

Chapter 2

Key issues

2.1 This chapter presents the key issues raised in evidence, as follows:

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

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

Human rights and constitutional contexts

2.3 The committee received a considerable amount of evidence about the context of the existing exemptions in the SDA that allow faith-based educational institutions to discriminate against students, teachers and staff, including on the basis of sexual orientation and gender identity and other attributes.

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

Human rights considerations

2.5 The Attorney-General's Department submitted that the '[l]egislative exemptions in the SDA that allow faith-based educational institutions to discriminate against students, teachers and staff seek to balance competing rights under international human rights law',¹ namely:

- the right to equality and non-discrimination;²
- the right to freedom of thought, conscience and religion or belief;³ and
- other relevant rights such as those under the *Convention on the Rights of the Child*.⁴

1 Attorney-General's Department, *Submission 67*, p. 7.

2 Pursuant to Articles 2(1) and 26 of the *International Covenant on Civil and Political Rights*.

3 Pursuant to Article 18 of the *International Covenant on Civil and Political Rights*.

2.6 The debate regarding legislative exemptions in the SDA therefore takes place within a broader human rights context.

2.7 Other evidence to the committee highlighted the tension between certain rights, primarily between the right to equality and non-discrimination, on one hand, and the right to freedom of religion on the other. For example, in its submission to the committee, the Australian Human Rights Commission (the Commission) submitted that 'human rights are universal, inalienable, indivisible, interdependent and interrelated'.⁵ The Commission stressed:

Care must be taken to accommodate human rights wherever they come into tension. This includes the right to freedom of religion and the right to be free from discrimination on the basis of sex, sexual orientation and gender identity.⁶

2.8 Lee Carnie of the Human Rights Law Centre discussed how to resolve the tension between the right to equality and non-discrimination and the right to freedom of thought, conscience and religion or belief. Lee Carnie suggested that the 'proportionality analysis is one avenue to consider reasonableness, necessity and proportionality in determining where that balance is struck', referring specifically to the *Guide to Human Rights* (the Guide) published by the Parliamentary Joint Committee on Human Rights (Human Rights Committee).⁷

2.9 The issue of proportionality was examined in detail by the Australian Law Reform Commission (ALRC) in its report, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*.⁸ In discussing the justification of limits on rights and freedoms in that report, the ALRC stated:

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

In short, a structured proportionality analysis involves considering whether a given law that limits important rights has a legitimate objective and is suitable and necessary to meet that objective, and whether—on balance—

4 For example, Article 3(1) provides that in all actions concerning children, whether undertaken by private or public social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

5 Australian Human Rights Commission, *Submission 5*, p. 2.

6 Australian Human Rights Commission, *Submission 5*, p. 2.

7 Lee Carnie, Senior Lawyer, Human Rights Law Centre, *Committee Hansard*, 19 November 2018, p. 58.

8 Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (ALRC Report 129), 2 March 2016.

the public interest pursued by the law outweighs the harm done to the individual right.⁹

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

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

2.11 Regarding the right to equality and non-discrimination, the Guide states:

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

2.12 As for the right to freedom of religion, the Guide states:

While the right to hold a religious or other belief or opinion is an absolute right, the right to exercise one's belief can be limited given its potential impact on others.

The right can be limited as long as it can be demonstrated that the limitation meets the limitation criteria and is necessary to protect public safety, order, health or morals or the rights of others.¹²

2.13 Regarding the final criterion—proportionality—the Human Rights Committee notes:

Even if the objective is of sufficient importance and the measures in question are rationally connected to the objective, the limitation may still not be justified because of the severity of its impact on individuals or groups.¹³

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

9 Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (ALRC Report 129), 2 March 2016, paragraphs 2.62–2.63 (citations omitted).

10 Parliamentary Joint Committee on Human Rights, *Guide to Human Rights*, June 2015, pp. 7–8.

11 Parliamentary Joint Committee on Human Rights, *Guide to Human Rights*, June 2015, p. 45.

12 Parliamentary Joint Committee on Human Rights, *Guide to Human Rights*, June 2015, p. 34.

13 Parliamentary Joint Committee on Human Rights, *Guide to Human Rights*, June 2015, p. 8.

the SDA with a general limitations clause'—a suggestion recommended by other submitters¹⁴—on the basis that:

A general limitations clause would clarify that conduct which is necessary to achieve a legitimate objective, including freedom of religion, and is a proportionate means of achieving that objective, is not discrimination.¹⁵

2.15 However the Commission did note that '[a]ny general limitations clause would need to be carefully worded in order to avoid allowing discriminatory acts that are currently unlawful'.¹⁶

2.16 The Australian Lawyers for Human Rights (ALHR) offered an alternative way in which rights may be balanced: by 'providing reasonable accommodation to other rights and other persons: "a fair balance needs to be struck between the rights of the individual and the rights of others"'.¹⁷ The ALHR noted that this approach 'is similar to the test of proportionate response to the harm in question which is generally used to assess whether or not legislation is too wide in its scope'.¹⁸

2.17 In assessing the particular provisions of the SDA within the human rights law framework, Ms Anna Brown, also of the Human Rights Law Centre opined that the existing permanent exemptions in the SDA 'are inappropriate and don't strike the right balance between equality and religious belief'.¹⁹ This position was also presented in other evidence to the committee, by, for example, the Victorian Gay & Lesbian Rights Lobby.²⁰

2.18 Jamie Gardiner, Vice-President of Liberty Victoria, acknowledged that the human right to equality is 'subject to some competition from other human rights'.²¹ However, 'when it comes to schools, for example, and the teaching of children, the best interests of the children must always come first'.²²

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

14 See, for example, Kingsford Legal Centre and Community Legal Centres NSW, *Submission 68*, p. 2.

15 Australian Human Rights Commission, *Submission 5*, p. 3.

16 Australian Human Rights Commission, *Submission 5*, p. 3.

17 Australian Lawyers for Human Rights, *Submission 87*, p. 7.

18 Australian Lawyers for Human Rights, *Submission 87*, p. 7.

19 Ms Anna Brown, Director of Legal Advocacy, Human Rights Law Centre, *Committee Hansard*, 19 November 2018, p. 52. This position was also presented in other evidence to the committee.

20 Victorian Gay & Lesbian Rights Lobby, *Submission 89*, p. 2.

21 Jamie Gardiner, Vice-President, Liberty Victoria, *Committee Hansard*, 19 November 2018, p. 3.

22 Jamie Gardiner, Vice-President, Liberty Victoria, *Committee Hansard*, 19 November 2018, p. 3.

different position, emphasising the importance of protecting freedom of religion in all areas, including the provision of education. Ms Pereira told the committee:

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

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

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

Constitutional considerations

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

23 Ms Annette Pereira, Executive Officer, Australian Association of Christian Schools, *Committee Hansard*, 19 November 2018, p. 31.

24 See, for example, Ms Megan Mitchell, National Children's Commissioner, Australian Human Rights Commission, *Committee Hansard*, 19 November 2018, p. 18.

25 See, for example, Mr Jonathon Hunyor, Chief Executive Officer, Public Interest Advocacy Centre, *Committee Hansard*, 19 November 2018, p. 53.

26 See, for example, Australian Family Coalition, *Submission 61*, p. 3.

27 Ms Robin Banks, *Committee Hansard*, 19 November 2018, p. 58.

...in our view, following the writings of Professor Luke Beck of Monash University, which we commend to the committee...religious exemptions in Commonwealth legislation are in themselves a violation of section 116 of the Constitution. They amount to giving a privilege, a benefit, to religious bodies that is not available to non-religious bodies—and should not be available to anyone, of course. That amounts to a preference and in many ways an establishment of one class of religious thinking against the rest of the country's other class.²⁸

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

...it is unconstitutional for the Australian Commonwealth to make any law for imposing any religious observance – including allowance for the exclusion of or discrimination against LGBTs in religious schools as currently exists in the SDA. It is also unconstitutional for the Australian Commonwealth to allow a religious test for qualifying for working in Australia's government-funded religious education sectors and schools for LGBT teachers and staff; and unconstitutional (given our legal requirement that all young people whether religious or not be physically at school until of age) to enforce such religious compliance tests for LGBT students.²⁹

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

A corporation is an entity that has legal personhood (ie perpetual succession, and the ability to sue and be sued) regardless of how it is described. A trading corporation is such an entity that has some substantial trading activities. Selling education, which is what non-government schools do, is trade and nongovernment schools are corporations.³⁰

2.24 Associate Professor Beck concluded that:

If a law is supported by the corporations power it does not matter whether the law implements any of Australia's treaty obligations or indeed if it breaches any of Australia's treaty obligations.³¹

2.25 On the other hand, Dr Alex Deagon stated that 'any attempt to remove the exemptions at the Commonwealth level may breach the free exercise clause of Section 116 of the Constitution by prohibiting the free exercise of religion'.³² Indeed,

28 Jamie Gardiner, Vice-President, Liberty Victoria, *Committee Hansard*, 19 November 2018, p. 4.

29 Dr Tiffany Jones, Department of Educational Studies, Macquarie University, *Submission 11*, p. 12 (emphasis omitted).

30 Associate Professor Luke Beck, *Submission 28*, p. 1.

31 Associate Professor Luke Beck, *Submission 28*, p. 2.

32 Dr Alex Deagon, *Submission 9*, p. 1.

as discussed in chapter 1, section 116 of the Constitution does not directly protect states from passing laws that restrict religious freedom or belief.³³

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

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

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

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

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

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

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

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

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

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

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

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

36 Archbishop Peter Comensoli, Delegate, Australian Catholic Bishops Conference, *Committee Hansard*, 19 November 2018, p. 21.

complaint being lodged by a principal or by parents in relation to the actions of a teacher who might be gay'.³⁷ Similarly, the President of the Australian Catholic Primary Principals' Association, Mr Brad Gaynor, said that he was 'unaware of situations where we've actually had to use the legislation'.³⁸

2.32 Many witnesses at the committee's hearing were asked to provide examples of cases in which the legislative exemptions 'have been involved or invoked', whether in relation to students, staff or contractors at faith-based schools.³⁹ Noting that some of these questions were taken on notice, many witnesses had not provided examples at the time of writing.

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

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

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

I've been an advocate for trans and gender-diverse people in Victoria for 20 years and have been aware of more than 100 cases of apparent discrimination. Very few of them get developed and taken to court or have action taken because of the outing process involved...⁴⁰

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

...has very strict statements about what it expects of its staff in relation to marriage and relationships outside marriage and so on. But they make that

37 Mr Ray Collins, Acting Executive Director, National Catholic Education Commission, *Committee Hansard*, 19 November 2018, p. 22.

38 Mr Brad Gaynor, President, Australian Catholic Primary Principals' Association, *Committee Hansard*, 19 November 2018, p. 39.

39 See, for example, Senator Fierravanti-Wells, *Committee Hansard*, 19 November 2018, p. 5.

40 Ms Brenda Appleton, Chair, Transgender Victoria, *Committee Hansard*, 19 November 2018, p. 14.

up front, so therefore the staff member is making a choice to work in that workplace before they actually go there.⁴¹

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

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

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

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

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

41 Mr James Laussen, Principal, Overnewton Anglican Community College, *Committee Hansard*, 19 November 2018, p. 66.

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

43 Equal Voices, *Submission 142*, p. 4.

44 Independent Education Union, *Submission 59*, pp. 2–4; also see, Mr Anthony Odgers, Assistant Federal Secretary, Independent Education Union of Australia, *Committee Hansard*, 19 November 2018, p. 47.

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

46 Mr Anthony Odgers, Assistant Federal Secretary, Independent Education Union of Australia, *Committee Hansard*, 19 November 2018, pp. 49–50.

2.40 The committee heard that the majority of schools facing these issues with respect to teachers would treat the issue as a contractual matter.⁴⁷ As Mr Odgers explained:

...those protections that are provided to the employer and that are enforceable, whether for breach of the agreement or breach of contract, are sitting alongside a legislative regimen in relation to the Sex Discrimination Act and the Fair Work Act. One is utilised weekly—the common law provisions of the contract and/or the agreement; the other is rarely, if ever, utilised in the Catholic system. It's utilised more often, but still quite rarely, by independent schools.⁴⁸

2.41 Mr Odgers further stated that not only are the legislative exemptions rarely relied upon, but in many cases of alleged discrimination 'the employer doesn't rely on anything'.⁴⁹ Mr Odgers also indicated that proportionately few unfair dismissal cases relating to faith-based schools are arbitrated by courts, as disputes about ongoing employment are normally settled through a payment to the employee. In part, this relates to business incentives:

The committee would be aware that it's not good business for schools to have any form of publicity that indicates that those who are responsible for teaching students at the school are in any way unhappy with or that there's any sort of disputation, and that disputation of that sort tends to sit on the front page of daily newspapers for some time.⁵⁰

Support for maintaining the existing legislative exemptions

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

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

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

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

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

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

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

50 Mr Anthony Odgers, Assistant Federal Secretary, Independent Education Union of Australia, *Committee Hansard*, 19 November 2018, pp. 48–49.

educational communities that demonstrate Christianity to their students both in word and in practice.⁵¹

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

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

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

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

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

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

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

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

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

51 Archbishop Peter Comensoli, Delegate, Australian Catholic Bishops Conference, *Committee Hansard*, 19 November 2018, p. 21.

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

53 Ms Annette Pereira, Executive Officer, Australian Association of Christian Schools, *Committee Hansard*, 19 November 2018, p. 31.

54 See, for example, Mr Blair Courtney-O'Connor, *Submission 12*, p. 1; Mr Bruce Burgess, *Submission 86*, pp. 2–3.

55 Ms Annette Pereira, Executive Officer, Australian Association of Christian Schools, *Committee Hansard*, 19 November 2018, p. 35.

regard to the education of their children, and that includes educating them in schools of a religious faith.⁵⁶

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

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

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

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

...

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

The existing exemptions protect faith-based educational institutions

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

56 Ms Beth Blackwood, Chief Executive Officer, Association of Heads of Independent Schools of Australia, *Committee Hansard*, 19 November 2018, p. 36.

57 Mr Frank FitzGerald, Executive Officer, Catholic Secondary Principals Australia, *Committee Hansard*, 19 November 2018, p. 37.

58 Mr Frank FitzGerald, Executive Officer, Catholic Secondary Principals Australia, *Committee Hansard*, 19 November 2018, p. 37.

59 Mr Mark Spencer, Executive Officer, Policy, Governance and Staff Relations, Christian Schools Australia, *Committee Hansard*, 19 November 2018, pp. 34–35.

2.52 For example, Ms Pereira of the Association of Christian Schools expressed concern that removing the exemptions might create grey areas in the law 'where it's quite hard for schools to know what they are and are not permitted to do until it's tested'.⁶⁰

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

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

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

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

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

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

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

60 Ms Annette Pereira, Executive Officer, Australian Association of Christian Schools, *Committee Hansard*, 19 November 2018, p. 34.

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

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

63 Archbishop Peter Comensoli, Delegate, Australian Catholic Bishops Conference, *Committee Hansard*, 19 November 2018, p. 21.

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

and their conduct (such as advocating positions contrary to the school's religious teachings).

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

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

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

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

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

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

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

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

Archbishop Comensoli: Yes.⁶⁶

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

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

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

67 Mr Frank FitzGerald, Executive Officer, Catholic Secondary Principals Australia, *Committee Hansard*, 19 November 2018, p. 39.

2.60 Regarding the meaning of 'advocacy', Mr Collins of the National Catholic Education Commission stated that it would depend on the circumstances and context in which the act occurs:

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

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

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

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

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

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

68 Mr Ray Collins, Acting Executive Director, National Catholic Education Commission, *Committee Hansard*, 19 November 2018, p. 26.

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

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

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

72 Mr Adel Salman, Islamic Schools Association of Australia, *Committee Hansard*, 19 November 2018, p. 69.

a person's attribute could be divorced from their conduct, Mr Salman's answer drew on whether the person's attribute was publicly known in the school community:

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

Support for removing the legislative exemptions

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

The legislative exemptions are discriminatory and harmful

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

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

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

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

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

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

73 Mr Adel Salman, Islamic Schools Association of Australia, *Committee Hansard*, 19 November 2018, p. 70.

74 See, for example, Ms Anna Brown, Director of Legal Advocacy, Human Rights Law Centre, *Committee Hansard*, 19 November 2018, p. 52.

75 Mr Jeremy Stowe-Lindner, Principal, Bialik College, *Submission 8*, p. 1.

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

capacity and, to quote Martin Luther King, the content of our character, not irrelevant factors such as our sexual orientation or gender identity. In this context, for students, I think that means having the same opportunities to contribute to and to gain from school life, including if that school life is at a faith based school. For teachers, it means being judged according to their abilities as teachers, not according to irrelevant factors, and I think that is what most parents who send their children to faith based schools will want.⁷⁷

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

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

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

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

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

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

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

79 Mr Daniel Comensoli, Policy Analyst, National LGBTI Health Alliance, *Committee Hansard*, 19 November 2018, pp. 2–3.

seriously undermine the mental health of LGBTIQ+ individuals, especially children and young people.⁸⁰

2.72 The committee received evidence regarding a range of adverse actions allegedly taken by faith-based educational institutions against students or staff on the basis of an attribute otherwise protected by the SDA, such as sexual orientation or gender.⁸¹ For example, Ms Appleton of Transgender Victoria described the experience of a transgender science teacher who had been assigned male at birth, and was working in a Catholic boys school in Melbourne:

After many years working through her gender identity issues, she approached the school to request their support to enable her to transition at school. They refused, and she was forced to resign. This was at a very vulnerable stage in her life and career. She then needed to seek employment post her transition, which was not easy and required her again to conceal her journey.⁸²

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

On a personal note, if my faith-based school had expelled me or otherwise discriminated against me on the basis of my sexual orientation, it is likely that this information would have become known to my parents, putting me at risk of homelessness due to rejection by my homophobic family of origin. This is exactly what happened shortly after I completed secondary school: our relationship completely broke down upon their learning about my sexual orientation, forcing me to become independent of my family at short order. This was a difficult and devastating time for me, but at least I was nineteen: a young adult and able to fend for myself. Had I been a few years younger, my position would have been even more precarious, and the outcomes may have been much worse. Not all LGBTIQ young people live in an accepting home environment, and no school student should be put at risk at home due to discrimination on the part of their school.⁸³

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

80 Royal Australian & New Zealand College of Psychiatrists, *Submission 106*, p. 1.

81 See, for example, Equal Voices, *Submission 142*, pp. 8–9; Parents of Gender Diverse Children, *Submission 51*, pp. 5–10.

82 Ms Brenda Appleton, Chair, Transgender Victoria, *Committee Hansard*, 19 November 2018, p. 10.

83 Name Withheld, *Submission 133*, p. 1.

at a Catholic school was allegedly dismissed because she became pregnant via IVF.⁸⁴ A further example, relating to marital status, was explained as follows:

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

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

The Assistant Principal was then demoted to a classroom teacher position with salary maintenance for a year. (It is noted that subsequently an annulment was obtained and the member, now correctly married in the view of the Church, obtained another Assistant Principal position.)⁸⁵

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

- 'I was scared the school was going to kick me out because I was pregnant';
- 'The school told me to leave when I got pregnant'; and
- "I was at school, but, by the time I was 20 weeks, I left because I was in and out of hospital. I asked the school for homework, but they didn't provide any support."⁸⁶

2.76 Ms Mitchell noted that while some of the young people she interviewed would have attended religious schools that the SDA currently exempts from antidiscrimination laws relating to pregnancy, that 'wasn't something I looked at in particular'.⁸⁷ However, the Australian Human Rights Commission's National Children's Report 2017 did recommend the following:

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

84 Independent Education Union, *Submission 59*, p. 3.

85 Independent Education Union, *Submission 59*, p. 2.

86 Ms Megan Mitchell, National Children's Commissioner, Australian Human Rights Commission, *Committee Hansard*, 19 November 2018, pp. 15–16.

87 Ms Megan Mitchell, National Children's Commissioner, Australian Human Rights Commission, *Committee Hansard*, 19 November 2018, p. 16.

pregnancy, breastfeeding or parental status/responsibilities is prohibited without exceptions.⁸⁸

2.77 In addition to these and other examples of adverse action allegedly taken by faith-based educational institutions under the current exemptions, which the committee published, the committee also received some other examples *in camera*.

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

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

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

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

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

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

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

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

2.82 Mr Dudman went on to state:

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

88 Australian Human Rights Commission, *Submission 5*, p. 2.

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

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

91 Mr Benjamin Dudman, *Submission 10*, p. 1.

92 Mr Benjamin Dudman, *Submission 10*, p. 1.

up and it is what a lot of students and staff feel on a daily basis in religious schools.⁹³

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

That hovers over employees in religious schools, and that means that there's an extra burden of threat hanging over these people. When teachers or staff want to go to their employer to complain about wages or conditions, they know that the school could terminate their employment on some unrelated ground, and there's no justification for that at all.⁹⁴

2.84 On behalf of Rainbow Families Victoria, Ms Marlowe stated that if her children are at an otherwise supportive faith-based school, 'we worry that we could be just one new principal or one new school board member away from those exemptions being exercised'.⁹⁵

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

The first question is the question of: 'We're not going to use the legislation; therefore, it doesn't matter.' My personal opinion is: why have the legislation in the first place if you're not going to use it? So we would be arguing to remove the legislation that allows an opportunity at some time in the future to discriminate.⁹⁶

2.86 Some witnesses put to the committee that removing the exemptions would help address these problems.⁹⁷ As Ms Marlowe of Rainbow Families stated:

I think that the most impactful thing that could occur as part of removing these exemptions is the lifting of the fear and of the daily fear that a child or a young person or a staff member would have going to work or school every day and not being able to be their authentic self.⁹⁸

2.87 The Rainbow Catholics InterAgency for Ministry also opposed the current exemptions in the SDA 'which [allow] faith-based educational institutions to

93 Mr Benjamin Dudman, *Submission 10*, p. 1; also see, for example, Mr Sam Watson, *Committee Hansard*, 19 November 2018, p. 55.

94 Mr Daniel Comensoli, Policy Analyst, National LGBTI Health Alliance, *Committee Hansard*, 19 November 2018, p. 5.

95 Ms Felicity Marlowe, Executive Director, Rainbow Families Victoria, *Committee Hansard*, 19 November 2018, pp. 7–8; also see, for example, Ms Karyn Walker, Co-Founder, Parents of Gender Diverse Children, *Committee Hansard*, 19 November 2018, p. 9.

96 Mr Phillip Grutzner, Principal, Carey Grammar Baptist School, *Committee Hansard*, 19 November 2018, p. 64.

97 See, for example, Ms Brenda Appleton, Chair, Transgender Victoria, *Committee Hansard*, 19 November 2018, p. 11.

98 Ms Felicity Marlowe, Executive Director, Rainbow Families Victoria, *Committee Hansard*, 19 November 2018, p. 11.

discriminate against teachers, students and staff on the basis of their gender identity, sexual orientation, marital status or other attributes', stating that '[t]he existence of discriminative laws and practices are in contradiction to Catholic teachings and have lasting and damaging effects on the health and wellbeing of our whole community'.⁹⁹

Other arguments supporting the removal of the exemptions

2.88 The Human Rights Law Centre presented research indicating that Australia is out of step with other likeminded countries on this issue—namely New Zealand, the United Kingdom, Ireland and Canada.¹⁰⁰

2.89 While these jurisdictions do have various relevant exemptions, Lee Carnie stated that '[i]n relation to discrimination against students, Australia is a clear outlier'.¹⁰¹ Further, while the situation is more complicated in these jurisdictions with regard to teachers and other employees, 'Australian laws are still at odds in explicitly singling out LGBT teachers and staff'.¹⁰²

2.90 Mr Rodney Croome also referred to a broadly representative survey of the LGBTI community which found overwhelming support for removing the exemptions.¹⁰³

2.91 Many submitters raised the issue of tax-payer funded schools discriminating against students.¹⁰⁴ This was also highlighted by Ms Marlowe of Rainbow Families in her evidence to the committee:

...we strongly believe that any educational institution receiving government funding should not be allowed to discriminate due to a person's sexuality, gender diversity, family structure or relationship status, be they a child, young person, family member, parent, carer or school staff member.¹⁰⁵

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

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

99 Rainbow Catholics InterAgency for Ministry, *Submission 74*, p. 2.

100 Human Rights Law Centre, *Submission 105*, pp. 10–11, pp. 13–15, pp. 21–22.

101 Lee Carnie, Senior Lawyer, Human Rights Law Centre, *Committee Hansard*, 19 November 2018, p. 53.

102 Lee Carnie, Senior Lawyer, Human Rights Law Centre, *Committee Hansard*, 19 November 2018, p. 53.

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

104 See, for example, Mr Phil Browne, *Submission 21*; Church of the Flying Spaghetti Monster Australia, *Submission 29*; Minus18 Foundation, *Submission 134*.

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

However, such calls for a ‘secular’ society often overlook the logical extension of the subsidy argument – that the 70% who profess a form of religious belief are also subsidising non-religious persons through the proportion of their taxation that is applied to public schools. Rather a truly neutral, democratic and pluralistic society will seek to most accurately reflect both the religious and non-religious sentiments that are exhibited within its underlying polity. In the context of this current Inquiry, this is most properly acquitted through the ongoing presence of both public schools and private religious schools.¹⁰⁶

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

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

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

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

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

106 Adjunct Associate Professor Mark Fowler, *Submission 46*, pp. 20–21 (citations omitted).

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

108 Independent Education Union of Australia, *Submission 59*, p. 5.

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

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

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

employment contract, if the exemption is removed from the Sex Discrimination Act, schools would be required to comply with that.¹¹²

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

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

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

...at least to be supportive of a particular identity and mission, stated up-front from the beginning, just as you would in any circumstance. The more senior the role within employment the more that that applies.¹¹³

2.98 However, Archbishop Comensoli suggested that the situation in regards to students is different, noting that students 'do not come to a school having signed up to a mission or ethos in an employment contract or any sort of contract'.¹¹⁴ Nonetheless, representatives of the Bishops Conference and the Catholic Education Commission indicated that there might still be some need for the exemption in relation to students.¹¹⁵

2.99 Representing the Islamic Schools Association, Mr Salman observed that teachers have more power and authority in their actions than students, and students are more vulnerable so schools need to 'tread very carefully'.¹¹⁶ However, the Islamic Schools Association stated that the current exemptions strike 'a reasonable balance',¹¹⁷ giving flexibility to schools to act according to the religious beliefs of the school. For example, Mr Salman hypothesised that:

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

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

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

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

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

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

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

have no issue. It is when a student is advocating for that...that would be a problem.¹¹⁸

2.100 Mr Salman added that a school would not take any steps against that student:

...as long as the student was generally abiding by the school's values and ethos and was not advocating for a particular view that was in contravention of what was being taught in the school.¹¹⁹

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

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

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

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

118 Mr Adel Salman, Islamic Schools Association of Australia, *Committee Hansard*, 19 November 2018, p. 70.

119 Mr Adel Salman, Islamic Schools Association of Australia, *Committee Hansard*, 19 November 2018, p. 70.

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

121 Mr Jonathon Hunyor, Chief Executive Officer, Public Interest Advocacy Centre, *Committee Hansard*, 19 November 2018, p. 54.

122 Mr Jonathon Hunyor, Chief Executive Officer, Public Interest Advocacy Centre, *Committee Hansard*, 19 November 2018, p. 59; also see Ms Felicity Marlowe, Executive Director, Rainbow Families Victoria, *Committee Hansard*, 19 November 2018, p. 11.

123 Jamie Gardiner, Vice-President, Liberty Victoria, *Committee Hansard*, 19 November 2018, p. 5.

124 Mr Daniel Comensoli, Policy Analyst, National LGBTI Health Alliance, *Committee Hansard*, 19 November 2018, p. 5.

Options for reform

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

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

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

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

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

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

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

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

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

128 Ms Robin Banks, *Committee Hansard*, 19 November 2018, p. 55.

public debate to suggest this is the case.¹²⁹ Indeed, Mr Croome told the committee that:

...the consensus I have from teachers and students who are LGBTI in the Tasmanian Catholic and independent schools systems is that the culture of those schools has changed immensely over the 20 years in no small part due to the fact that our Anti-Discrimination Act doesn't allow discrimination.¹³⁰

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

Until the law in Tasmania is tested it is unclear what will be considered lawful. Faith-based schools do not have the clarity they need to be certain that they have the freedom to operate in ways that are consistent with their beliefs. If the Commonwealth Government was to adopt the model of Tasmania, it would be failing to protect the freedom of faith-based schools.¹³¹

2.110 Ms Anna Brown of the Human Rights Law Centre proposed specific amendments to the SDA which, in effect, would remove the current exemptions.¹³² She also expressed concern about leaked recommendations of the Religious Freedom Review, particularly the way in which they proposed 'exceptionalism around sexual orientation and gender identity and relationship status, compared with other attributes'.¹³³ Ms Brown further stated:

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

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

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

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

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

133 Ms Anna Brown, Director of Legal Advocacy, Human Rights Law Centre, *Committee Hansard*, 19 November 2018, pp. 56–57.

loyalty to their employer, which means that they can't act in a way that undermines their employer.¹³⁴

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

...only allow discrimination on the basis of religious belief and it would have to be part of the inherent requirements of the position held by the employee and also necessary to conform with the doctrines, tenets and beliefs of that religion.¹³⁵

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

So, ideally, we would say the removal of these exemptions would come as part of a comprehensive modernisation and consolidation of antidiscrimination laws and, we would also say, as part of the introduction of a federal human rights act that protects freedom of religion and belief from government overreach within a robust framework that protects all human rights.¹³⁶

2.113 Several other witnesses also expressed support for a charter of rights that would protect all rights in a way that is, in their view, appropriately balanced.¹³⁷

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

The position of the commission is that there should be alternatives to the current system of religious exemptions to antidiscrimination laws that do recognise a protected attribute for freedom of religion and belief.¹³⁸

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

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

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

137 See, for example, Ms Robin Banks, *Committee Hansard*, 19 November 2018, p. 61; Mr Jonathon Hunyor, Chief Executive Officer, Public Interest Advocacy Centre, *Committee Hansard*, 19 November 2018, p. 61; Northern Territory Anti-Discrimination Commissioner, *Submission 31*, p. 2.

2.115 In advocating for the removal of the exemptions, Mr Jonathon Hunyor of the Public Interest Advocacy Centre emphasised the importance of simplicity, noting that the drafting and legal interpretation of current discrimination law is 'notoriously complicated'. He suggested that this 'is particularly unhelpful when it comes to Australians understanding their rights and ensuring they're protected and respected'.¹³⁹

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

...as exemptions rather than as rights can give rise to the perception they are less significant as rights because they are framed as exemptions rather than rights. We understand that rights need to be balanced. But I think the challenge that we have is: why are our rights recognised as exemptions when others are recognised in terms of rights?¹⁴⁰

2.117 Archbishop Comensoli of the Catholic Bishops Conference also supported 'getting a positive statement into legislation around religious freedom as a fundamental right'.¹⁴¹ He suggested that this:

...might start to enable the possibility of recognising this right in its fullest sense, alongside all the other various rights that we enjoy in Australia, such that there are then mechanisms by which balancing can happen rather than one right trumping another.¹⁴²

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

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

138 Ms Megan Mitchell, National Children's Commissioner, Australian Human Rights Commission, *Committee Hansard*, 19 November 2018, p. 17.

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

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

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

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

protections for religious freedom that allow faith communities to live out their faith in a balanced and proportional way.¹⁴³

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

2.120 Furthermore, a large number of witnesses¹⁴⁵ and submitters¹⁴⁶ from organisations across the spectrum—including organisations that support the existing exemptions as well as those that oppose them—supported the release of the full report of the Religious Freedom Review, in order to put the leaked recommendations in context and better inform public debate.

Committee view

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

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

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

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

143 Mr Mark Spencer, Executive Officer, Policy, Governance and Staff Relations, Christian Schools Australia, *Committee Hansard*, 19 November 2018, p. 36.

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

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

146 See, for example, Association of Heads of Independent Schools of Australia, *Submission 2*, p. 1; Law Council of Australia, *Submission 88*, p. 8.

issues raised. Indeed, this would allow the government the benefit of a more informed public debate on which to draw.

2.125 Further, apparent leaks of the Review's recommendations show that the Panel recommends amending legislation to permit discrimination by faith-based schools against students or employees on the basis of sexual orientation, gender identity or relationship status.¹⁴⁷ The weight of evidence to the committee indicated that this kind of legislation would not provide adequate protections for LGBTIQ+ communities. The committee is concerned that the Panel's recommendations would carve out and entrench discrimination against certain groups in particular—that is, on the basis of sexual orientation, gender identity or relationship status, in particular circumstances.

Recommendation 1

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

Recommendation 2

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

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

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

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

147 See recommendations 5 and 7 of the Review, according to leaks published by the media, '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 23 November 2018).

Recommendation 3

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

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

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

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

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

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

Recommendation 4

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

2.138 The committee acknowledges that this debate takes place in a broader human rights context. In the committee's view, the existing exemptions do not strike the right

balance between the right to religious freedom and other rights, such as the right to equality and non-discrimination.

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

Recommendation 5

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

Senator Louise Pratt
Chair