. In answering this question, it is relevant to consider the scope and clarity of the threshold tests contained in the relevant provisions, namely, the reasonableness test (in subclause 7(2)) and the religious susceptibilities test (in subclause 7(4)), as well as the requirement that conduct be in accordance with a publicly available policy and comply with any requirements determined by the minister (in subclause 7(6)). Subclauses 7(2) and (4) are discussed in detail in Chapter 4.

5.84 In relation to the requirement for conduct to be in accordance with a publicly available policy, this may assist in clarifying the circumstances in which the rights of individuals (in the context of employment) may be limited. The explanatory memorandum states that:

A policy must be available to prospective and existing employees or partners. It may be issued publicly through a variety of means, such as being provided online at the point of application or by a copy being provided upon request or as part of the recruitment package. The publicly available policy requirements do not affect the employment arrangements for existing staff, but are intended to provide information for current and prospective employees on the position of the school in relation to the use of these exceptions.¹³³

5.85 The matters set out in paragraph 11(1)(b) provide some guidance as to the contents of such policies. It requires a written policy to outline the religious educational institution's position in relation to the particular religious belief or activity; to explain how the position will be enforced; and to be publicly available, including at the time employment opportunities with the educational institution become available. The manner in which the policy is to be made public is not specified in the bill. The Attorney-General's Department stated that a 'policy may be made public through any appropriate means, such as being provided online at the point of application, or as part of a package of relevant material associated with a job

132 *Pinkney v Canada*, UN Human Rights Communication No.27/1977 (1981) [34]; *Travas v Croatia*, European Court of Human Rights, Application No 75581/13 (2017) [78]; *Gorzelik and others v Poland*, European Court of Human Rights (Grand Chamber), Application No. 44158/98 (2004) [64].

133 Religious Discrimination Bill 2021, explanatory memorandum, p. 44.

advertisement, or by a printed copy being provided to a person who requests the policy'.¹³⁴

5.86 The public policy requirement may clarify the circumstances in which the rights of employees or prospective employees may be limited. However, it does not appear to assist children or students in understanding the circumstances in which their rights may be limited by a religious school, noting that the requirement only applies to conduct in the context of employment.¹³⁵ It thus remains unclear whether the measure is drafted in such a way as to be sufficiently clear to enable all persons, particularly children, to foresee the circumstances in which a religious school may limit their rights. The breadth of the measure is also relevant to questions of proportionality (as discussed below).

Legitimate objective and rational connection

5.87 The statement of compatibility states that Part 2 of the bill seeks to enable religious bodies to conduct themselves in accordance with their religion, thereby promoting an individual's rights to manifest religion in community with others and freedom of association.¹³⁶ The stated objective of this particular measure is to 'ensure that religious bodies are able to maintain their religious ethos through staff, admission and other decisions'.¹³⁷ Regarding clause 11, the Attorney-General's Department stated that its purpose is to:

preserve these exemptions, as provided in state and territory laws. The Government considered that it would only be necessary to prescribe a state or territory law if a jurisdiction enacted a law that removed or limited an existing religious exception that permits religious educational institutions to preference in employment.¹³⁸

5.88 As noted in Chapter 4, international human rights law has recognised protection of religious institutional autonomy – an aspect of the right to freedom of religion – as a legitimate objective.¹³⁹ Insofar as the measure affords greater protection to religious educational institutions to act in accordance with their faith,

134 Attorney-General's Department, *Submission 191*, p. 11.

135 See, e.g., Australian Human Rights Commission, *Submission 97*, p. 48.

136 Religious Discrimination Bill 2021, statement of compatibility, p. 11.

137 Religious Discrimination Bill 2021, explanatory memorandum, p. 45.

138 Attorney-General's Department, *Submission 191*, p. 10.

139 See, e.g. *Travas v Croatia*, European Court of Human Rights, Application No 75581/13 (2017) [86]; *Siebenhaar v Germany*, European Court of Human Rights, Grand Chamber, Application No 18136/02 (2011) [41]; *Obst v Germany*, European Court of Human Rights, Application No 425/03 (2010) [44]; *Hasan and Chaush v Bulgaria*, European Court of Human Rights, Grand Chamber, Application No 30985/96 (2000) [62]. See also, Ms Anja Hilkemeijer, *Submission 5*, quoting Anja Hilkemeijer and Amy Maguire, 'Religious Schools and Discrimination against Staff on the basis of Sexual Orientation: Lessons from European Human Rights Jurisprudence', *ALJ*, 93, 2019, p. 756; Associate Professor Mark Fowler, *Submission 20*, pp. 34–36.

including by overriding any state or territory laws that would interfere with the ability of educational institutions to preference people in employment on the basis of religion, the measure appears to be rationally connected to the stated objective.¹⁴⁰

Proportionality

5.89 As discussed above and in Chapter 4, there are some concerns that the measure is drafted in overly broad terms. In particular, the threshold tests to determine whether conduct by a religious educational institution is not discrimination may not be sufficiently clear as to enable individuals, particularly children, to foresee the circumstances in which their rights may be limited. The breadth of the measure raises questions as to whether the proposed limitation is sufficiently circumscribed. Some submitters and witnesses raised concerns about the broad scope of the measure. For example, the Australian Discrimination Law Experts Group stated:

Clause 11 applies not only to determinations or preferences as to who should be employed but also determinations once someone is employed or in the determination to remove staff. This is because clause 11 applies to conduct that would otherwise be unlawful in both clause 19(1) in relation to hiring and in clause 19(2) in relation to terms and conditions in employment and preferencing in employment. Clause 11 allows religious educational institutions an extremely wide exception with respect to both hiring staff as well as making determinations about their conditions of ongoing employment after they have commenced work.¹⁴¹

5.90 The requirement that conduct be in accordance with a publicly available policy may assist in circumscribing the measure, although the extent to which it may assist will depend on the content of such policies. As noted above, this requirement only applies in the context of employment and does not apply to matters relating to students (such as admission or expulsion of students). The explanatory memorandum identified this requirement as a key safeguard, stating:

Paragraph 11(1)(b) is intended to provide an additional safeguard for the general community noting the broader impact this provision could have on people who are employed by, or seeking to be employed by, these bodies. The requirement to have a written, publicly available policy would increase certainty and transparency and ensure that the general public is able to ascertain and understand the position of a religious body in relation to

140 Although, some submitters have raised concerns that the measure may not be rationally connected to the objects of the bill itself, noting that part 2 permits discrimination in the name of religion rather than prohibiting religious discrimination, see Australian Discrimination Law Experts Group, *Submission 33*, p. 14; Law Council of Australia, *Submission 28*, pp. 23–26.

141 Australian Discrimination Law Experts Group, *Submission 33*, p. 17. See also Australian Human Rights Commission, *Submission 97*.

preferencing in employment prior to seeking employment or otherwise engaging with the religious body.¹⁴²

5.91 Some submitters, however, were of the view that conferring a broad power on the minister to determine requirements in relation to the publicly available policy would not assist to circumscribe the measure (as set out above at paragraph [5.28]).

5.92 Subject to any additional requirements set out by the minister, the public policy requirement would likely enhance transparency and may help to ensure the measure is sufficiently circumscribed, which could assist with proportionality. However, as discussed in Chapter 4, the extent to which the requirement would serve as an adequate safeguard to protect the rights of others is unclear, noting that a policy setting out when a person's rights may be limited does not prevent the limitation occurring. In this regard, some submitters and witnesses were concerned that a publicly available policy may in practice facilitate discrimination rather than act as a safeguard.¹⁴³

5.93 A related consideration is the flexibility of the measure. This is discussed in Chapter 4. As noted, the flexibility to have regard to the individual circumstances of the case is particularly important in circumstances where competing rights must be balanced, as is necessary in the context of this measure.

5.94 In the context of religious schools, while international human rights law has recognised the right of religious schools to decide who may teach religion and in what manner it should be taught, distinctions have been drawn between employees teaching religion and other employees who may owe a lower degree of loyalty to the school.¹⁴⁴ For example, in *Fernández Martínez v Spain* (see paragraph [5.78]), the European Court of Human Rights stated that:

as a consequence of their autonomy religious communities can demand a certain degree of loyalty from those working for them or representing them. In this context the Court has already considered that the nature of the post occupied by those persons is an important element to be taken into account when assessing the proportionality of a restrictive measure taken by the State or the religious organisation concerned...In particular, the specific mission assigned to the person concerned in a religious organisation is a relevant consideration in determining whether that person should be subject to a heightened duty of loyalty.

142 Religious Discrimination Bill 2021, explanatory memorandum, p. 52. See also Attorney-General's Department, *Submission 191*, p. 11.

143 See, e.g., Australian Discrimination Law Experts Group, *Submission 33*, p. 18; Law Council of Australia, *Submission 28*, p. 32; Professor Luke Beck, *Submission 38*, p.16.

144 See, e.g., *William Eduardo Delgado Páez v. Colombia*, UN Human Rights Committee Communication No. 195/1985 (1990) [5.7]–[5.8]; *Fernández Martínez v Spain*, European Court of Human Rights (Grand Chamber), Application No. 56030/07 (2014); *Travas v Croatia*, European Court of Human Rights, Application No 75581/13 (2017); *Schüth v Germany*, European Court of Human Rights, Application No 1620/03 (2010).

That being said, a mere allegation by a religious community that there is an actual or potential threat to its autonomy is not sufficient to render any interference with its members' rights to respect for their private or family life compatible with [the right to privacy] of the Convention. In addition, the religious community in question must also show, in the light of the circumstances of the individual case, that the risk alleged is probable and substantial and that the impugned interference with the right to respect for private life does not go beyond what is necessary to eliminate that risk and does not serve any other purpose unrelated to the exercise of the religious community's autonomy. Neither should it affect the substance of the right to private and family life. The national courts must ensure that these conditions are satisfied, by conducting an in-depth examination of the circumstances of the case and a thorough balancing exercise between the competing interests at stake.¹⁴⁵

5.95 In applying the above test to the circumstances of the case, the court considered the status of the applicant, noting that by signing successive employment contracts, the teacher had accepted a heightened duty of loyalty to the church; the fact that the teacher had publicly campaigned in favour of a way of life that was contrary to the views of the church; the specific content of the teaching, noting that religious education teachers have a heightened duty of loyalty and 'religion must be taught by a person whose way of life and public statements are not flagrantly at odds with the religion in question'; and the severity of the sanction, including the teacher's ability to find other employment and the availability of a less rights restrictive option.¹⁴⁶ Regarding the latter, in the case of *Schüth v Germany*, the inability of a church organisation to find a new job outside the church was a factor the court considered in finding that the applicant's rights had been violated.¹⁴⁷

145 *Fernández Martínez v Spain*, European Court of Human Rights (Grand Chamber), Application No. 56030/07 (2014) [131].

146 At [137], the Court stated that 'it is not unreasonable for a Church or religious community to expect particular loyalty of religious-education teachers in so far as they may be regarded as its representatives. The existence of a discrepancy between the ideas that have to be taught and the teacher's personal beliefs may raise an issue of credibility if the teacher actively and publicly campaigns against the ideas in question'. At [141], the court held that 'the applicant was voluntarily part of the circle of individuals who were bound, for reasons of credibility, by a duty of loyalty towards the Catholic Church, thus limiting his right to respect for his private life to a certain degree. In the Court's view, the fact of being seen as campaigning publicly in movements opposed to Catholic doctrine clearly runs counter to that duty. In addition, there is little doubt that the applicant, as a former priest and director of a seminary, was or must have been aware of the substance and significance of that duty'.

147 *Schüth v Germany*, European Court of Human Rights, Application No 1620/03 (2010). See also, Anja Hilkmeyer and Amy Maguire, 'Religious Schools and Discrimination against Staff on the basis of Sexual Orientation: Lessons from European Human Rights Jurisprudence', *ALJ*, 93, 2019, pp. 752–765.

5.96 These cases indicate that in signing an employment contract with a religious institution, employees accept a duty of loyalty towards that institution, noting it has been held that contractual limitations on individual rights are permissible so long as they are freely accepted.¹⁴⁸ However, the demands of loyalty must still be reasonable, having regard to the individual circumstances of the case.

5.97 The jurisprudence of the European Court of Human Rights indicates that where the right of religious institutional autonomy, including that of religious educational institutions, conflicts with individual rights, each right must be balanced against the other and the permissibility of any limitation of rights turns on the specific circumstances of the case.¹⁴⁹ For example, in circumstances where the only available school in a remote location is a religious school, greater weight may be given to the rights of individuals (such as teachers or students) against the right of the religious school to institutional autonomy, noting that it may be more difficult to find alternative employment and educational opportunities.¹⁵⁰ The vulnerability of the individuals involved would also be a relevant factor, noting jurisprudence has held that 'religious liberty' cannot be invoked to justify discrimination against vulnerable groups, including women, girls and LGBTIQ+ persons.¹⁵¹ In addition, where children are involved, strong regard would need to be given to the best interests of the child. On this issue, the UN Committee on the Rights of the Child has explained that:

the expression "primary consideration" means that the child's best interests may not be considered on the same level as all other

148 See, e.g., *Schüth v Germany*, European Court of Human Rights, Application No 1620/03 (2010) [71].

149 See also, UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [47].

150 See Northern Territory Anti-Discrimination Commission, *Submission 69*, p. 5. The Northern Territory Anti-Discrimination Commission stated that in the Northern Territory, 'there are a number of locations where there are no options but religious schools'. They were concerned that the 'reforms will impact on Aboriginal people whose communities this occurs in, by limiting employment opportunities in communities that already have very limited employment opportunities, and impacting on teaching a diverse curriculum, that reflects the need of maturing students, particularly in relation to sexuality and gender identity'. See also Australian Human Rights Commission, *Submission 97*, p. 44.

151 UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [40]. At [39], the Special Rapporteur noted 'with concern the increasing trend by some States, groups and individuals, to invoke "religious liberty" concerns in order to justify differential treatment against particular individuals or groups, including women and members of the lesbian, gay, bisexual, transgender and intersex community. This trend is most often seen within the context of conscientious objection, including of government officials, regarding the provision of certain goods or services to members of the public'. See also Ms Anja Hilke Meijer, *Submission 5* and Professor Luke Beck, *Submission 38*.

considerations. This strong position is justified by the special situation of the child.¹⁵²

5.98 Some submitters raised concerns that the measure does not give sufficient weight to the rights of the child, instead privileging the rights of religious educational institutions.¹⁵³ The ACT Government, for instance, submitted:

Whereas section 46 of the ACT Discrimination Act allows schools to discriminate against students on the grounds of religion only at the time of admission, [clause] 7 of the Bill would appear to allow schools to discriminate on the grounds of religion after a student is enrolled in a school...This approach, particularly given the lack of human rights safeguards discussed below, may unreasonably limit students' human rights. This is despite the Convention of the Rights of the Child requiring that the best interests of the child be a primary consideration in both public and private institutions. It permits a school to prioritise religious freedoms to expel a child who, for example, converts to a different religion during their studies, yet requires no balancing consideration by the school of the child's welfare or rights to education. This approach may also limit the rights in the ACT Human Rights Act to education without discrimination.¹⁵⁴

5.99 The Australian Human Rights Commission also raised concerns about potential discrimination against children, stating:

Permitting discrimination against students on the basis of religious belief or activity, either at the point of admission or thereafter, is more difficult to justify than preferencing the hiring of staff of a particular faith where those staff are responsible for providing the leadership of the institution and creating its ethos.

...

Many students may not have chosen the school in which they are enrolled; it may have been a decision by a parent or guardian. Young people are at a formative stage of development and their religious beliefs may change over time. The Commission's view is that they should not be penalised for this in either the terms or conditions on which they are enrolled, or in decisions about expulsion. Such an approach would be consistent with the importance accorded by the *Convention on the Rights of the Child* to children's agency and their ability to make their own decisions, including in relation to questions of religion.¹⁵⁵

152 UN Committee on the Rights of the Child, *General comment 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013); see also *IAM v Denmark*, UN Committee on the Rights of the Child Communication No.3/2016 (2018) [11.8].

153 See, e.g. Australian Discrimination Law Experts Group, *Submission 33*, p. 16.

154 ACT Government, *Submission 192*, [54].

155 Australian Human Rights Commission, *Submission 97*, pp. 49–50.

5.100 The measure, as currently drafted, does not allow for this balancing exercise to occur. As discussed in Chapter 4, it is not clear that the objects clause (which refers to the indivisibility and universality of human rights, and their equal status in international law) would necessarily facilitate this balancing exercise in practice. Thus, in the absence of the ability to consider the individual circumstances of the case and balance competing human rights, there appears to be a risk that the measure may not be proportionate in all circumstances.

5.101 Further, it is not clear that the measure represents the least rights restrictive way of achieving the stated objective. The breadth of the measure and inability to consider individual circumstances makes it difficult to ensure that the least rights restrictive approach is taken, noting that where a religious body interferes with the rights of others, such interference should be based on a 'real and substantial' risk to institutional autonomy and should 'not go beyond what is necessary to eliminate that risk'.¹⁵⁶

5.102 In relation to children, a less rights restrictive option may be to allow religious schools to treat students differentially on the ground of religion at the time of admission to the school but not in respect of their continuing enrolment. The Australian Discrimination Law Experts Group noted that this approach has been adopted in state and territory legislative schemes and 'provides a more balanced protection of the right of religious educational institutions to operate in accordance with their faith, but also respects a child's individual right to explore their own faith and beliefs'.¹⁵⁷

5.103 In relation to staff, a less rights restrictive option may be to limit the scope of the exemption so as to allow religious educational institutions to discriminate on the basis of religion in the context of employment where the role in question is an inherently religious one or where the employee would owe a heightened degree of loyalty to the religious institution.¹⁵⁸

5.104 In conclusion, while the measure pursues a legitimate objective of protecting the autonomy of religious educational institutions and appears to be rationally connected to that objective, there are questions as to whether the measure would meet the quality of law test and would be proportionate in all circumstances. Under international human rights law, the ability to consider the individual circumstances of the case is critical to ensuring that rights are appropriately balanced and any limitation on individual rights is reasonable, necessary and proportionate in each case.

156 *Sindicatul "Păstorul cel Bun" v. Romania*, European Court of Human Rights, Grand Chamber, Application No. 2330/09 (2013) [159]. See also, *Yaker v France*, UN Human Rights Committee Communication No.2747/2016 (2018) [8.6]–[8.8] regarding the need to take the least restrictive measure necessary to ensure the protection of the freedom of religion or belief.

157 Australian Discrimination Law Experts Group, *Submission 33*, p. 17.

158 See, e.g., Law Council of Australia, *Submission 28*, p. 22.

Committee view

5.105 The committee considers it is essential for religious educational institutions to be able to maintain the religious ethos of their school. The ability of a religious educational institution to conduct itself according to its faith and values is an important aspect of the right to freedom of religion or belief. The committee also emphasises the importance of safeguarding parents' rights to ensure the religious and moral education of their children in accordance with their religious convictions.

5.106 The committee acknowledges the concerns that have been raised that staff and students in religious schools would not be afforded protection under this legislation for any discrimination they may experience on the basis of their religion. As stated, the right to freedom of religion requires that faith-based organisations have a right to select staff, who are not only adherents of that faith, but who also support the organisation's religious doctrines and practices. This is even more important in schools, where values are often more caught than taught. Therefore, the ability for religious schools to recruit those who can model the religious values and beliefs of a school in their interactions with students and their families is essential to preserving the general ethos and values of religious schools. The power to override certain state and territory laws that prevent this from occurring is also essential to adequately protecting this right. While acknowledging that this issue remains contentious and noting the different views received by the committee regarding the necessity and appropriateness of this override provision, on balance, the committee considers that it is an important measure to protect the right of religious educational institutions to manifest their religion and maintain the religious ethos of the school and educational community. The committee acknowledges that this may limit the right to freedom of religion and equality and non-discrimination for some, and that there is a difficult balancing act to undertake. The committee considers that the bill includes important safeguards, with conduct by religious bodies only captured if it is engaged in in good faith by bodies that are inherently religious, and where that conduct is necessary for the body to properly maintain its religious ethos.

5.107 Another important safeguard in the bill is the requirement that schools that engage in differential treatment on the basis of religion in relation to the employment of staff must do so in accordance with a publicly available policy. The committee considers this increases certainty and transparency and ensures that prospective or existing employees, as well as the general public, would be able to ascertain and understand the position of a religious body on such matters. The committee supports this measure, although it retains some scrutiny concerns that the bill specifies that the minister can determine the requirements for such a policy in delegated legislation. No further detail is provided in subclauses 7(6), 7(7) and 9(3) as to what the minister may require of such a policy. The committee considers these are potentially significant matters that are best dealt with in primary legislation and not left to delegated legislation which has a much lower level of parliamentary

oversight. As such, the committee considers these clauses should, similarly to clause 12, at least set out the basic requirements for the policy, namely that it outline the religious body's position in relation to particular religious beliefs or activities, and explains how this position will be enforced by the religious body. The committee considers this would provide clarity around what the policy should contain, and should it be necessary to prescribe additional requirements, the minister could do so, but this would be ancillary to what is set out on the face of the bill.

5.108 Further, the committee emphasises that conduct that is not discrimination under this bill may still constitute discrimination under other anti-discrimination laws. In particular, these bills do not affect the operation of the current religious exemptions in the *Sex Discrimination Act 1984*. The committee notes that the Australian Law Reform Commission has been tasked with inquiring into religious exceptions in all Australian laws. In doing so the government has expressly stated that it is concerned to get the balance right between ensuring religious schools can maintain their religious ethos and ensuring people are free from discrimination. The committee considers that questions regarding exemptions from the *Sex Discrimination Act 1984* (which currently means it is not discrimination for religious bodies to discriminate on the grounds of sex or sexual orientation) are best dealt with as part of this broader review.

Recommendation 8

5.109 The committee recommends that subclauses 7(6), 7(7) and 9(3) of the Religious Discrimination Bill 2021 be amended to set out what is required to be included in a publicly available policy, namely: that the policy must outline the religious body's position in relation to particular religious beliefs or activities, and explain how this position will be enforced by the religious body. These subclauses should also provide that the minister may, by legislative instrument, determine any other requirements ancillary to this, which the policy must comply with.

