

Chapter 1

Introduction

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

Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff, including on the basis of sexual orientation and gender identity and other attributes covered by the *Sex Discrimination Act 1984*, with particular reference to proposals for amendments to current legislation, and any related matters.¹

Conduct of this inquiry

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

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

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

Structure of this report

1.5 There are two chapters in this report:

- This chapter provides background and outlines the administrative details of the inquiry.
- Chapter 2 presents the key issues raised in evidence and the committee's view.

Background

Religious Freedom Review

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

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

1 *Journals of the Senate [Proof]*, No. 127, 13 November 2018, p. 4077.

- The Hon Philip Ruddock (Chair)
- Emeritus Professor Rosalind Croucher AM
- The Hon Dr Annabelle Bennett AO SC
- Father Frank Brennan SJ AO, and
- Professor Dr Nicholas Aroney.²

1.8 The work conducted by the Panel is known as the Religious Freedom Review (the Review) or the Ruddock Review. The Terms of Reference for the Review were announced on 14 December 2017. The objective, scope and timing of the review were set out as follows:

Objective

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

Scope

In undertaking this Review, the Panel should:

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

...

Timing

Following the Prime Minister's agreement to an extension of its reporting date, the Panel will report its findings to the Prime Minister by 18 May 2018.³

1.9 The Panel received over 15,500 submissions, some of which have been published on the website of the Department of the Prime Minister and Cabinet.⁴ The Panel delivered its report to the Prime Minister on 18 May 2018, and released a statement that day summarising its process:

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

2 Department of the Prime Minister and Cabinet, 'Religious Freedom Review', <https://www.pmc.gov.au/domestic-policy/religious-freedom-review> (accessed 14 November 2018).

3 Department of the Prime Minister and Cabinet, *Religious Freedom Review Terms of Reference*, 14 December 2017, <https://www.pmc.gov.au/resource-centre/domestic-policy/religious-freedom-review-terms-reference> (accessed 14 November 2018).

4 Department of the Prime Minister and Cabinet, *Religious Freedom Review – Submissions*, <https://www.pmc.gov.au/domestic-policy/religious-freedom-review/review-submissions> (accessed 14 November 2018).

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

1.10 The Attorney-General's Department was provided with a copy of the report on 21 May 2018.⁶ The Panel's report has not been published by the government. Indeed, on 10 October 2018, the Prime Minister, the Hon Scott Morrison MP, said that the report had not yet been considered by Cabinet.⁷

1.11 However, what were reported to be leaked sections of the report appeared in the media on 9 October 2018.⁸ On 12 October 2018, *Fairfax Media* published what it claimed was a copy of all 20 recommendations of the Review.⁹

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

Recommendation 5

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

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

Recommendation 6

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

5 Department of the Prime Minister and Cabinet, 'Statement from the Panel', <https://www.pmc.gov.au/news-centre/domestic-policy/statement-panel> (accessed 14 November 2018).

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

7 Matthew Doran, 'Religious freedom panel recommends formalising ability for religious schools to turn away gay students', *ABC News*, 10 October 2018, <https://www.abc.net.au/news/2018-10-10/religious-freedom-panel-recommendation-on-religious-schools/10358790> (accessed 15 November 2018).

8 Jewel Topsfield, 'Religious freedom review enshrines right of schools to turn away gay children and teachers', *The Sydney Morning Herald*, 9 October 2018, <https://www.smh.com.au/politics/federal/religious-freedom-review-enshrines-right-of-schools-to-turn-away-gay-children-and-teachers-20181009-p508o7.html> (accessed 15 November 2018).

9 'Read the full 20 recommendations from the religious freedom review', *Fairfax Media*, 12 October 2018, <https://www.smh.com.au/politics/federal/read-the-full-20-recommendations-from-the-religious-freedom-review-20181011-p50918.html> (accessed 14 November 2018).

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

Recommendation 7

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

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

Recommendation 8

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

Proposed amendments to the Sex Discrimination Act 1984

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

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

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

10 'Read the full 20 recommendations from the religious freedom review', *Fairfax Media*, 12 October 2018, <https://www.smh.com.au/politics/federal/read-the-full-20-recommendations-from-the-religious-freedom-review-20181011-p50918.html> (accessed 14 November 2018).

11 See, for example, Mr Peter Black, Queensland Director, Equality Campaign, *Committee Hansard*, 19 November 2018, p. 3; Mr Jonathon Hunyor, Chief Executive Officer, Public Interest Advocacy Centre, *Committee Hansard*, 19 November 2018, p. 53.

1.16 On 12 October, the Opposition Leader, the Hon Bill Shorten MP, indicated that the Opposition would be supportive of repealing those discrimination law exemptions that allow religious educational institutions 'to turn away and expel gay students'.¹²

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

...be taking action to ensure amendments are introduced as soon as practicable to make it clear that no student of a non-state school should be expelled on the basis of their sexuality. I believe this view is shared across the Parliament and we should use the next fortnight to ensure this matter is addressed.¹³

1.18 The Prime Minister also stated that he had directed the Attorney-General to prepare amendments and consult with the Opposition to achieve this end.¹⁴

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

1.20 The Attorney-General, the Hon Christian Porter MP, indicated at the end of the most recent sitting fortnight (not including the Senate-only sitting) that negotiations with the Opposition had been conducted in good faith. Mr Porter stated that one of the issues arising from removing the clause about LGBTIQ+ students was the potential to remove the ability of faith-based educational institutions to put in place their own rules, such as requiring students to attend chapel or undertake religion lessons. Mr Porter further indicated that he hoped an agreed bill could be introduced in the final sitting fortnight of the year, starting on 26 November.¹⁵

Legislative changes proposed by the Australian Greens

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

- the SDA to remove the exemption for religious educational institutions to discriminate against students and teachers on the basis of gender, sexual

12 Paul Karp, 'Labor offers support if Morrison acts to stop schools from expelling gay students' *Guardian Australia*, 12 October 2018, <https://www.theguardian.com/australia-news/2018/oct/12/labor-offers-support-if-morrison-acts-to-stop-schools-from-expelling-gay-students> (accessed 14 November 2018).

13 The Hon Scott Morrison, MP, Prime Minister, 'Media Release', *Media Release*, 13 October 2018, <https://www.pm.gov.au/media/media-statement> (accessed 14 November 2018).

14 The Hon Scott Morrison, MP, Prime Minister, 'Media Release', *Media Release*, 13 October 2018, <https://www.pm.gov.au/media/media-statement> (accessed 14 November 2018).

15 Paul Osborne, 'Gay student laws debate delayed', *The Australian*, 25 October 2018.

orientation, gender identification, marital or relationship status or pregnancy; and

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

Responses to proposed legislative changes

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

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

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

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

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

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

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

16 Explanatory Memorandum, *Discrimination Free Schools Bill 2018*, p. 1.

17 Anglican Church Diocese of Sydney, 'Open Letter to All Members of Parliament of Australia', 25 October 2018.

18 Name Withheld, *Submission 128*, p. 1.

19 'Third Anglican school backtracks over letter about gay teachers and students', *SBS News*, 8 November 2018, <https://www.sbs.com.au/news/third-anglican-school-backtracks-over-letter-about-gay-teachers-and-students> (accessed 14 November 2018).

20 'Third Anglican school backtracks over letter about gay teachers and students', *SBS News*, 8 November 2018, <https://www.sbs.com.au/news/third-anglican-school-backtracks-over-letter-about-gay-teachers-and-students> (accessed 14 November 2018).

The current legal framework

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

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

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

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

Commonwealth laws

Australian Constitution

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

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

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

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

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

22 *Australian Constitution*, s. 116.

direct protection in respect of religion or belief at the State level. This means that States may pass laws that restrict religious freedom or belief'.²³

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

Commonwealth legislation

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

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

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

The Sex Discrimination Act 1984

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

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

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

23 Professor George Williams AO, *Submission to the Religious Freedoms Review*, 14 December 2017, p. 1.

24 Attorney-General's Department, *Submission 67*, p. 1.

25 Senator the Hon. Susan Ryan, Minister for Education and Youth Affairs, *Senate Hansard*, 2 June 1983, 1185.

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

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

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

The purpose of the Bill is to foster a more inclusive society by prohibiting unlawful discrimination against LGBTI people and promoting attitudinal change in Australia.²⁶

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

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

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

1.42 In its current form, the SDA:

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

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

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

28 Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013, Supplementary Explanatory Memorandum, p. 4.

family responsibilities in certain areas of public life including work and education.²⁹

1.43 The SDA sets out that discrimination may occur where:

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

1.44 Discrimination for a 'protected attribute' includes discrimination on the grounds of sexual orientation,³¹ gender identity³² and intersex status.³³

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

- (a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; and
- (b) the feasibility of overcoming or mitigating the disadvantage; and
- (c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice.³⁴

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

- the application or admission of a student to school;³⁵ or
- by denying the student access, or limiting the student's access, to any benefit provided by the educational authority; expelling the student; or subjecting a student to another form of detriment.³⁶

29 Attorney-General's Department, *Submission 67*, p. 1.

30 Attorney-General's Department, *Submission 67*, p. 2.

31 *Sex Discrimination Act 1984*, s. 5A.

32 *Sex Discrimination Act 1984*, s. 5B.

33 *Sex Discrimination Act 1984*, s. 5C.

34 *Sex Discrimination Act 1984*, para. 7(b).

35 *Sex Discrimination Act 1984*, ss. 21(1).

36 *Sex Discrimination Act 1984*, ss. 21(2).

1.47 The SDA defines 'educational authority' as 'a body or person administering an educational institution',³⁷ which extends the application of the SDA beyond schools to include, for example, universities.

1.48 The SDA also provides that it is unlawful for an employer to discriminate against a person on the ground of the person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities in respect of the offer of employment,³⁸ or during the course of employment.³⁹

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

...conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.⁴⁰

1.50 The SDA defines 'educational institution' as 'a school, college, university or other institution at which education or training is provided'.⁴¹ This, too, extends the application of the SDA beyond schools to include universities.

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

...any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.⁴²

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

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

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

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

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

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

42 *Sex Discrimination Act 1984*, para. 37(1)(d).

discrimination, and implications for the statutory construction of section 37 of the SDA.⁴³ Specifically, the Attorney-General's Department stated that:

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

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

The Fair Work Act

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

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

- (i) in good faith; and
- (ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.⁴⁶

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

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

43 Attorney-General's Department, *Submission 67*, p. 9.

44 Attorney-General's Department, *Submission 67*, p. 8.

45 Law Council of Australia, *Submission 88*, p. 18.

46 *Fair Work Act 2009*, para. 153(2)(b).

47 *Fair Work Act 2009*, para. 195(2)(b).

48 *Fair Work Act 2009*, para. 351(2)(c).

49 *Fair Work Act 2009*, para. 772(2).

employment, and not on the basis of other protected attributes like sexual orientation and gender identity'.⁵⁰

1.57 Further, PIAC noted that 'trans, gender diverse and intersex people are currently not protected against adverse treatment, or unfair dismissal' in the FWA and also recommended that the FWA 'be amended to add the protected attributes of gender identity and sex characteristics to ss 153, 195, 351, 772 and 578'.⁵¹

1.58 In practice, these exemptions do not apply to action that is not unlawful under federal anti-discrimination law, such that 'there is that direct relationship between the Fair Work Act and antidiscrimination laws'.⁵²

States and Territories

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

Australian Capital Territory

1.60 The *Discrimination Act 1991* (ACT) prohibits discrimination⁵³ on the ground of any of the following attributes: accommodation status; age; association (whether as a relative or otherwise) with a person who is identified by reference to another protected attribute; breastfeeding; disability; employment status; gender identity; genetic information; immigration status; industrial activity; intersex status; irrelevant criminal record; parent, family, carer or kinship responsibilities; physical features; political conviction; pregnancy; profession, trade, occupation or calling; race; record of a person's sex having been altered under the *Births, Deaths and Marriages Registration Act 1997* (ACT) or a law of another jurisdiction that corresponds, or substantially, corresponds, to the Act; relationship status; religious conviction; sex; sexuality; and subjection to domestic or family violence.⁵⁴

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

1.62 Of relevance to this inquiry, the *Discrimination Act 1991* (ACT) prohibits discrimination against an applicant for employment and an employee, specifically providing that this includes instances where 'an employer discriminates against an

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

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

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

53 Defined at section 8.

54 *Discrimination Act 1991* (ACT), s. 7.

employee if the employer denies the employee access to a benefit associated with employment because the employee is in a same-sex relationship'.⁵⁵

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

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

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

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

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

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

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

New South Wales

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

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

55 *Discrimination Act 1991* (ACT), ss. 10(3).

56 *Discrimination Act 1991* (ACT), ss. 33(1).

57 *Discrimination Act 1991* (ACT), s. 18.

58 *Discrimination Act 1991* (ACT), ss. 33(2).

59 *Human Rights Act 2004* (ACT), ss. 8(2).

60 *Human Rights Act 2004* (ACT), s. 14.

61 *Human Rights Act 2004* (ACT), s. 7.

62 *Human Rights Act 2004* (ACT), s. 28.

1.70 In relation to this inquiry, the *Anti-Discrimination Act 1977* (NSW) prohibits discrimination against work applicants or employees on the grounds of homosexuality.⁶³ The discrimination against a prospective or current student on the grounds of homosexuality is also prohibited under the Act.⁶⁴

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

Northern Territory

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

1.73 The Act also prohibits sexual harassment.

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

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

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

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

(a) is on the grounds of:

(i) religious belief or activity; or

(ii) sexuality; and

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

63 *Anti-Discrimination Act 1977* (NSW), s. 49ZH.

64 *Anti-Discrimination Act 1977* (NSW), s. 49ZO.

65 *Anti-Discrimination Act 1977* (NSW), para. 49ZH (3)(c); ss. 49ZO (3).

66 *Anti-Discrimination Act 1977* (NSW), s. 49ZT.

67 *Anti-Discrimination Act 1996* (NT) ss. 19(1). Discrimination is defined at s. 20. This probation does not apply to transgender people.

68 *Anti-Discrimination Act 1996* (NT) ss. 30(2).

69 *Anti-Discrimination Act 1996* (NT) s. 37A.

1.76 The Northern Territory Anti-Discrimination Commission has advised the committee that the *Anti-Discrimination Act 1996* (NT) is currently under review, an area under consideration 'is the appropriateness of the exemption in the legislation that currently provides for exclusion of staff on the basis of sexuality or religious belief or activity'.⁷⁰

Queensland

1.77 The *Anti-Discrimination Act 1991* (Qld) prohibits discrimination on the basis of sex; relationship status; pregnancy; parental status; breastfeeding; age; race; impairment; religious belief or religious activity; political belief or activity; trade union activity; lawful sexual activity; gender identity; sexuality; family responsibilities; and association with, or relation to, a person identified on the basis of any of the above attributes.⁷¹

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

1.79 Discrimination is prohibited in a specified 'area', which includes education⁷² and work.⁷³

1.80 In respect of education, a school or other educational institution may discriminate by excluding students who are not of the particular religion⁷⁴—religious discrimination is not allowed against LGBT students.

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

- it is a genuine occupational requirement that workers act in a way that is consistent with the religious beliefs of the school or educational institution; and
- the worker or applicant openly acts in a way that is inconsistent with those religious beliefs during the course of work or doing something connected with work; and
- the discrimination action is not unreasonable.⁷⁵

South Australia

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

70 Northern Territory Anti-Discrimination Commission, *Submission 126*, p. 3.

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

72 *Anti-Discrimination Act 1991* (Qld), div. 3.

73 *Anti-Discrimination Act 1991* (Qld), div. 2.

74 *Anti-Discrimination Act 1991* (Qld), s. 41.

75 *Anti-Discrimination Act 1991* (Qld), ss. 25(3).

disability; gender identity; intersex status; marital status; pregnancy; race; religious dress; sex; sexual orientation and a spouse or partner's identity.

1.83 The Act also prohibits sexual harassment.

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

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

- (a) the educational institution is administered in accordance with the precepts of a particular religion and the discrimination is founded on the precepts of that religion; and
- (b) the educational authority administering the institution has a written policy stating its position in relation to the matter; and
- (c) a copy of the policy is given to a person who is to be interviewed for or offered employment with the authority or a teacher who is to be offered engagement as a contractor by the authority; and
- (d) a copy of the policy is provided on request, free of charge—
 - (i) to employees and contractors and prospective employees and contractors of the authority to whom it relates or may relate; and
 - (ii) to students, prospective students and parents and guardians of students and prospective students of the institution; and
 - (iii) to other members of the public.⁷⁷

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

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

Tasmania

1.87 The *Anti-Discrimination Act 1998* (TAS) prohibits discrimination⁸⁰ on the grounds of the following attributes: race; age; sexual orientation; lawful sexual activity; gender; gender identity; intersex; marital status; relationship status;

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

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

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

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

80 Defined at s. 14 and s. 15.

pregnancy; breastfeeding; parental status; family responsibilities; disability; industrial activity; political belief or affiliation; political activity; religious belief or affiliation; religious activity; irrelevant criminal record; irrelevant medical record; and association with a person who has, or is believed to have, any of these attributes.⁸¹

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

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

A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to employment in an educational institution that is or is to be conducted in accordance with the tenets, beliefs, teachings, principles or practices of a particular religion if the discrimination is in order to enable, or better enable, the educational institution to be conducted in accordance with those tenets, beliefs, teachings, principles or practices.⁸²

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

(1) A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to admission of that other person as a student to an educational institution that is or is to be conducted in accordance with the tenets, beliefs, teachings, principles or practices of a particular religion.

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

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

(4) A person may, on a ground specified in subsection (1), discriminate against another person in relation to the admission of the other person as a student to an educational institution, if the educational institution's policy for the admission of students demonstrates that the criteria for admission relates to the religious belief or affiliation, or religious activity, of the other person, the other person's parents or the other person's grandparents.⁸³

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

81 *Anti-Discrimination Act 1998* (TAS), s. 16.

82 *Anti-Discrimination Act 1998* (TAS), ss. 51(2).

83 *Anti-Discrimination Act 1998* (TAS), s. 51A.

Victoria

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

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

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

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

- (a) conforms with the doctrines, beliefs or principles of the religion; or
- (b) is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.⁸⁵

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

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

Western Australia

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

84 *Equal Opportunity Act 2010* (VIC), s. 6. Section 7 of the Act defines discrimination.

85 *Equal Opportunity Act 2010* (VIC), s. 83.

86 *Charter of Human Rights and Responsibilities Act 2006* (VIC), s. 8.

87 *Charter of Human Rights and Responsibilities Act 2006* (VIC), s. 14.

1.98 The Act also prohibits sexual harassment and racial harassment. Further, the *Spent Convictions Act 1988* (WA) prohibits discrimination on the basis of having a spent conviction.

1.99 In respect of this inquiry, Western Australian legislation therefore prohibits discrimination against applicants and employees on the grounds of sexual orientation,⁸⁸ as well as discrimination against a prospective or current student on the grounds of sexual orientation.⁸⁹

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

...in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.⁹⁰

Acknowledgements

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

88 *Equal Opportunity Act 1984* (WA), s. 35O.

89 *Equal Opportunity Act 1984* (WA), s. 35W.

90 *Equal Opportunity Act 1984* (WA), ss. 73(1) and ss. 73(3). This also applies to contract workers—see: ss. 73(2).