

# DRAWING THE BOUNDARIES: THE SCOPE OF THE RELIGIOUS BODIES EXEMPTIONS IN AUSTRALIAN ANTI-DISCRIMINATION LAW AND IMPLICATIONS FOR REFORM

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*Australia is in the midst of an impassioned debate about how to appropriately balance freedom from discrimination with freedom of religious expression. This debate, which has its recent origins in the push for marriage equality, has been reignited by discussions at the Commonwealth level to introduce new legal protections for discrimination on the grounds of religious belief and to re-examine existing exceptions relating to the treatment of non-heterosexual and transgender or non-binary staff and students by religious schools. At the State and Territory level, uncertainty surrounds the content and operation of relevant anti-discrimination laws, and significant differences exist across jurisdictions. Some jurisdictions, such as Tasmania and the Australian Capital Territory take a narrow approach to religious bodies exceptions, permitting discrimination against students and staff of religious schools only on religious grounds. Other jurisdictions employ a range of different tests to determine whether religious bodies can lawfully discriminate against others in the area of employment or education in line with their religious beliefs. This gives rise to a spectrum of legislative responses across the different Australian jurisdictions, with practical implications for those seeking to exercise their right to freely express their religion and those demanding protection from discrimination. It also has significant implications for those contemplating reform to these laws, including those considering the findings of the 2018 Religious Freedoms Review or responding to the Australian Law Reform Commission's recent Reference in this area. Rather than commenting on the merits of these reform options, this article aims to examine the different legislative frameworks currently in place across Australia and reflect on the implications of current reform proposals for these different jurisdictions. In this way, the article aims to add clarity to the broader debate on religious freedom and anti-discrimination regimes in Australia.*

## I INTRODUCTION

Australia is in the midst of an impassioned debate about how to appropriately protect the rights of gay, lesbian, bisexual, transgender and non-binary Australians whilst also preserving the freedoms of religious bodies and religious individuals to express their religious beliefs. This debate, which took centre stage in the push for marriage equality over the past decade, has been reignited by

discussions at the Commonwealth level to introduce new legal protections against religious discrimination and reform the existing anti-discrimination laws.<sup>1</sup> In particular, there has been a sustained focus on the extent to which religious bodies, and in particular, religious educational institutions, are (or should be) able to lawfully discriminate against staff and students. At the State and territory level, there is a spectrum of legislative approaches to these competing rights claims, and uncertainty surrounding the content and operation of many relevant anti-discrimination provisions. This makes anticipating the impact of any federal reforms in this area difficult and complex.

This article aims to add clarity to the debate about legislative reform in this area by outlining the scope of the existing anti-discrimination provisions and exceptions<sup>2</sup> that apply to religious bodies across the different Australian jurisdictions. The article begins with a brief overview of the key principles informing the development of the existing State and Commonwealth anti-discrimination provisions designed to protect discrimination against gay, lesbian, bisexual, transgender and non-binary Australians,<sup>3</sup> and the corresponding exceptions that have been included to preserve the rights and

<sup>1</sup> Department of Prime Minister and Cabinet, *Religious Freedom Review* (2018) <<https://www.pmc.gov.au/domestic-policy/religious-freedom-review>> (Religious Freedom Review); Australian Government, *Australian Government Response to the Religious Freedom Review* (13 December 2018) <<https://www.ag.gov.au/RightsAndProtections/HumanRights/Documents/Response-religious-freedom-2018.pdf>>

<sup>2</sup> In this article, the term 'exceptions' will be used to refer to provisions that set out the circumstances in which conduct that would otherwise be *unlawful* discrimination, is considered *lawful* under the relevant statutory regime. It is noted that some regimes (such as Australian Capital Territory) use the term 'exemption' to describe the effect of these provisions, however for the sake of consistency, 'exception' will be preferred in this article.

<sup>3</sup> This article does not directly address the issue of discrimination on the grounds of intersex status as religious bodies and individuals rarely assert the need to access exceptions or exemptions for discrimination on these grounds (although some of the recommendations made in the Religious Freedom Review address the extent to which religious bodies are or should be exempt from existing protections against discrimination on the grounds of intersex status). It is noted that not all States and Territories provide protection against discrimination on these grounds, with New South Wales, Western Australia and the Northern Territory currently containing no protections. It is also noted that some advocates oppose the use of the term 'intersex status' as a protected attribute under anti-discrimination law, and prefer the term 'sex characteristics' as a way to describe physical or other characteristics that distinguish some individuals from the stereotypical binary categories of 'male' and 'female'. For further information about these issues, and for a discussion of the merits of adopting the term 'sex characteristics' as opposed to 'intersex status' see Australian Human Rights Commission website, 'About Sexual Orientation, Gender Identity and Intersex Status Discrimination' (7 May 2019) <<https://www.humanrights.gov.au/our-work/lgbti/about-sexual-orientation-gender-identity-and-intersex-status-discrimination>>; Intersex Human Rights Australia website, 'Discrimination' (4 January 2019) <<https://ihra.org.au/discrimination/>>.

interests of religious bodies and individuals. The article then introduces the spectrum of legislative responses to the challenge of 'balancing' these competing principles. The article concludes by outlining the challenges this spectrum of approaches poses for reform in this area, with reference to the recommendations made by the 2018 Ruddock Review into Religious Freedoms in Australia. Rather than advocating for or against a particular reform pathway, this article aims to highlight the areas of convergence and divergence across Australian jurisdictions when it comes to addressing these complex rights issues, with a view to supporting a more holistic evaluation of the merits of future reforms, whether at the federal or State or Territory level.

## II PART 1: GUIDING PRINCIPLES AND BALANCING FREEDOMS

When it comes to protecting and promoting the rights of individuals in Australia, a heavy reliance is placed on anti-discrimination regimes that exists at the state, territory and federal level. These laws not only make certain types of conduct unlawful, but also set a normative standard for equality in the Australian community, by listing attributes that the law considers should be protected from unfair or discriminatory treatment.<sup>4</sup> Among these attributes are sex, gender, sexual orientation, marital or relationship status, and in some jurisdictions, gender identity.<sup>5</sup> This provides important legal protection for the rights of non-binary, gender diverse and non-heterosexual Australians. Other attributes – such as religious conviction or belief, or religious dress or appearance – also feature in some Australian anti-discrimination laws,<sup>6</sup> and form part of a broader Australian legal and normative commitment to protecting the rights of religious organisations and religious individuals to freely express, practice or act upon their religious beliefs in Australia.<sup>7</sup>

<sup>4</sup> For discussion of the normative role equal opportunity laws play in communities see e.g. Sandra Fredman, (2016) 'Substantive equality revisited' 14(3), *International Journal of Constitutional Law*, 712–738, Sandra Fredman, *Discrimination Law* (Oxford University Press, 2nd ed, 2011) Chapter 1; Kate Malleon, 'Equality law and the protected characteristics (2018) 81(4) *Modern Law Review* 598.

<sup>5</sup> For example, the *Sex Discrimination Act 1984* (Cth) ('SDA'), prohibits unlawful discrimination in the areas of employment or occupation on the grounds of a person's sex, sexual orientation, gender identity or intersex status while the Victorian *Equal Opportunity Act 2010* (Vic) prohibits unlawful discrimination on the grounds of a person's gender identity, lawful sexual activity, sex, sexual orientation, and personal association with someone who has, or is assumed to have, any of these personal characteristics.

<sup>6</sup> See eg *Equal Opportunity Act 1984* (SA) s85T (religious dress); *Discrimination Act 1991* (ACT) s7 (religious conviction); *Anti-Discrimination Act 1998* (Tas) s3 (religious belief or affiliation)

<sup>7</sup> See e.g. Paul Babie, 'The Place of Religion in Australian Socio-Legal Interaction' in Tim Stanley (ed), *Political Religion in Secular Australia* (Palgrave Macmillan, 2015); Paul Babie, (2009) 'The of law

The co-existence of these legal and normative commitments can give rise to tensions when it comes to setting out practical legal tests for determining when certain conduct should be considered *unlawful* discrimination, and when certain conduct should be permitted despite its discriminatory effect. Should a religious school be permitted to turn away a gay student or fire a transgender teacher if the teachings of their religion condemn such attributes? Should an aged care provider that forms part of a religious organisation be able to refuse services to a lesbian couple?<sup>8</sup> These are the practical questions that plague policy and law makers around the country, and that are front and centre of the current ‘religious freedoms’ debate at the federal level. With religious-affiliated aged care providers, schools and educational authorities making up a significant portion of the service sector in Australia, these questions are not just esoteric, but have important practical consequences for many thousands of Australian families.<sup>9</sup>

On the one side of the debate are those that consider that the current anti-discrimination laws inappropriately exclude religious bodies and religious educational institutions from the anti-discrimination regime, arguing that ‘children in schools should be focusing on classes, homework and building friendships, not living in fear of mistreatment because of who they or their families are.’<sup>10</sup> Many others have referred to the degree and impact of homophobia and transphobia experienced by lesbian, gay bisexual, transgender and queer students in Australia.<sup>11</sup> On the other side of the debate are a number

and religion in Australia: it matters’ 30(1) *Adelaide Law Review* 7; Carolyn Evans, *Legal Protection of Religious Freedom in Australia* (Federation Press, 2012); see also Neville Rochow and Jacqueline Rochow ‘From the Exception to the Rule: Dignity, *Clubb v Edwards*, the Ruddock Review, and Religious Freedom as a Right’ *Special Edition Paper*;

<sup>8</sup> For an example of how this question is resolved at the federal level, see *Sex Discrimination Act 1984* (Cth) s37.

<sup>9</sup> Beth Gaze, (2010) ‘Discrimination by religious schools : views from the coal face’ .34(2) *Melbourne University Law Review* 392, 393.

<sup>10</sup> Human Rights Law Centre, ‘Freedom from discrimination in religious schools’, Submission to the Senate Legal and Constitutional Affairs Committee on the inquiry into Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff (21 November 2018).

<sup>11</sup> Submissions makers regularly cite the following reports: Kerry Robinson, Peter Bansel, Nida Denson, Georgia Ovenden and Cristyn Davies, ‘Growing Up Queer: Issues Facing Young Australians Who Are Gender Variant and Sexuality Diverse’ (Report, Young and Well Cooperative Research Centre, Melbourne, February 2014); Elizabeth Smith, Tiffany Jones, Roz Ward, Jennifer Dixon, Anne Mitchell and Lynne Hillier, ‘From Blues to Rainbows: The mental health and well-being of gender diverse and transgender young people in Australia’ (Report, Australian Research Centre in Sex, Health and Society, (ARCSHS), La Trobe University, September 2014); Australian Human Rights Commission, ‘Addressing sexual orientation and sex and/or gender identity discrimination: Consultation Report’ (Consultation Report, Australian Human Rights Commission, 2011).

of religious bodies who consider that the protections in anti-discrimination law relating to sexual orientation and gender identity 'directly contradict moral values of the Christian faith and other faiths'.<sup>12</sup> For example, in a submission to the Australian Law Reform Commission, Family Voice explained that such provisions 'represent a direct assault on religious freedom by prohibiting some conduct that may be required to give effect to religious beliefs'.<sup>13</sup> Some religious schools have also expressed the view that religious observance occurs 'in all facets of a student's school experience'<sup>14</sup> and 'permeates all that takes place and is lived out in the daily lives of the community of the school'<sup>15</sup> which gives rise to the need for broader exemptions to anti-discrimination laws.

Before outlining the spectrum of legislative response to these issues, it is useful to briefly explore the two guiding principles that inform law making in this area. The first is that religious individuals have the right to express their thoughts, conscience, religion and beliefs and to act in accordance with the principles of their beliefs or religion. This right is protected under international human rights law<sup>16</sup> and 'is far-reaching and profound'.<sup>17</sup> It extends to the rights of parents to educate their children in line with their religious principles<sup>18</sup> and

<sup>12</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachment of Commonwealth Laws* (2016) Report No 129, Chapter 5, [5.74], FamilyVoice Australia, Submission to Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachment of Commonwealth Laws* (2015) Submission 112.

<sup>13</sup> *Ibid.*

<sup>14</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachment of Commonwealth Laws* (2016) Report No 129, Chapter 5, [5.96], Australian Christian Schools Ltd, Submission to Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachment of Commonwealth Laws* (2015) Submission 45.

<sup>15</sup> *Ibid.*

<sup>16</sup> Article 18 of the *International Covenant on Civil and Political Rights* (ICCPR) (open for signature on 16 December 1966 ([1980] ATS 23)). This principle is also reflected in a much more limited way in section 116 of the *Australian Constitution*, which prohibits the Commonwealth Parliament from passing laws prescribing or limiting religious practice.

<sup>17</sup> United Nations Human Rights Committee, General Comment No 22: The right to freedom of thought, conscience and religion, 48th sess, 1993, UN Doc HRI/GEN/1/Rev.1 (29 July 1994) 35, [8]

<sup>18</sup> Article 13 of the *International Convention on Economic, Social and Cultural Rights* (ICESCR) (open for signature on 16 December 1966 ([1976] ATS 5)) which explains that the general right to education includes an obligation on the State to 'have respect for the liberty of parents ... to ensure the religious and moral education of their children in conformity with their own convictions'. Article 14 (2) of the *Convention on the Rights of the Child* recognises states parties' obligation to respect the rights and duties of parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

cannot be subject to limitation unless certain strict criteria are satisfied, such as where necessary to protect the fundamental rights of others.<sup>19</sup>

The second guiding principle is that all people, regardless of sexual orientation or gender identity, have the right to be treated equally when seeking employment and accessing education and other public services. This principle is also reflected in international human rights law,<sup>20</sup> and places obligations on States to address discrimination against children and who identify or are perceived as gay, bisexual or gender diverse.<sup>21</sup> Cutting across both of these principles is the international obligation to protect the rights and interests of children.<sup>22</sup> For example, Article 3 of the *Convention on the Rights of the Child* requires State parties to ensure that 'the best interests of the child' are at the 'centre of all actions concerning children, whether undertaken by public or private institutions'.<sup>23</sup>

International law recognises that both of these principles (freedom from discrimination and freedom of religious belief) can be subject to limitations,<sup>24</sup> but great care must be taken when seeking to limit the rights of one individual or group in favour of another. As the Special Rapporteur for Freedom of Religion and Belief has warned:

States that adopt more secular or neutral governance models may ... run afoul of article 18(3) of the Covenant if they intervene extensively, overzealously and aggressively in the manifestation of religion or belief alleging the attempt to protect

<sup>19</sup> For example, any limitations must be 'prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others'. United Nations Human Rights Committee, General Comment No 22, above n 4, [8].

<sup>20</sup> See e.g. ICCPR Arts 2, 26. These articles provided that all persons - including children - are equal before the law and entitled, without any discrimination, to the equal protection of the law.

<sup>21</sup> United Nations High Commissioner on Human Rights, Report to the Human Rights Council on discrimination and violence against individuals based on their sexual orientation and gender identity, UN Human Rights Council, 29th sess, Agenda items 2 and 8, UN Doc A/HRC/29/23 (May 2015) [16]-[17] <[http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Documents/A\\_HRC\\_29\\_23\\_en.doc](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Documents/A_HRC_29_23_en.doc)>.

<sup>22</sup> **John Tobin, (2010)** 'Should Discrimination in Victoria's **Religious Schools** be Protected? Using the Victorian Charter of Human Rights and Responsibilities Act to Achieve the Right Balance' 36(2) *Monash University Law Review* 16, 32-33.

<sup>23</sup> Expert Panel Report, Commonwealth, *Religious Freedom Review: Report of the Expert Panel* (18 May 2018).

<sup>24</sup> For example, Article 18(3) of the *International Covenant on Civil and Political Rights* (ICCPR) (open for signature on 16 December 1966 ([1980] ATS 23) provides that freedom to manifest one's religion or beliefs may be limited in certain circumstances. Such limitations must be 'prescribed by law' and 'necessary' to protect, among other things, the fundamental rights and freedoms of others—which includes the right to equality before the law and to effective protection against discrimination.

other rights, for example the right to gender equality or sexual orientation. Such protection efforts need to be reconciled with the obligations to uphold freedom of religion or belief, although its manifestation can be limited if this leads to the violation of the rights and freedoms of others. When these rights ultimately clash, every effort must be made, through a careful case-by-case analysis, to ensure that all rights are brought in practical concordance or protected through reasonable accommodation.<sup>25</sup>

Achieving this 'practical concordance' is the key challenge posed by the recent debate on the extent to which religious bodies, and in particular, religious educational institutions should be able to lawfully discriminate against gay, bisexual, transgender or non-binary students or staff members. This article does not seek to set out a reform pathway that legislators should follow when addressing this challenge, but rather to map the existing legislative landscape with a view to assisting law makers and policy makers to evaluate the merits and implications of proposed reforms in this area, having particular regard to the reforms proposed by the Religious Freedom Review and currently under examination by the ALRC. The existing spectrum of legislative responses are described in the next Part of this Paper.

### III PART 2: A SPECTRUM OF LEGISLATIVE APPROACHES

#### A *General Religious Bodies Exceptions*

All Australian jurisdictions make it unlawful to discriminate against a person on the basis of their sex, sexual orientation, or marital or relationship status, and most also protect against discrimination on the basis of a person's gender identity.<sup>26</sup> The prohibition on discrimination on the basis of these attributes extends to the provision of goods and services, including education and health services.<sup>27</sup>

All Australian jurisdictions also acknowledge that anti-discrimination laws - designed to promote and protect the right to equality - must also coexist with

<sup>25</sup> Ahmed Shaheed, *Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/HRC/37/49 (28 February 2018) [47].

<sup>26</sup> It should be noted that not all jurisdictions use the term 'gender identity' to describe this protected attribute. For example, under the *Equal Opportunity Act 1984* (WA) Part IIAA, the term 'gender history' is used. It is further noted that transgenderism or gender identity is not a protected attribute under Northern Territory law.

<sup>27</sup> See eg *Sex Discrimination Act 1984* (Cth) Division 1 (covers discrimination in work eg s14 addresses discrimination in employment or superannuation); Division 2 (covers discrimination in education s21, the provision of goods and services s22, accommodation s23, clubs s25 and administration of Commonwealth laws and programs s26).

other equally important rights and freedoms, including freedom of thought, conscience, religion and belief.<sup>28</sup> As a result, all Australian jurisdictions exempt certain 'core internal aspects of religion'<sup>29</sup> (such as the appointment, training or ordination of priests or ministers)<sup>30</sup> from the general unlawful discrimination provisions.

As noted above, it is clear that religious bodies play a much larger role in the Australian community than merely attending to these core internal aspects of religion. In fact, religious bodies are often directly or indirectly involved in providing a range of essential public services, including education services, health care services, adoption services, aged care services and commercial activities, including the leasing out of facilities for community use.<sup>31</sup> In many instances religious bodies also receive public funding to deliver these services. This gives rise to the question of whether the provisions that exempt religious bodies from the general unlawful discrimination provisions with respect to the core internal aspects of religion should be extended to the provision of other public or commercial services.

In some jurisdictions, such as South Australia (SA) and the Commonwealth, the exceptions relating to 'core aspects of the religion' extend to 'any other act or practice' of a body established for religious purposes that 'conforms to the doctrines, tenets or beliefs of that religion' *or* is necessary to avoid 'injury to the religious susceptibilities or adherents to that religion'.<sup>32</sup> This potentially extends to the provision of education, health or other services provided by a body established for religious purposes. Narrower versions of this test exist in Tasmania, Queensland and the Australian Capital Territory (ACT), where the respondent has to prove both that the act or practice is in accordance with the

<sup>28</sup> Evans, Carolyn and Beth Gaze, 'Discrimination by Religious Schools: Views from the Coal Face' (2010) 34 *Melbourne University Law Review* 392, 395.

<sup>29</sup> See e.g. *Sex Discrimination Act 1984* (Cth) s37(1)(a)-(c). See also Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (2017, Cambridge) 158; Carolyn Evans and Beth Gaze, 'Discrimination by Religious Schools: Views from the Coal Face' (2010) 34 *Melbourne University Law Review* 392.

<sup>30</sup> *Sex Discrimination Act 1984* (Cth) s37(1); *Equal Opportunity Act 2010* (Vic) s 82-83 (on the basis of sex or gender identity), *Anti-Discrimination Act 1977* (NSW) s 56 *Anti-Discrimination Act 1998* (Tas) s 52 (on the basis of gender); *Anti-Discrimination Act 1991* (Qld) s861, *Equal Opportunity Act 1984* (WA) s 72; *Discrimination Act 1991* (ACT) s32, *Anti-Discrimination Act 1996* (NT) s 51; *Equal Opportunity Act 1984* (SA) s50.

<sup>31</sup> Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (2017, Cambridge) 158; See also Carolyn Evans and Beth Gaze, 'Discrimination by Religious Schools: Views from the Coal Face' (2010) 34 *Melbourne University Law Review* 392.

<sup>32</sup> See e.g. *Sex Discrimination Act 1984* (Cth) 37(1)(d), *Equal Opportunity Act 1984* (SA) s50.

doctrines, tenets or beliefs of that religion' *and* is necessary to avoid 'injury to the religious susceptibilities or adherents to that religion'.<sup>33</sup>

The precise scope of these exceptions remains unclear, particularly in so far as they may be used by religious educational authorities which, as discussed below, have access to separate, specific exceptions in most jurisdictions<sup>34</sup>. As discussed below, the interaction between these general exceptions for religious bodies and the more specific exceptions for religious educational authorities gives rise to complexities both for those seeking to rely upon the provisions to defend or assert claims of unlawful discrimination, and for those seeking to understand the implications of proposed reforms in this area.

#### B *Specific Exceptions for Religious Educational Authorities*

When it comes to specific exceptions for religious educational authorities, a spectrum of legislative approaches emerge. At one end of the spectrum are the jurisdictions (ACT and Tasmania) that permit religious bodies to lawfully discriminate against others in the area of employment in religious educational institutions, but only the basis of religious conviction or belief (rather than on the grounds of sexual orientation or gender identity). Both jurisdictions prescribe different tests to determine whether these limited exceptions apply, and in Tasmania, the exceptions do not extend to the admission or treatment of students. These are described as the jurisdictions with the '**narrower, religion focused exceptions**'.

Then comes Queensland and SA, which permit religious educational institutions to discriminate against others in the area of employment, but prescribe novel tests for determining the scope of the exception. Both jurisdictions require some kind of nexus between the discriminatory act and the body's religious beliefs, but each jurisdiction formulates a different legal test for

<sup>33</sup> See eg *Discrimination Act 1991* (ACT) 32(1)(d). NB, as discussed below, under the ACT law this provision makes it clear that it does not extend to religious educational authorities, which are instead subject to a specific exception set out in s51.

<sup>34</sup> The relationship between specific and general exemptions and exceptions in anti-discrimination law remains complex. The conventional approach to statutory interpretation provides that where an Act contains a general power or exception that is not subject to limitations and a special power or exception that is subject to limitations or qualifications, that the general power cannot be exercised to do that which is the subject of the special power. However, this may not always be the approach adopted by the courts. See eg *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* [2006] HCA 50; (2006) 230 ALR 370; (2006) 81 ALJR 1 where the High Court declined to limit a general power because of the limitations attached to another, more specific, power. Cf *Anthony Hordern and Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1, 7; *Food Preservers Union of Western Australia v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch* (2001) 24 WAR 89, 95-6.

determining whether an exception applies. Queensland adopts a ‘genuine occupational requirements’ approach, and SA requires the adoption and publication of a policy to support the exception. The potential scope of these exceptions are difficult to predict and questions arise in SA as to whether or not an exception exists for religious educational institutions to discriminate against *students* on the grounds of sexual orientation and gender identity. These are described as the jurisdictions with ‘**novel exceptions with uncertain scope**’.

Next comes the Commonwealth, with its broad based exception for religious bodies to discriminate in the provision of services and employment on the grounds of sexual orientation and gender identity, but with the novel ‘carve out’ for publicly funded aged-care services, described as the ‘**Commonwealth carve-out approach**’. Hard to place is **Victoria**, which restricts the exceptions available to religious bodies with reference to tests of necessity and reasonableness, but also includes broad based exceptions for religious individuals to discriminate against others.

Completing the spectrum are those jurisdictions with broad exceptions for religious bodies to discriminate on the grounds of sexual orientation and gender identity in the areas of employment and the provision of educational services. These jurisdictions are New South Wales (NSW), Western Australia (WA) and the Northern Territory (NT), and are described as the ‘**broad exceptions**’ for religious bodies and institutions.

It is also important to note that a majority of Australian jurisdictions (Tasmania, ACT, Victoria, Queensland, WA and the NT) include religious belief or religious conviction as a protected attribute under their anti-discrimination regime. In Victoria and the ACT, these protections are complemented by specific human rights legislation which sets out a regime for assessing legislative and executive actions for compliance with human rights standards. Similar legislation has recently been enacted in Queensland.<sup>35</sup>

SA, NSW and the Commonwealth regimes do not contain explicit protections against discrimination on the basis of religious belief or conviction, although in SA, limited protections exist with respect to religious appearance or dress. This divergence in legislative approaches has implications for the reforms contemplated in the Religious Freedoms Review, and will be discussed further in Part 4 of this Paper.

a. Narrower, religion focused exceptions

<sup>35</sup> *Human Rights Act 2019* (Qld) enacted 1 July 2017.

Both the ACT and Tasmania include 'religious belief or affiliation'<sup>36</sup> or 'religious conviction'<sup>37</sup> as a protected attribute<sup>38</sup> alongside other attributes such as sexual orientation, gender, gender identity, marital status and intersex variations.<sup>39</sup> As a result, discrimination on the grounds of any of these attributes in the areas of education and employment is unlawful unless a specific exception applies.

In Tasmania, there are only limited exceptions available to religious bodies outside of the core internal operation of the religious body.<sup>40</sup> Discrimination in the area of employment is only exempt on the grounds of 'religious belief or affiliation or religious activity' and only if the observance or practice of a particular religion is a 'genuine occupational qualification or requirement'.<sup>41</sup> This can extend to employment in an educational institution, if the institution is to be conducted in 'accordance with the tenets, beliefs, teachings, principles or practices of a particular religion' and the discrimination is needed to enable, the educational institution to be conducted in accordance with those tenets, beliefs, teachings, principles or practice.<sup>42</sup>

It is also possible for religious educational institutions to lawfully discriminate against potential students<sup>43</sup> under the Tasmania provisions, but only the ground of 'religious belief or affiliation or religious activity', and only when the educational institution is 'conducted in accordance with the tenets, beliefs, teachings, principles or practices of a particular religion'.<sup>44</sup> To take advantage of this exception, the educational institution must have a policy for the admission of students that sets out criteria for admission relating to the religious belief or affiliation of the potential student, their parents or grandparents.<sup>45</sup>

<sup>36</sup> Under the *Anti-Discrimination Act 1998* (Tas) s3 'religious belief or affiliation' means holding or not holding a religious belief or view.

<sup>37</sup> *Discrimination Act 1991* (ACT) s7.

<sup>38</sup> *Anti-Discrimination Act 1998* (Tas) s16.

<sup>39</sup> *Discrimination Act 1991* (ACT) Part 3.

<sup>40</sup> *Anti-Discrimination Act 1998* (Tas) s 27(1)(a), s52. Section 42 provides the exception that a person may discriminate against a person on the grounds of race 'in relation to places of cultural or religious significance if the discrimination – ... is in accordance with – ... the customs of the culture; or ... the doctrines of the religion; and ... is necessary to avoid offending the cultural or religious sensitivities of any person of the culture or religion'.

<sup>41</sup> *Anti-Discrimination Act 1998* (Tas) s51(1).

<sup>42</sup> *Anti-Discrimination Act 1998* (Tas) s51(2).

<sup>43</sup> *Anti-Discrimination Act 1998* (Tas) s51A does not apply to existing students s51A(2).

<sup>44</sup> *Anti-Discrimination Act 1998* (Tas) s51A.

<sup>45</sup> *Anti-Discrimination Act 1998* (Tas) s51A (4).

Outside of these exceptions, there are no other exceptions that apply to the delivery of services, including education services, by religious bodies. This means that in Tasmania religious schools are not permitted to discriminate existing students on any grounds and cannot discriminate against potential students or staff on the grounds of sexual orientation and gender identity.<sup>46</sup>

It is interesting to note that in 2016, efforts were made to further extend the protections provided to religious bodies and individuals with religious belief under the Tasmanian laws. A Draft Bill was introduced that was designed to ensure exceptions available under the Act applied in circumstances where an alleged breach of the incitement<sup>47</sup> and prohibited conduct<sup>48</sup> provisions involved a public act done for religious purposes. The Tasmanian Equal Opportunity Commission explained that:

The effect of the proposed changes would be to allow, specifically for religious purposes, attribute-linked offensive, humiliating, ridiculing, insulting or intimidating public conduct, and permit public speech or actions that are capable of inciting hatred, serious contempt or severe ridicule on the basis of a person's race, disability, religious belief, affiliation or activity or sexual orientation or lawful sexual conduct.

If adopted the changes would potentially permit a person to assert that their actions were based on religious views or doctrines—irrespective of how out-dated or inconsistent with a modern pluralist society, international laws or community standards—those views or doctrines might be.

These changes were opposed by the Commission on the grounds that they 'represent a fundamental curtailing of the right to equality and the right to freedom from discrimination'<sup>49</sup> and privilege acts done for religious purposes in this way that 'goes well beyond the public interest and beyond what is necessary to protect freedom of religion or freedom of expression'.<sup>50</sup> These proposed changes have not been enacted into law.

<sup>46</sup> *Anti-Discrimination Act 1998* (Tas) s51(2).

<sup>47</sup> *Anti-Discrimination Act 1998* (Tas) s 19.

<sup>48</sup> *Anti-Discrimination Act 1998* (Tas) s 17(1).

<sup>49</sup> Anti-Discrimination Commissioner (Tasmania), *Anti-Discrimination Amendment Bill 2016 released for consultation on 29 August 2016: Response of the Anti-Discrimination Commissioner (Tas)* (2016, Equal Opportunity Tasmania) <[http://equalopportunity.tas.gov.au/news\\_and\\_events/report\\_papers\\_submissions](http://equalopportunity.tas.gov.au/news_and_events/report_papers_submissions)>.

<sup>50</sup> Protecting Freedom of Religion or Belief, Submission by the Tasmanian Anti-Discrimination Commissioner to the Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry into Protecting Freedom of Religion or Belief, January 2017. <[https://equalopportunity.tas.gov.au/news\\_and\\_events/report\\_papers\\_submissions](https://equalopportunity.tas.gov.au/news_and_events/report_papers_submissions)>.

A broadly similar approach to exceptions for religious bodies is contained in the ACT legislation, which also contains general protections for discrimination on the grounds of religious belief and the grounds of sexual orientation and gender identity.<sup>51</sup> However parts of the ACT legislation may potentially give rise to broader exceptions for religious bodies. For example, in addition to exceptions relating to the core internal functions of religious bodies,<sup>52</sup> the ACT legislation also provides that religious bodies will be exempt from the unlawful discrimination protections in the Act with respect to:

any other act or practice (*other than a defined act*) of a body established for religious purposes, if the act or practice conforms to the doctrines, tenets or beliefs of that religion *and* is necessary to avoid injury to the religious susceptibilities of adherents of that religion (emphasis added).<sup>53</sup>

This provision is potentially broad in scope, but specifically excludes employment in an educational institution or the admission or treatment of students, both of which are 'defined acts' for the purpose of the provision.<sup>54</sup> Exceptions for religious bodies in the area of employment for religious educational institutions are limited to the grounds of 'religious conviction', but only if the duties of the job involve participating in the 'teaching, observance or practice of the relevant religion.' Section 46 further explains that the exception will only be available to religious educational institutions if 'the institution is conducted in accordance with the doctrines, tenets, beliefs or teaching of a particular religion or creed' and the discrimination is intended to help the institution to be conducted in accordance with those 'doctrines, tenets, beliefs or teachings'.<sup>55</sup> The ACT provisions also require religious educational institutions to have published a policy dealing with these matters<sup>56</sup> that is 'readily accessible' by prospective and current employees and contractors.<sup>57</sup>

The religious body exceptions in the ACT legislation extend to religious educational institutions lawfully discriminating against potential students, but only on the ground of 'religious conviction' and only if the institution is

<sup>51</sup> *Discrimination Act 1991* (ACT) s7.

<sup>52</sup> *Discrimination Act 1991* (ACT) 32(1)(a)-(c)

<sup>53</sup> *Discrimination Act 1991* (ACT) 32(1)(d).

<sup>54</sup> *Discrimination Act 1991* (ACT) 32(2).

<sup>55</sup> *Discrimination Act 1991* (ACT) 46(2).

<sup>56</sup> Under the *Discrimination Act 1991* (ACT) 46(5) 'staff matters' in relation to an educational institution, means (a) the employment of a member of staff of the institution; or (b) the engagement of a contractor to do work in the institution.

<sup>57</sup> *Discrimination Act 1991* (ACT) 46(4).

conducted solely for students having a religious conviction other than that of the applicant.<sup>58</sup> To rely upon this exception, the religious school must also have a public policy detailing these matters that is available to potential students.<sup>59</sup>

These provisions reflect recent amendments passed in 2018<sup>60</sup> to 'strengthen protections against discrimination' for both students and staff in religious educational institutions and provide limited exception for these institutions to discriminate against staff and students, but only on the grounds of religious conviction, and 'not other protected attributes such as sexuality.'<sup>61</sup> In his Second Reading speech introducing the amendments, Chief Minister Andrew Barr said:

This bill will improve the protection from discrimination provided by our Discrimination Act for both students and staff in non-government religious schools ... [In the course of] the Ruddock review into religious freedom, genuine concerns have been raised about exceptions in anti-discrimination laws at commonwealth, state and territory level that might allow students to be expelled or teachers to be fired because they are gay or because of their gender identity or other attributes protected by the Discrimination Act ...<sup>62</sup>

b. Novel exceptions with uncertain scope

### C *Queensland's 'Genuine Occupational Requirements approach'*

In line with the ACT and Tasmania, the *Anti-Discrimination Act 1991* (Qld) includes 'religious belief or religious activity' as protected attributes in its anti-discrimination regime,<sup>63</sup> which applies to the areas of education and employment. When it comes to admission of students in religious schools section 41 of the *Anti-Discrimination Act 1991* (Qld) permits discrimination against applicants who are of a different religion to that under which the religious school operates. However, the Queensland Act takes a different approach to employment in religious schools. It does not provide a general exception for employment by religious bodies, but instead relies on the concept of 'a genuine occupational qualification or requirement'. Section 25 of the *Anti-Discrimination Act 1991* (Qld) provides that any employer may impose 'genuine occupational requirements' for a position, including with respect to work in a

<sup>58</sup> *Discrimination Act 1991* (ACT) 46 (1).

<sup>59</sup> *Discrimination Act 1991* (ACT) 46(5).

<sup>60</sup> *Discrimination Amendment Bill 2018* (ACT)

<sup>61</sup> Explanatory Memorandum to *Discrimination Amendment Bill 2018* (ACT).

<sup>62</sup> Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 1 November 2019, (Andrew Barr) 4612.

<sup>63</sup> *Anti-Discrimination Act 1991* (Qld) s7.

religious educational institution or any other work for a body established for religious purposes if the work 'genuinely and necessarily involves adhering to and communicating the body's religious beliefs.'<sup>64</sup> In such cases, it is not unlawful for an employer to discriminate if the staff member '*openly acts*' in a way that the staff member '*knows or ought reasonably to know*' is contrary to the employer's religious beliefs and 'it is a genuine occupational requirement' that the staff act in a way consistent with the employer's religious beliefs'.<sup>65</sup> Section 25 further explains that whether the discrimination is not reasonable depends on 'all the circumstances of the case', including

- (a) whether the action taken or proposed to be taken by the employer is harsh or unjust or disproportionate to the person's actions;
- (b) the consequences for both the person and the employer should the discrimination happen or not happen.<sup>66</sup>

The Queensland legislation provides the following examples to illustrate the scope of these provisions:

"employing persons of a particular religion to teach in a school established for students of the particular religion"<sup>67</sup>

"A staff member openly acts in a way contrary to a requirement imposed by the staff member's employer in his or her contract of employment, that the staff member abstain from acting in a way openly contrary to the employer's religious beliefs in the course of, or in connection with the staff member's employment."<sup>68</sup>

It is this second example that appears to most closely mirror the legislative intent behind these provisions when they were introduced in 2002.<sup>69</sup> As Mortensen explains, at the time these provisions were introduced they replaced much broader exceptions for religious organisations to lawfully discriminate on a range of protected attributes in the area of employment. These 'genuine occupational requirements' provisions were considered necessary to appease concerns by religious groups relating to teachers 'flaunting sexuality in a

<sup>64</sup> *Anti-Discrimination Act 1991* (Qld) s25(2)

<sup>65</sup> *Anti-Discrimination Act 1991* (Qld) s25(3)-(4).

<sup>66</sup> *Anti-Discrimination Act 1991* (Qld) 25(5).

<sup>67</sup> *Anti-Discrimination Act 1991* (Qld) 25(1).

<sup>68</sup> *Anti-Discrimination Act 1991* (Qld) 25(3).

<sup>69</sup> Discrimination Law Amendment Bill 2002 (Qld)

classroom'.<sup>70</sup> For example, when introducing these provisions, the Premier said that teachers, 'whether they are heterosexual or in a de facto relationship of whatever kind', should not act inappropriately in front of a class.<sup>71</sup> The Premier further explained that:

If the person was gay and that person openly acted in a way that was not consistent with the religious view, then the church has the right to discriminate against that person. That is what it means. This is what the churches asked us for.<sup>72</sup>

As a result, the Queensland provisions can be described as 'don't ask, don't tell' provisions, where gay or transgender staff members are effectively asked to 'hide' their sexual or gender identity. For this reason, some have argued that the Queensland provisions continue provide religious organisations with a broad scope to discriminate on the grounds of sexual orientation and gender identity in the area of employment.<sup>73</sup>

More recently, the Queensland Anti-Discrimination Commission has developed a Fact Sheet addressing the practical application of the exemption contained in section 25, which explains that the exemption 'relates to the behaviour of a person, rather than a characteristic of a person such as gender, race, or sexuality'.<sup>74</sup> The Fact Sheet also makes it clear that there are 'limits on how far an employer can dictate how an employee can behave in their private life, and these limits prevail over contractual arrangements', noting that the exemption does not apply to discrimination on the basis of age, race or impairment and does not 'allow seeking information such a person's age or sexuality, and whether or not they have children'.<sup>75</sup>

#### D *South Australia's 'Publicised Policy' Approach*

<sup>70</sup>Reid Mortensen, (2003) 'A Reconstruction of Religious Freedom and Equality: Gay, Lesbian and De Facto Rights and the Religious School in Queensland' 3(1) *Queensland University of Technology Law and Justice Journal* 320, 322.

<sup>71</sup> Queensland, *Parliamentary Hansard*, Legislative Assembly, 28-9 November 2002, 5010.

<sup>72</sup> Queensland, *Parliamentary Hansard*, Legislative Assembly, 28-9 November 2002, 5010.

<sup>73</sup> See e.g. Reid Mortensen, (2003) 'A Reconstruction of Religious Freedom and Equality: Gay, Lesbian and De Facto Rights and the Religious School in Queensland' 3(1) *Queensland University of Technology Law and Justice Journal* 320, 322.

<sup>74</sup> Queensland Anti-Discrimination Commission, Fact Sheet 'Religious Based Schools and Institutions' <<https://www.adcq.qld.gov.au/resources/brochures-and-guides/fact-sheets/religious-based-schools>> (accessed 4 June 2019).

<sup>75</sup> Queensland Anti-Discrimination Commission, Fact Sheet 'Religious Based Schools and Institutions' <<https://www.adcq.qld.gov.au/resources/brochures-and-guides/fact-sheets/religious-based-schools>> (accessed 4 June 2019).

There are currently no explicit protections against discrimination on the grounds of religious belief under the *Equal Opportunity Act 1984* (SA), although protections exist for religious dress.<sup>76</sup> The SA Act prohibits discrimination on the ground of sexual orientation and gender identity, in both direct and indirect forms,<sup>77</sup> including by school and educational authorities.<sup>78</sup> There are also a number of exceptions, including in the area of employment of teachers for religious schools<sup>79</sup> and by religious bodies in the appointment and related training of members of a religious order.<sup>80</sup> For example, section 34(c) of the *Equal Opportunity Act 1984* (SA) states that discrimination on the 'ground of gender identity or sexual orientation' in relation to employment in a educational institution will be lawful if the school is administered 'in accordance with the precepts of a particular religion and the discrimination is founded on the precepts of that religion'.<sup>81</sup> In order to take advantage of this exception, the religious educational authority must have a written policy setting out its discriminatory employment practices and provide a copy of the policy to anyone who is interviewed for or offered employment with the institution. The policy should also be made available to students, prospective students and parents and guardians of students and prospective students of the institution and to other members of the public.<sup>82</sup>

Section 50(1)(c) of the SA Act also provides a broad exemption with respect to 'any other practice of a body 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' [emphasis added]. As discussed, this provision (and similar provisions in force at the Commonwealth level) has been criticised as providing a 'blank cheque' for religious organisations to discriminate in any number of areas, including employment, education, health and service delivery.<sup>83</sup> However, it is important to note that the extension of the

<sup>76</sup> *Equal Opportunity Act 1984* (SA) s85T. As discussed below, review bodies have recommended changes to implement further legal protections in this area

<sup>77</sup> For tests of direct and indirect discrimination on these grounds see *Equal Opportunity Act 1984* (SA) s29.

<sup>78</sup> *Equal Opportunity Act 1984* (SA) s37.

<sup>79</sup> *Equal Opportunity Act 1984* (SA) s34(3).

<sup>80</sup> *Equal Opportunity Act 1984* (SA) s50.

<sup>81</sup> *Equal Opportunity Act 1984* (SA) s34C(a)

<sup>82</sup> *Equal Opportunity Act 1984* (SA) s34C(c)

<sup>83</sup> South Australian Law Reform Institute, Report '*Lawful Discrimination: Exceptions under the Equal Opportunity Act 1984 (SA) to unlawful discrimination on the grounds of gender identity, sexual orientation and intersex status*' (June 2016) Submission No 33, 3.

section 50 exemption to discrimination by religious schools against gay or transgender *students* does not appear to have been contemplated by the SA Parliament when enacting the relevant provisions. For example, when debating the Bill first introducing protections for gay and transgender South Australians,<sup>84</sup> the relevant Minister, Gail Gago MLC, observed that the religious bodies exemption in section 50 'would not apply to the treatment of students but only the hiring of staff.'<sup>85</sup> Similar comments were made by the then Attorney General, the Hon Michael Atkinson.<sup>86</sup> The Archbishop of Adelaide has also challenged the suggestion that section 50 could be used to justify discrimination against students on the grounds of their sexual orientation or gender identity.<sup>87</sup> These views appear to align with established principles of statutory interpretation relevant to the relationship between general clauses (such as that contained in s50) and more specific provisions (such as that set out in s34), however recent jurisprudence raises questions about how the courts might interpret the relationship between these general and specific exemptions.<sup>88</sup>

During the 2016 South Australian Law Reform Institute Inquiry, the South Australia Equal Opportunity Commission and a number of other submission makers representing religious schools in South Australia expressed the view that it is at least arguable that the scope of s 50(1)(c) extends to discriminatory treatment of students attending religious schools.<sup>89</sup> This highlights the potentially uncertain scope of the religious bodies exception in section 50, which attracted the particular attention of the South Australian Law Reform Institute in its 2016 report into the exceptions in the *Equal Opportunity Act 1984* (SA). In response, the Institute recommended that the broad scope of the religious bodies exemption in section 50 be amended to make it clear that no students should be treated unfairly due to their gender identity, intersex status or sexual

<sup>84</sup> *Equal Opportunity (Miscellaneous) Amendment Act 2009* (SA).

<sup>85</sup> South Australia, *Parliamentary Debates*, Legislative Council, 26 November 2008, 865 (Gail Gago) [emphasis added].

<sup>86</sup> South Australia, *Parliamentary Debates*, House of Assembly, 30 April 2009, 2563 (Michael Atkinson, Attorney-General).

<sup>87</sup> South Australian Law Reform Institute, Report '*Lawful Discrimination: Exceptions under the Equal Opportunity Act 1984 (SA) to unlawful discrimination on the grounds of gender identity, sexual orientation and intersex status*' (June 2016), Submission No 363. See also Sarah Moulds, 'The Right to Turn Away Gay Students? Exceptions to Unlawful Discrimination for Religious Schools in Australia' (2019) 41(1) *Bulletin (Law Society of South Australia)*.

<sup>88</sup> See discussion above n 35.

<sup>89</sup> South Australian Law Reform Institute, Report '*Lawful Discrimination: Exceptions under the Equal Opportunity Act 1984 (SA) to unlawful discrimination on the grounds of gender identity, sexual orientation and intersex status*' (June 2016), 45-47.

orientation;<sup>90</sup> and that religious schools are not authorised to discriminate against current or potential employees simply due to these attributes.<sup>91</sup> The Institute also recommended further changes to the existing exception relating to employment in religious educational institutions, and that specific protections against discrimination on the grounds of religious belief be included in the Act.<sup>92</sup>

c. Commonwealth ‘carve-out’ approach

The next legislative response on the spectrum considered in this article is the Commonwealth *Sex Discrimination Act 1984* (Cth) (SDA). This Act focuses on prohibiting discrimination on the grounds of sex and gender, and also contains protections against discrimination on the grounds of sexual orientation and gender identity.<sup>93</sup> These protections make it unlawful for educational authorities to discriminate against students or staff on the grounds of sexual orientation or gender identity.<sup>94</sup> There are currently no explicit protections against discrimination on the grounds of religious belief at the Commonwealth level, however, as discussed below, the Commonwealth Government has promised to introduce a *Religious Discrimination Bill*<sup>95</sup> and released exposure draft legislation for community consultation in 2019. The existing SDA also contains a range of exemptions for religious bodies. These include provisions that allow discrimination in the provision of accommodation by religious bodies;<sup>96</sup> in the ordination, appointment and training of priests or ministers of religion;<sup>97</sup> and by educational institutions established for religious purposes in relation to the employment of staff and the provision of education and training, provided that

<sup>90</sup> South Australian Law Reform Institute, Report ‘*Lawful Discrimination: Exceptions under the Equal Opportunity Act 1984 (SA) to unlawful discrimination on the grounds of gender identity, sexual orientation and intersex status*’ (June 2016), Recommendation 2 and 7.

<sup>91</sup> Ibid 2, Recommendation 3. The Institute also suggested that an alternative option would be to list the specific services that should be removed from the potential scope of the exception in section 50, following the approach described above with respect to aged care under the SDA.

<sup>92</sup> Ibid, Recommendation 3. For example, the Institute recommended that the existing exemption available to religious educational authorities with respect to employment in s 34(3)— which permits discrimination on the grounds of sex, sexuality and chosen gender — be replaced with an exemption that permits discrimination by religious educational authorities in the area of employment on the basis of religious belief.

<sup>93</sup> *Sex Discrimination Act 1984* (Cth) s3.

<sup>94</sup> *Sex Discrimination Act 1984* (Cth) s21.

<sup>95</sup> Australian Government, *Australian Government Response to the Religious Freedom Review* (13 December 2018), 17.

<sup>96</sup> *Sex Discrimination Act 1984* (Cth) s23(3)(b).

<sup>97</sup> *Sex Discrimination Act 1984* (Cth) s37(1)(d).

the discrimination is in 'good faith in order to avoid injury to the religious susceptibilities of adherents of that religion'.<sup>98</sup>

Interestingly, the SDA makes it clear that this exemption does *not* apply to the provision of Commonwealth-funded aged care thorough provisions inserted in 2013.<sup>99</sup> The reasons for this 'carve out' were set out the Explanatory Memorandum to the amending Bill as follows:

The qualification was included ... as there was significant feedback [in the context of broad reforms proposed the federal anti-discrimination law framework] of the discrimination faced by older same-sex couples in accessing aged care services run by religious organisations, particularly when seeking to be recognised as a couple. When such services are provided with Commonwealth funding, the Government does not consider that discrimination in the provision of those services is appropriate. This applies regardless of whether the Commonwealth is the sole or even dominant funder of these services (that is, this applies even if the services are provided with a combination of Commonwealth and other resources). ...<sup>100</sup>

The Explanatory Memorandum also explains that this qualification for aged care providers 'only applies in the context of service provision and not employment'. This means that 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.'. <sup>101</sup> A similar 'carve out' does not currently exist for the provision of educational services, although as noted below, such a reform has been proposed by the Labor Opposition.

Provisions guarding against discrimination in the area of employment also exist under the *Fair Work Act 2009* (Cth), which prohibit employers, including religious schools, from taking 'adverse action' against, or terminating the employment of, employees on the basis of certain protected attributes.<sup>102</sup> Exceptions also exist under this regime which permit religious institutions to

<sup>98</sup> *Sex Discrimination Act 1984* (Cth) s38.

<sup>99</sup> This 'carve out' of Commonwealth funded aged care services from the broader exception was explained in Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013, Supplementary Explanatory Memorandum <[http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2F5026\\_ems\\_3afab29a-1766-4409-baac-5c1217ee6adf%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2F5026_ems_3afab29a-1766-4409-baac-5c1217ee6adf%22)>

<sup>100</sup> Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013, Supplementary Explanatory Memorandum, [6].

<sup>101</sup> Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013, Supplementary Explanatory Memorandum, [6], [8]-[9].

<sup>102</sup> *Fair Work Act 2009* (Cth) ss 351(1), 772(1)(f).

avoid these requirements if the action meets the ‘good faith’ and ‘religious susceptibilities’ tests.<sup>103</sup>

d. Victoria

As noted above, Victoria is hard to place on the spectrum of legislative responses to the challenge of balancing the protection of discrimination on the grounds of sexual orientation and gender identity and freedom to express religious belief. This is because on the one hand, Victoria’s equal opportunity laws restrict the exceptions available to religious bodies with reference to tests of necessity and reasonableness, but on the other, they include broad based exceptions for religious individuals to discriminate against others.

For example, under the *Equal Opportunity Act 2010* (Vic) a religious school may discriminate ‘in the course of establishing, directing, controlling or administering the educational institution’ on grounds including religious belief or activity, sex, sexual orientation, lawful sexual activity or gender identity if the act ‘(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(emphasis added)’<sup>104</sup> While the precise application of this ‘reasonably necessary’ test is difficult to predict, the Victorian Human Rights and Equal Opportunity Commission has provided some examples,<sup>105</sup> noting that under this provision religious bodies and schools can lawfully:

- advertise a position for a pastoral care coordinator, and specify that the successful applicant must be of the same faith as that held and taught by the school;<sup>106</sup>
- prohibit same-sex couples attending school forums because it believes homosexuality is incompatible with the faith held and taught by the school.

<sup>107</sup>

In addition the Victorian legislation goes further than other jurisdictions in that it also provides an exception for unlawful discrimination by religious *individuals*, making discrimination on the basis of that person’s religious belief

<sup>103</sup> *Fair Work Act 2009* (Cth) s 772(2). Discrimination is also permitted if it is not unlawful under the anti-discrimination law in force in the place where the action is taken *Fair Work Act 2009* (Cth) s 351(2).

<sup>104</sup> *Equal Opportunity Act 2010* (Vic) s 83(2).

<sup>105</sup> Victorian Human Rights and Equal Opportunity Commission website, ‘Religious belief and activity’ <<https://www.humanrightscommission.vic.gov.au/discrimination/discrimination/types-of-discrimination/religious-belief-or-activity>> (accessed 4 June 2019).

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity lawful if the discrimination is 'reasonably necessary for the first person to comply with the doctrines, beliefs or principles of their religion'.<sup>108</sup>

The combination of these two provisions has led some to describe the Victorian provisions as too broad (without the requirement to consider whether the discriminatory action was undertaken good faith, or to consider the strength of belief or importance of doctrine or belief, or the impact of such discrimination).<sup>109</sup> As scholars such as Tobin have documented, the history of these provisions reveals a deep tension between Victoria's clear legislative intention to provide legal protection for the full range of individual human rights (for example through the enactment of its *Charter of Human Rights and Responsibilities*) and the Parliament's ongoing commitment to recognising that such rights can be subject to reasonable limitations in certain circumstances.<sup>110</sup>

e. Broad based exceptions for religious bodies and institutions

The final group of jurisdictions on the spectrum of legislative responses includes NSW, WA and the NT. While each of these jurisdictions impose slightly different tests for determining when discrimination by religious bodies will be lawful, they are broadly similar in scope in so far as they make it clear that religious schools can discriminate against potential and existing staff on the grounds of sexual orientation and gender identity. Slightly different tests apply when it comes to lawful discrimination against existing and potential students - and some of these tests have unique or novel features, such as the requirement in WA that students of a particular class or group not be discriminated against by religious educational authority. Of the three jurisdictions, the laws in WA and

<sup>108</sup> *Equal Opportunity Act 2010* (Vic) s 84.

<sup>109</sup> Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (2017, Cambridge) 159; Also check Carolyn Evans and Beth Gaze, 'Discrimination by Religious Schools: Views from the Coal Face' (2010) 34 *Melbourne University Law Review* 392

<sup>110</sup> See **John Tobin, (2010)** 'Should Discrimination in Victoria's **Religious Schools** be Protected? Using the Victorian Charter of Human Rights and Responsibilities Act to Achieve the Right Balance' 36(2) *Monash University Law Review* 16, Human Rights Law Centre, 'Freedom from discrimination in religious schools', Submission to the Senate Legal and Constitutional Affairs Committee on the inquiry into Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff (21 November 2018); see also Scrutiny of Acts and Regulations Committee, Victorian Parliament, *Exceptions and Exemptions to the Equal Opportunity Act 1995*, Final Report, November 2009 <  
[https://www.parliament.vic.gov.au/archive/sarc/EOA\\_exempt\\_except/Final%20Report/Final%20Report%20November.pdf](https://www.parliament.vic.gov.au/archive/sarc/EOA_exempt_except/Final%20Report/Final%20Report%20November.pdf)> .

NSW are the most generous in scope when it comes to excluding religious bodies from what would otherwise constitute unlawful discrimination.

Each of these jurisdictions contain exceptions to unlawful discrimination for the core internal functions of religious bodies,<sup>111</sup> and extend these exceptions to *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.<sup>112</sup> As discussed above, in light of contrasting judicial approaches to interpreting the relationship between specific and general exemptions in anti-discrimination law, it remains unclear whether this type of broad exception provision could be successfully relied upon by religious educational institutions.

In WA a further exception is provided for religious educational institutions to discriminate on *any* of the grounds listed in the Act in the area of employment of staff, provided (a) the school is 'conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed' and (b) the discrimination occurs 'in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed'.<sup>113</sup> A similar exception exists in the NT, but unlike the WA provision, is limited to discrimination on the grounds of religious belief or 'sexuality' (no protections currently exist for discrimination on the grounds of gender identity or transgender(?) status).<sup>114</sup> The *Anti-Discrimination Act 1992* (NT) also provides a specific exemption for discrimination in the area of admission of *students* for schools that operates 'in accordance with the doctrine of a particular religion' to 'exclude applicants who are not of that religion'.<sup>115</sup>

A broader exemption is provided under the WA laws, which allows religious educational institutions to discriminate against potential and existing students *on all grounds* except race, impairment or age, provided (a) the school is 'conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed' and (b) the discrimination occurs 'good faith' in favour of adherents of that religion or creed *generally*. The exception is not available to religious institutional organisations that discriminates against a

<sup>111</sup> *Equal Opportunity Act 1984* (WA) s72(a)-(c).

<sup>112</sup> *Equal Opportunity Act 1984* (WA) s72(d), *Anti-Discrimination Act 1977* (NSW) S56(a)-(c), *Anti-Discrimination Act 1992* (NT) s51.

<sup>113</sup> *Equal Opportunity Act 1984* (WA) s73(1).

<sup>114</sup> *Anti-Discrimination Act 1992* (NT) s37A.

<sup>115</sup> *Anti-Discrimination Act 1992* (NT) s30(2).

*particular class or group of persons* who are not adherents of that religion or creed, such as students of a particular nationality or ethnicity.<sup>116</sup>

Western Australia's equal opportunity laws are currently being reviewed by the Western Australian Law Reform Commission, including the provisions described above.<sup>117</sup> The Law Reform Commission has been asked to look specifically at the exceptions relating to religious bodies, and the related findings of the federal Religious Freedoms Review,<sup>118</sup> and make recommendations for possible amendments to enhance and update the *Equal Opportunity Act 1984* (WA) having regard to Australian and international best practices regarding equality and non-discrimination.

This reference follows an earlier comprehensive inquiry by the WA Law Reform Commission into legislation in relation to the registration or change of a person's sex and/or gender and status relating to sex characteristics completed in 2018.<sup>119</sup> Among its suite of recommended reforms, this inquiry recommended that the *Equal Opportunity Act 1984* (WA) be amended to 'better protected intersex, trans and gender diverse people'.<sup>120</sup>

It is important to note that both the *Equal Opportunity Act 1984* (WA) and the *Anti-Discrimination Act 1992* (NT) make it unlawful to discriminate on the grounds of 'religious or political conviction'<sup>121</sup>. No such provisions exist in NSW. Instead, the *Anti-Discrimination Act 1977* (NSW) contains a range of separate exceptions for religious bodies in the area of employment on the grounds of sex,<sup>122</sup> 'being transgender',<sup>123</sup> and 'homosexuality'.<sup>124</sup> Each of these

<sup>116</sup> *Equal Opportunity Act 1984* (WA) s73(3).

<sup>117</sup> Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA), Project No 111 (2019); Phoebe Wearne, 'Outdated' equal opportunity laws to be reviewed by WA government' *Perth Now Online*, 11 October 2018 <<https://www.perthnow.com.au/news/wa/outdated-equal-opportunity-laws-to-be-reviewed-by-wa-government-ng-b88987548z>> In this article it was reported that Premier Mark McGowan said he was "personally uncomfortable" with religious schools discriminating against gay students and teachers, but the review would look at what reforms were necessary.

<sup>118</sup> Expert Panel Report, Commonwealth, *Religious Freedom Review: Report of the Expert Panel* (18 May 2018) Terms of Reference, particularly (g) and (l)

<sup>119</sup> Law Reform Commission of Western Australia, *Review of legislation in relation to the registration or change of a person's sex and/or gender and status relating to sex characteristics*, Project 108 (2018).

<sup>120</sup> Law Reform Commission of Western Australia, *Review of legislation in relation to the registration or change of a person's sex and/or gender and status relating to sex characteristics*, Project 108 (2018) Recommendation 1.

<sup>121</sup> *Equal Opportunity Act 1984* (WA) s53, *Anti-Discrimination Act 1992* (NT) S19(1)(n)

<sup>122</sup> *Anti-Discrimination Act 1977* (NSW) s 25(3)(c).

<sup>123</sup> *Anti-Discrimination Act 1977* (NSW) s 38C(3).

<sup>124</sup> *Anti-Discrimination Act 1977* (NSW) s 49ZH(3).

exceptions states that it is not unlawful for a ‘*private educational authority*’ to discriminate in employment.<sup>125</sup>

This means that in NSW, all private schools (regardless of whether or not they are established in accordance with the teachings of a particular religion) can lawfully discriminate against students and prospective students applying for admission on the grounds of sex, transgender status, marital and domestic status, disability, homosexuality, and age.<sup>126</sup> The good faith and religious susceptibilities tests that feature in the provisions in force in other jurisdictions do not apply.

f. Judicial engagement with the religious bodies exceptions to anti-discrimination laws

Given the incentives within anti-discrimination regimes to resolve disputes through conciliation and other forms of alternative dispute resolution, it is difficult to identify any particular trends in terms of judicial engagement with the religious bodies exceptions described above.<sup>127</sup> However, a handful of cases shed some light on how key terms may be interpreted and applied in future cases. For example, the courts have provided some parameters around the concept of what might constitute ‘religious doctrines’ or ‘religious susceptibilities’. In *OV v Wesley Mission*<sup>128</sup> the NSW Court of Appeal held that when determining whether a particular matter offended or injured ‘religious doctrine’ or ‘religious susceptibilities’ will be a question of objective fact, based on expert evidence.<sup>129</sup> The Court also explained that it is not necessary to show that the particular matter would offend or injure the ‘religious susceptibilities’ of *all* people who are adherents of that religion (such as all people who identified Christians), rather, it would be a question of fact having regard to the *particular* religious body or institution (such as the members of the Wesley Mission).<sup>130</sup>

<sup>125</sup> *Anti-Discrimination Act 1977* (NSW) s 4: ‘private educational authority’ means a person or body administering a school, college, university or other institution at which education or training is provided, not being: (a) a school, college, university or other institution established under the *Education Reform Act 1990* (by the Minister administering that Act), the *Technical and Further Education Commission Act 1990* or an Act of incorporation of a university, or (b) an agricultural college administered by the Minister for Agriculture.

<sup>126</sup> *Anti-Discrimination Act 1977* (NSW) ss 31A, 38K, 46A, 49L, 49ZO, 49ZYL.

<sup>127</sup> This was also noted by the Religious Freedoms Review Committee who observed “The Panel heard concerns about uncertainty in the operation of exceptions for religious schools. Very few formal complaints have been made to the commissions in recent years relating to these provisions. The lack of case law in the area, as well as the fact that jurisdictions balance the rights in different ways, makes it unclear how narrowly or extensively these exceptions may apply.” Expert Panel Report, Commonwealth, *Religious Freedom Review: Report of the Expert Panel* (18 May 2018) 61.

<sup>128</sup> *OV v Wesley Mission* [2010] NSWCA 155.

<sup>129</sup> *OV v Wesley Mission* [2010] NSWCA 155 at [12] and [41].

<sup>130</sup> *OV v Wesley Mission* [2010] NSWCA 155 at [12] and [41]

The courts have also explored whether the commercial nature of the activity being undertaken by the religious body is relevant to the application of the relevant exceptions described above. For example, in *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd (CYC v Cobaw)*<sup>131</sup> a religious body was unable to rely upon a previous exception to the Victorian provisions when it refused to hire camp facilities to an organisation concerned with youth suicide prevention for same-sex-attracted young people.<sup>132</sup> This finding was made on the basis that Christian Youth Camps Ltd was hiring out its camp site as a business activity run on a commercial basis, rather than engaging in religious practice or teachings.<sup>133</sup> However it is important to note that this case interpreted legislative provisions that had already been replaced by new legislation.<sup>134</sup> It is further noted that one of the recommendations made by the *Religious Freedoms Review* is that the Commonwealth should adopt legislative changes to clarify that religious schools are not required to make available their facilities available for marriage services that do not conform to the doctrines, tenets or beliefs of their religion.<sup>135</sup>

The courts have also considered whether the fact that a religious body receives funding is relevant to the application of the relevant exceptions described above, but ultimately dismissed this as a basis for determining the lawfulness of otherwise discriminatory conduct. For example, in *OV v Wesley Mission*, the Court found that the Wesley Mission adoption agency operating was able to rely on the NSW religious bodies exception when refusing to accept same sex couple as foster parents on grounds, regardless of the fact that it received government funding. The court found that reliance on the exception was justified by the 'injury' the couple's sexual orientation posed to the specific doctrine of the mission's branch of Christianity.<sup>136</sup> As noted above, under the

<sup>131</sup> *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd (CYC v Cobaw)* (2014) 50 VR 256

<sup>132</sup> CYC was a corporation that was established by, and leased property from, the trustees of the Christian Brethren Trust and operated the camping resort on that property. Profits from the enterprise were returned to the Trust. CYC considered homosexuality was against God's teaching as set out in the Bible and argued that, as a religious body, it was entitled to rely on exceptions in the relevant legislation that permitted discrimination on religious grounds.

<sup>133</sup> *CYC v Cobaw* [2014] VSCA 75; Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (2017, Cambridge) 159

<sup>134</sup> *CYC v Cobaw* [2014] VSCA 75; Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (2017, Cambridge) 159

<sup>135</sup> Expert Panel Report, Commonwealth, *Religious Freedom Review: Report of the Expert Panel* (18 May 2018) Recommendation 12.

<sup>136</sup> *OV v Wesley Mission* [2010] NSWCA 155; Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (2017, Cambridge) 159

SDA the receipt of public funding by aged care service providers limits their access to Commonwealth religious bodies exceptions, however no other jurisdiction adopts this type of 'carve out' approach to publicly funded services provided by religious bodies.

There has also been some limited judicial consideration as to the question of what constitutes a religious body for the purpose of the exceptions described above. For example, in *Walsh v St Vincent de Paul Society Queensland (No.2)*<sup>137</sup> the Queensland Anti-Discrimination Tribunal found that the St Vincent de Paul Society Queensland did not constitute a religious body despite its close association with the Catholic Church and its spiritual objectives to help others and 'earn grace themselves for their common salvation'.<sup>138</sup> The Tribunal found that these qualities were not enough to make the Society a religious body within the meaning of the employment related exemptions contained in the Queensland Act.<sup>139</sup> In this case, a 'lay Catholic' had been accepted as part of the Society and undertaken leadership roles in line with the objectives of the Society. Having accepted this person into the organisation, the Tribunal found that the Society could not then seek to rely upon the exceptions in the Queensland Act to make it 'a genuine occupational requirement that a president of a conference of the Respondent be a Catholic'.<sup>140</sup> The Tribunal expressed the view that the role and activities of a president of a conference would be the same regardless of whether the person in the position was Catholic or not.

The Australian Human Rights Commission has also provided some insights into the type of nexus that, in its view, will need to be established between the religious 'doctrines, tenets, beliefs and teachings' of a religious educational institution, and the otherwise discriminatory act before the exemptions described above can be invoked.<sup>141</sup> For example, in the case of *Griffin v The*

<sup>137</sup> *Walsh v St Vincent de Paul Society Queensland (No.2)* [2008] QADT 32.

<sup>138</sup> *Walsh v St Vincent de Paul Society Queensland (No.2)* [2008] QADT 32 [76].

<sup>139</sup> *Walsh v St Vincent de Paul Society Queensland (No.2)* [2008] QADT 32 [76].

<sup>140</sup> *Walsh v St Vincent de Paul Society Queensland (No.2)* [2008] QADT 32 [126].

<sup>141</sup> *Griffin v The Catholic Education Office* (1998) EOC 92-92, discussed below. See also *Thompson v Catholic College, Wodonga* (1988) EOC 92-217. A teacher who worked at a Catholic school lived in a de facto relationship and had a child. She was dismissed when she returned from maternity leave. The school claimed the main reason for dismissing the teacher was that her pregnancy and having a child when she was not married was a public declaration of a lifestyle contrary to the teaching of the Catholic Church on marriage. The matter came before the Education Service (Catholic Schools) Conciliation and Arbitration Board under the Victorian industrial legislation at the time. The Board found that the dismissal was harsh, unjust and unreasonable under the legislation. The Board concluded that the teacher was not aware, nor would a reasonable person have been aware, of the

*Catholic Education Office*<sup>142</sup> the Catholic Education Office refused to classify an applicant as a teacher for Catholic schools in the Archdiocese of Sydney because the applicant had a 'high profile as co-convenor of the Gay and Lesbian Teachers and Students Association and her public statements on lesbian lifestyles'.<sup>143</sup> The Catholic Education Office submitted that it was an inherent requirement of the position of a teacher in the Catholic system that the person be able to 'minister in the name of the Catholic church'<sup>144</sup>. It further submitted that a person who engages in homosexual activity is unable to uphold the doctrines, tenets, beliefs and teachings of the Church.<sup>145</sup> The Australian Human Rights Commission rejected these submissions and found that there was no evidence of any homosexual activity of the applicant, and that the Catholic Education Office's action in rejecting the application were not founded on the doctrines, tenets, beliefs and teachings of their faith. The Commission observed that any offence to the parents and pupils of the relevant school was not an injury 'to their religious susceptibilities but an injury to their prejudices'.<sup>146</sup>

This limited collection of case law does little to illuminate the precise scope of existing or proposed provisions in this area, particularly due to the frequent legislative changes that occur in this space around the country. However, it does help to underscore the general uncertainty that plagues this area of law, and the challenges complainants or respondents necessarily face when attempting to anticipate the outcome of their dispute. This emphasises both the practical significance of reforms designed to promote consistency across jurisdictions and to clearly define the limits of exceptions for religious bodies and the need to think carefully about the implications of reform in one jurisdiction, for the practical application of laws in another. These issues arise frequently in the context of the most recent reform agenda set about the *Religious Freedoms Review* discussed in further detail in Part 3 below.

#### IV PART 3: IMPLICATIONS FOR FUTURE REFORMS

detailed conditions of lifestyle that the school said it demanded or expected of her. The school was ordered to pay compensation to the teacher.

<sup>142</sup> *Griffin v The Catholic Education Office* (1998) EOC 92-92; Human Rights and Equal Opportunity Commission, *Report of Inquiry into a Complaint of Discrimination in Employment and Occupation Discrimination on the ground of sexual preference* HRC Report No. 6 (March 1998) 8

<sup>143</sup> *Ibid* 8.

<sup>144</sup> *Ibid* 11.

<sup>145</sup> *Ibid* 22.

<sup>146</sup> *Ibid* 22.

The spectrum of legislative responses described in Part 2 highlights the complex range of options available to lawmakers seeking to 'get the balance right' when it comes to implementing the two guiding principles discussed in Part 1. This spectrum also highlights the complexities associated with advancing reform in this area, particularly reform priorities that seek to promote a 'nationally consistent' approach to law making in this area.<sup>147</sup> This has implications for the range of legislative reforms currently being considered around Australia in this area, including those set out in the Commonwealth's *Religious Freedoms Review*,<sup>148</sup> and related reference to the Australian Law Reform Commission (ALRC). This Part of the article briefly outlines the relevant recommendations contained in the *Religious Freedoms Review* and the implications these proposed changes hold for the different legislative regimes currently in force around Australia.<sup>149</sup>

a. The Religious Freedoms Review and ALRC Reference

In November 2017, and against the background of the marriage equality reforms,<sup>150</sup> the Turnbull Government commissioned an 'independent review' into religious freedom in Australia.<sup>151</sup> This Review was conducted by an Expert Panel led by the Hon Phillip Ruddock and had a broad terms of reference to consider the 'intersections between the enjoyment of the freedom of religion and other human rights',<sup>152</sup> as well as reflecting on the findings of other relevant reviews with similar themes. The Panel received more than 15,500 submissions,

<sup>147</sup> See Media Release, the Hon Christian Porter, 'Review into the Framework of Religious Exemptions in Anti discrimination Legislation' (10 April 2019) <<https://www.attorneygeneral.gov.au/Media/Pages/Review-into-the-Framework-of-Religious-Exemptions-in-Anti-discrimination-Legislation-10-april-19.aspx>> where the Attorney General said that: "It is essential that Australia's laws are nationally consistent and effectively protect the rights and freedoms recognised in international agreements, to which Australia is a party. This particularly applies to the right to freedom of religion and the rights of equality and non-discrimination."

<sup>148</sup> Expert Panel Report, Commonwealth, *Religious Freedom Review: Report of the Expert Panel* (18 May 2018)

<sup>149</sup> The background to the Religious Freedoms Review is also explored in Neville Rochow and Jacqueline Rochow 'From the Exception to the Rule: Dignity, *Clubb v Edwards*, the Ruddock Review, and Religious Freedom as a Right' *Special Edition Paper*.

<sup>150</sup> For a comprehensive overview of the legislative history of the marriage equality reforms see Shirleene Robinson and Alex Greenwich, *Yes Yes Yes: Australia's Journey to Marriage Equality* (2018, NewSouth Books); D McKeown, *A chronology of same-sex marriage bills introduced into the federal parliament: a quick guide*, Research paper series, 2016-17, Parliamentary Library, Canberra, updated February 2018.

<sup>151</sup> This inquiry was conducted by an Expert Panel led by Phillip Ruddock and was designed to examine whether Australian law adequately protects the human right to freedom of religion. See Religious Freedoms Review, above n 1, announced on 22 November 2018.

<sup>152</sup> Expert Panel Report, Commonwealth, *Religious Freedom Review: Report of the Expert Panel* (18 May 2018) Terms of Reference.

many of which drew attention to the religious bodies exemptions in Australia's anti-discrimination laws and their impact on non-heterosexual or transgender students and teachers.<sup>153</sup> Some submissions called for an end to the religious bodies exemptions in the SDA, others called for a Religious Freedom Act to give religious institutions a positive right to uphold their values in employment and admission practices.<sup>154</sup>

The Review Panel delivered its report to the Prime Minister on 18 May 2018, and despite numerous references to the recommendations of the report in the media<sup>155</sup> was not publicly released until December 2018. In the meantime, the Labor Opposition introduced Bills seeking to make changes to the current SDA provisions that provide exemptions for religious bodies in the area of education. Two Bills were introduced (one in the Senate,<sup>156</sup> the other to the House<sup>157</sup>) designed to amend the SDA to make it unlawful for religious schools to directly discriminate against students on the basis of their sexual orientation, gender identity or intersex status,<sup>158</sup> leaving in place the existing exemptions with respect to discrimination against staff employed by religious institutions.<sup>159</sup> While the Prime Minister publicly expressed support for the proposition that

<sup>153</sup> In undertaking its Review, the Prime Minister instructed the Panel to: 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. The Expert Panel comprised: the Hon Philip Ruddock (chair) Emeritus Professor Rosalind Croucher AM; the Hon Dr Annabelle Bennett AO SC; Father Frank Brennan SJ AO; Professor Dr Nicholas Aroney.

<sup>154</sup> For an overview of some of the views expressed in submissions to the Review see David Marr 'The right to expel gay children from school isn't about freedom; it's about cruelty' *The Guardian* (online, 11 October 2018).

<sup>155</sup> See e.g. 'Read the full 20 recommendations from the religious freedom review' *Sydney Morning Herald* (online, 12 October 2018) < <https://www.smh.com.au/politics/federal/read-the-full-20-recommendations-from-the-religious-freedom-review-20181011-p50918.html>>.

<sup>156</sup> On 29 November 2018 Labor Senator Penny Wong introduced the Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018 (Cth) into the Senate

<sup>157</sup> On 3 December 2018 Opposition Leader Bill Shorten MP introduced the Sex Discrimination Amendment (Removing Discrimination Against Students) Bill No 2 2018 (Cth) into the House of Representatives.

<sup>158</sup> See Explanatory Memorandum Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018 (Cth), Item 1. It is important to note that neither of these Bills make changes to the existing provisions of the SDA that concern *indirect discrimination*, which means that despite the amendments proposed in the Bills, religious schools can continue to lawfully impose 'reasonable' conditions or requirements on students in accordance with the teachings of their particular religion'

<sup>159</sup> *Ibid.*

there should be 'no discrimination against children',<sup>160</sup> the Coalition Government refused to debate the Opposition Bills and as a result, the Bills have not been debated or passed.<sup>161</sup>

Then, on 13 December 2018, the Prime Minister released the long-awaited findings of the *Religious Freedom Review*, which included a raft of recommendations for legislative change including that the Commonwealth enact provisions to provide explicit legal protection against discrimination on the grounds of religious belief.<sup>162</sup> The Government accepted this and many other recommendations made by the Expert Panel and promised to introduce a Religious Discrimination Bill into Parliament in 2019 and establish a new Freedom of Religion Commissioner within the ALRC.<sup>163</sup> The Review also included recommendations to preserve (but slightly modify) existing state and federal exemptions to allow religious schools to lawfully discriminate against staff and students on the grounds of sexual orientation and gender identity.<sup>164</sup> In response to these recommendations, the Government promised to work with the states and territories to refer these issues to the ALRC for further investigation,<sup>165</sup> however it also flagged the need for a 'nationally consistent' approach to law-making in this area,<sup>166</sup> which when combined with its

<sup>160</sup> Malcolm Farr, 'Protecting gay students becoming a headache for Scott Morrison', news.com.au (5 December 2018, online) <<https://www.news.com.au/lifestyle/parenting/school-life/protecting-gay-students-becoming-a-headache-for-scott-morrison/news-story/e4b12187fa8f5077bc1881d4f93fb5fe>>.

<sup>161</sup> The Prime Minister has also reportedly sought cooperation from Labor to adopt an alternative approach that involves removing the ability for religious bodies to directly discriminate against students based on gender or sexual orientation, while preserving the right for schools to teach in accordance with its own religious beliefs. Malcolm Farr, 'Protecting gay students becoming a headache for Scott Morrison', news.com.au (5 December 2018, online) <<https://www.news.com.au/lifestyle/parenting/school-life/protecting-gay-students-becoming-a-headache-for-scott-morrison/news-story/e4b12187fa8f5077bc1881d4f93fb5fe>>.

<sup>162</sup> Expert Panel Report, *Religious Freedom Review* (18 May 2018) <<https://pmc.gov.au/domestic-policy/religious-freedom-review>> Recommendation 15. See also Recommendations 2-4, 9-14 and 16-20.

<sup>163</sup> Australian Government, *Australian Government Response to the Religious Freedom Review* (13 December 2018) 5-6, 17 (responding to Recommendation 15). Exposure Draft legislation has since been introduced for community consultation.

<sup>164</sup> Expert Panel Report, Commonwealth, *Religious Freedom Review: Report of the Expert Panel* (18 May 2018) Recommendations 5-8.

<sup>165</sup> Australian Government, *Australian Government Response to the Religious Freedom Review* (13 December 2018) 5-6, 18 (responding to recommendations 5-8).

<sup>166</sup> See Media Release, the Hon Chris Porter, 'Review into the Framework of Religious Exemptions in Anti discrimination Legislation' (10 April 2019) <<https://www.attorneygeneral.gov.au/Media/Pages/Review-into-the-Framework-of-Religious-Exemptions-in-Anti-discrimination-Legislation-10-april-19.aspx>> where the Attorney General said that: "It is essential that Australia's laws are nationally consistent and effectively protect the rights and

commitments to enact new federal legislation containing protections against discrimination on the grounds of religious belief or activity<sup>167</sup> and the establishment of a new Religious Discrimination Commissioner, could have significant implications for any potentially inconsistent State or Territory laws.<sup>168</sup>

A formal referral to the ALRC to inquire into these matters was issued in April 2019, with a focus on religious exemptions in anti-discrimination legislation and five particular *Religious Freedom Review* recommendations.<sup>169</sup> Among its specific terms of reference, the ALRC was asked to consider what reforms to Commonwealth, State and Territory law, should be made in order to 'limit or remove altogether (if practicable) religious exemptions to prohibitions on discrimination, while also guaranteeing the right of religious institutions to conduct their affairs in a way consistent with their religious ethos.'<sup>170</sup> The ALRC was also asked to 'consult widely with State and Territory governments, religious institutions, the education sector, and other civil society representatives', and provide its report to the Attorney-General by 10 April 2020. This deadline, and the ALRC's terms of reference, were subsequently modified in August 2019, following the introduction of draft legislation containing the Morrison Government's *Religious Discrimination Bill* and related amendments.<sup>171</sup> The next section of this Paper considers the implications of the recommendations

freedoms recognised in international agreements, to which Australia is a party. This particularly applies to the right to freedom of religion and the rights of equality and non-discrimination."

<sup>167</sup> Draft Bills containing these provisions were released for public consultation by the Attorney General, the Hon Christian Porter MP, on 29 August 2019. See Attorney General's Department Website, Religious Freedom Bills, < <https://www.ag.gov.au/Consultations/Pages/religious-freedom-bills.aspx>> (accessed 30 September 2019); Attorney-General for Australia, the Hon Christian Porter MP, Media Release 'Morrison Government delivers on religious reforms' 29 August 2019 < <https://www.attorneygeneral.gov.au/Media/Pages/morrison-government-delivers-on-religious-reforms-29-august-2019.aspx>>

<sup>168</sup> This is because section 109 of the Australian Constitution provides that Commonwealth laws will prevail over State or Territory laws to the extent of any inconsistency. See e.g. *Australian Mutual Provident Society v Goulden* (1986) 160 CLR 330; *Commercial Radio Coffs Harbour v Fuller* (1986) 161 CLR 47.

<sup>169</sup> Expert Panel Report, Commonwealth, *Religious Freedom Review: Report of the Expert Panel* (18 May 2018) Recommendations 1 and 5-8.

<sup>170</sup> Australian Law Reform Commission, Media Release, 'Review into the Framework of Religious Exemptions in Anti-discrimination Legislation', 10 April 2019, <<https://www.alrc.gov.au/inquiries/review-framework-religious-exemptions-anti-discrimination-legislation>>.

<sup>171</sup> Australian Law Reform Commission, Media Release 'Review into the Framework of Religious Exemptions in Anti-discrimination Legislation', 29 August 2019, <[https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc\\_media\\_release\\_29\\_augusta.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_media_release_29_augusta.pdf)> The media release stated that "The Attorney-General has now amended the terms of reference narrowing the focus of the inquiry to confine the inquiry to issues not resolved by the Government's Religious Discrimination Bill, and to confine the ALRC's recommendations to legislation other than the Religious Discrimination Bill."

contained in the *Religious Freedoms Review* for the spectrum of legislative approaches set out in Part 2 of the Paper.

b. Relevant *Religious Freedoms Review* Recommendations

The key Religious Freedoms Review recommendations relating to exceptions to anti-discrimination laws and forming the focus of the original ALRC's inquiry related to the following matters:<sup>172</sup>

- abolish exceptions or exemptions that allow religious bodies to lawfully discriminate against students on the grounds of race, disability, pregnancy or intersex status,<sup>173</sup> and review such provisions in the area of employment in religious schools 'having regard to community expectations'<sup>174</sup>.
- ensure that any exceptions for religious schools do not permit discrimination against existing employees solely on the basis of marital status.<sup>175</sup>
- preserve the existing exceptions for religious educational institutions in the SDA but require the schools to have a publicly available policy outlining its position and explaining how the policy will be enforced,<sup>176</sup> and when it comes to students, that the school has had regard to the best interests of the child as the primary consideration in its conduct.<sup>177</sup>
- NSW and SA should amend their anti-discrimination laws to render it unlawful to discriminate on the basis of a person's 'religious belief or

<sup>172</sup> Recommendations that are less relevant to this theme include Recommendation 4 'The Commonwealth should amend section 11 of the Charities Act 2013 to clarify that advocacy of a 'traditional' view of marriage would not, of itself, amount to a 'disqualifying purpose'; Recommendation 9 'State and Territory education departments should maintain clear policies as to when and how a parent or guardian may request that a child be removed from a class that contains instruction on religious or moral matters and ensure that these policies are applied consistently.' Recommendations 10 and 11 concerning solemnisation of marriages and use of places of worship; Recommendations 13 and 14 concerning blasphemy; and Recommendations 18-20 concerning poor literacy concerning human rights and religion. Expert Panel Report, Commonwealth, *Religious Freedom Review: Report of the Expert Panel* (18 May 2018) Some of the key findings of the Religious Freedoms Review are also explored in Neville Rochow and Jacqueline Rochow 'From the Exception to the Rule: Dignity, *Clubb v Edwards*, the Ruddock Review, and Religious Freedom as a Right' *Special Edition Paper*.

<sup>173</sup> Expert Panel Report, Commonwealth, *Religious Freedom Review: Report of the Expert Panel* (18 May 2018) Recommendation 8.

<sup>174</sup> Expert Panel Report, Commonwealth, *Religious Freedom Review: Report of the Expert Panel* (18 May 2018) Recommendation 1.

<sup>175</sup> Expert Panel Report, Commonwealth, *Religious Freedom Review: Report of the Expert Panel* (18 May 2018) Recommendation 6.

<sup>176</sup> Expert Panel Report, Commonwealth, *Religious Freedom Review: Report of the Expert Panel* (18 May 2018) Recommendation 5.

<sup>177</sup> Expert Panel Report, Commonwealth, *Religious Freedom Review: Report of the Expert Panel* (18 May 2018) Recommendation 7.

activity' including on the basis that a person does not hold any religious belief.<sup>178</sup>

Outside of these specific recommendations that now form part of the ALRC terms of reference, the *Religious Freedoms Review* also recommended that Commonwealth, State and Territory governments should consider the use of 'objects, purposes or other interpretive clauses in anti-discrimination legislation to reflect the equal status in international law of all human rights, including freedom of religion'.<sup>179</sup>

This Paper discusses the implications of these recommendations for the existing anti-discrimination regime, having regard to the spectrum of approaches discussed above.<sup>180</sup>

c. Implications for the narrow, religion-based exception jurisdictions - Tasmania and ACT

The key recommendations made by the *Religious Freedoms Review* do not appear to require Tasmania or the ACT to take any remedial action or amend their existing anti-discrimination laws. However, it is also clear that the recommendations described above do not require other jurisdictions to 'move into line' with the narrow exceptions approach adopted by these jurisdictions. In fact, the recommendations set out above envisage jurisdictions adopting an approach to exceptions for religious bodies and educational institutions that is broader in scope than the existing Tasmania and ACT provisions, and that actively permits discrimination against students and teachers on the grounds of sexual orientation and gender identity by religious bodies in certain circumstances. This gives rise to a potential tension between what has been cited by some rights advocates as the 'best practice' approach to protecting against unlawful discrimination and the approach recommended by the *Religious*

<sup>178</sup>Expert Panel Report, Commonwealth, *Religious Freedom Review: Report of the Expert Panel* (18 May 2018) Recommendation 16.

<sup>179</sup>Expert Panel Report, Commonwealth, *Religious Freedom Review: Report of the Expert Panel* (18 May 2018) Recommendation 3.

<sup>180</sup>Since August 2019 and the introduction of the draft Religious Discrimination Bill by the Morrison Government, the scope of the ALRC's terms of reference has been narrowed to 'issues not resolved by the Government's Religious Discrimination Bill'. This narrowing of the ALRC's terms of reference may have implications for those seeking to raise concerns with the implications of the federal reforms on state and territory laws. Such concerns may need to be raised within the context of the public consultation on the Draft Bill and any resulting parliamentary committee consideration of the proposed new federal provisions. See Australian Law Reform Commission, Media Release 'Review into the Framework of Religious Exemptions in Anti-discrimination Legislation', 29 August 2019, <[https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc\\_media\\_release\\_29\\_augusta.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_media_release_29_augusta.pdf)>

*Freedoms Review*.<sup>181</sup> The release of draft federal legislation by the Morrison Government in August 2019,<sup>182</sup> which aims to provide ‘comprehensive protection against discrimination on the basis of religious belief or activity in specified areas of public life’,<sup>183</sup> and contains provisions designed to ‘override’ LGBTIQ related protections in State anti-discrimination law,<sup>184</sup> brings these potential tensions into sharp focus,<sup>185</sup> and highlights the importance of all jurisdictions carefully considering the full range of implications of reform in this area.

d. Implications for the novel exception jurisdictions - Queensland and South Australia

The recommendations set out above may have significant implications for the novel exception approaches adopted in Queensland and SA, depending on how comprehensively these jurisdictions respond to the reforms contemplated by the Review. For example, if it were to take a comprehensive approach to the recommendations made by the *Religious Freedoms Review*, SA would need to consider:

- narrowing the scope of the general religious bodies exceptions in section 50 of the *Equal Opportunity Act 1984* (SA) to clarify that it does not extend to permitting discrimination on the grounds basis of race, disability, pregnancy or intersex status by a religious body in the provision of

<sup>181</sup> See e.g Sam Watson, ‘Tasmania has shown it can protect LGBTI students’ rights — why can’t the rest of the nation?’ ABC Online, 8 February 2019 <<https://www.abc.net.au/news/2019-02-08/tasmania-gay-teen-discrimination-laws-catholic-church/10771204>>.

<sup>182</sup> Attorney General’s Department Website, Religious Freedom Bills, <<https://www.ag.gov.au/Consultations/Pages/religious-freedom-bills.aspx>> (accessed 30 September 2019); Attorney-General for Australia, the Hon Christian Porter MP, Media Release ‘Morrison Government delivers on religious reforms’ 29 August 2019 <<https://www.attorneygeneral.gov.au/Media/Pages/morrison-government-delivers-on-religious-reforms-29-august-2019.aspx>>

<sup>183</sup> Attorney-General for Australia, the Hon Christian Porter MP, Media Release ‘Morrison Government delivers on religious reforms’ 29 August 2019 <<https://www.attorneygeneral.gov.au/Media/Pages/morrison-government-delivers-on-religious-reforms-29-august-2019.aspx>>

<sup>184</sup> See e.g Draft Religious Freedoms Bill clause 41(1) (renumbered as clause 42 in the Second Exposure Draft Religious Freedoms Bill).

<sup>185</sup> It should also be noted that in accordance with section 109 of the *Constitution*, in the event of an inconsistency between federal and state laws, the state law will be found to be invalid to the extent of any inconsistency. As the court said in *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508, 523 “[Section] 109 requires a comparison between any two laws which create rights, privileges or powers, and duties and obligations, and s109 resolves conflict, if any exists, in favour of the Commonwealth.” Some of the provisions in the proposed new federal Religious Discrimination Bill (such as clause 41) may also give rise to questions as to whether the Commonwealth intends to displace state law or ‘cover the field’ see *Victoria v Commonwealth* (1937) 58 CLR 618; *Wenn v Attorney General (Vic)* (1948) 77 CLR 84; *University of Wollongong v Metwally* (1984) 158 CLR 447.

education to students or in the area of employment in religious educational institutions;<sup>186</sup>

- amending the exception in section 34(3) relating to employment in religious educational institutions to remove the inclusion of the attribute 'intersex status';<sup>187</sup> and
- enact new provisions to list 'religious belief or conviction' as a protected attribute under the *Equal Opportunity Act* and adopt a set of relevant exceptions, having regard to the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*.<sup>188</sup>

SA may also offer a potential model for other jurisdictions seeking to implement *Religious Freedoms Review* recommendations relating to discrimination against potential employees at religious educational institutions. The Review recommended that other jurisdictions consider adopting provisions with features similar to section 34(3) of the *Equal Opportunity Act* which requires religious educational institutions to prepare and make publicly available a policy document setting out how they intend to rely upon this type of exemption.

If looking comprehensively at the implications for its legislation, Queensland would need to consider whether its 'genuine occupational requirements of the job' approach adequately protects against discrimination on the grounds of race, disability, pregnancy or intersex status or marital status. An amendment clarifying that the Queensland provision does not exempt discriminatory conduct on those grounds may be needed to fully satisfy *Religious Freedoms Review* recommendation 6.<sup>189</sup>

e. Implications for the Commonwealth and Victoria

<sup>186</sup> Expert Panel Report, Commonwealth, *Religious Freedom Review: Report of the Expert Panel* (18 May 2018) Recommendations 1, and 6 and 8.

<sup>187</sup> Expert Panel Report, Commonwealth, *Religious Freedom Review: Report of the Expert Panel* (18 May 2018) Recommendation 6.

<sup>188</sup> Expert Panel Report, Commonwealth, *Religious Freedom Review: Report of the Expert Panel* (18 May 2018) Recommendation 16 provides that "New South Wales and South Australia should amend their anti-discrimination laws to render it unlawful to discriminate on the basis of a person's 'religious belief or activity' including on the basis that a person does not hold any religious belief. In doing so, consideration should be given to providing for the appropriate exceptions and exemptions, including for religious bodies, religious schools and charities."

<sup>189</sup> Expert Panel Report, Commonwealth, *Religious Freedom Review: Report of the Expert Panel* (18 May 2018) Recommendation 6.

When it comes to the Commonwealth, the implications of the *Religious Freedoms Review* are specific and clear. The recommendations require the SDA to be amended to ensure that:

- the exemptions in section 37 and 38 of the Act relating to religious bodies and religious educational institutions do not extend to discrimination by religious schools in employment on the basis of pregnancy, intersex status and do not permit discrimination against an existing employee solely on the basis that the employee has entered into a marriage.<sup>190</sup>
- the exemption in section 38(1) and (2) continues to allow religious schools to discriminate in relation to the employment of staff, and the engagement of contractors, on the basis of sexual orientation, gender identity or relationship status but require that (a) the discrimination is founded in the precepts of the religion (b) the school has a publicly available policy outlining its position in relation to the matter and explaining how the policy will be enforced, and (c) the school provides a copy of the policy in writing to employees and contractors and prospective employees and contractors.<sup>191</sup>
- the exemption in section 38(3) relating to students at religious institutions continues to allow schools to discriminate on the basis of sexual orientation, gender identity or relationship status (*not* intersex status) but require that (a) the discrimination is founded in the precepts of the religion; (b) the school has a publicly available policy outlining its position in relation to the matter; (c) 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, and (d) the school has regard to the best interests of the child as the primary consideration in its conduct.<sup>192</sup>

This last recommendation appears to have some potentially inconsistent internal features. It is not clear, for example, on what basis a religious school would be able to justify a policy that discriminates against students on the basis of their gender identity but is also developed having regard to the 'best interest

<sup>190</sup> Expert Panel Report, Commonwealth, *Religious Freedom Review: Report of the Expert Panel* (18 May 2018) Recommendation 6.

<sup>191</sup> Expert Panel Report, Commonwealth, *Religious Freedom Review: Report of the Expert Panel* (18 May 2018) Recommendation 5.

<sup>192</sup> Expert Panel Report, Commonwealth, *Religious Freedom Review: Report of the Expert Panel* (18 May 2018) Recommendation 7.

of the child' as its primary consideration. No specific examples were provided by the *Religious Freedoms Review* Panel in its report on this issue.

In addition, and perhaps most significantly, the *Religious Freedoms Review* recommended that the Commonwealth amend the *Racial Discrimination Act 1975*, or enact a *Religious Discrimination Act*, to render it unlawful to discriminate on the basis of a person's 'religious belief or activity', including on the basis that a person does not hold any religious belief. Such a reform could have significant practical implications for the rights of religious bodies and religious individuals in Australia, depending on the scope of protection granted and the exceptions included in the proposed new provisions. The implications of this reform for SA and NSW are particularly pronounced, given that those jurisdictions do not currently include 'religious beliefs or convictions' as protected attributes under their anti-discrimination regime.<sup>193</sup>

The implications of the *Religious Freedoms Review* for the Victorian legislative approach are less clear. No immediate legislative changes appear necessary, however, if the reforms with respect to the SDA are adopted, it could leave Victoria out of step with a growing trend towards the requirement for religious schools to have policies in place setting out the basis for their reliance on exceptions in the area of employment and student enrolment. The Victorian provisions that exempt religious individuals from the unlawful discrimination provisions may also provide a template for the broader religious freedoms provisions contemplated at the federal level. As noted above, if adopted, this would constitute a significant expansion of the scope of the federal anti-discrimination regime with implications for any inconsistent State and Territory laws, and for groups and individuals within the Australian community who may be subject to discrimination by religious individuals.

f. Implications for the broad exception jurisdictions - NSW, WA and NT

Perhaps the biggest impact of the *Religious Freedoms Review* recommendations will be felt in those jurisdictions with the broadest exceptions for religious bodies and religious institutions. For example, if WA was to respond comprehensively to the recommendations described above it would need to consider introducing changes to make it clear that its existing exceptions (that currently extend to *any* of the grounds listed in the Act) do not extend to discrimination against students or teachers on the basis of race, disability,

<sup>193</sup> Expert Panel Report, Commonwealth, *Religious Freedom Review: Report of the Expert Panel* (18 May 2018) Recommendation 15.

pregnancy or intersex status or marital status.<sup>194</sup> The obligation is expressed in stronger terms with respect to students, where jurisdictions are asked to 'abolish' these provisions, than with respect to employment practices, which are suggested to be reviewed 'having regard to community expectations'.<sup>195</sup> It appears that these matters are likely to be front and centre in the review of the WA laws currently being undertaken by the WA Law Reform Commission.

Like SA, NSW would also need to consider amending its anti-discrimination laws to provide specific protection for discrimination on the basis of a person's 'religious belief or activity' and provide appropriate exceptions and exemptions, including for religious bodies, religious schools and charities.<sup>196</sup> The NT may also need to consider enacting specific protections against discrimination on the grounds of gender identity or trans status to address a significant gap in the attributes protected under its existing laws, although this is not specifically recommended by the *Religious Freedoms Review*

In addition, each of these jurisdictions may also need to consider the scope of their religious body exceptions that extend to *any other act or practice* of a body established for religious purposes,<sup>197</sup> to ensure that this does not permit discrimination on the grounds of race, race, disability, pregnancy or intersex status in the area of educational services or employment in religious educational institutions.

If the full range of *Religious Freedoms Review* recommendations are implemented, the 'private institutions' approach to exceptions contained in the NSW legislation may appear further out of step with the general approach adopted elsewhere in Australia, and pulls against the key themes set out in the *Religious Freedoms Review* that focus squarely on the need to protect *religious* freedom (rather than freedoms associated with the 'private' status of certain schools), having regard to the rights of others.

## V CONCLUSION

This article has attempted to sketch a broad outline of the different legislative responses that exist around Australia when it comes to providing protections

<sup>194</sup> Expert Panel Report, Commonwealth, *Religious Freedom Review: Report of the Expert Panel* (18 May 2018) Recommendation 6.

<sup>195</sup> Expert Panel Report, Commonwealth, *Religious Freedom Review: Report of the Expert Panel* (18 May 2018) Recommendation 1.

<sup>196</sup> Expert Panel Report, Commonwealth, *Religious Freedom Review: Report of the Expert Panel* (18 May 2018) Recommendation 16.

<sup>197</sup> *Equal Opportunity Act 1984* (WA) s72(d), *Anti-Discrimination Act 1977* (NSW) S56(a)-(c), NT s51

against discrimination on the grounds of sexual orientation and gender identity, and ensuring religious bodies and individuals are free to express their religious belief. It aims to outline a spectrum of responses which ranges from narrow exceptions for religious bodies to discriminate against others on the basis of religious belief, to broad-based exceptions that potentially apply to exempt religious bodies from unlawful discrimination on the basis of all attributes protected under anti-discrimination law. Understanding the differences between the Australian jurisdictions is essential to contemplating the implications of proposed reforms, including the reforms recently proposed by the *Religious Freedoms Review* and accepted by the Morrison Government, and the reform options currently being contemplated by the ALRC.

This article has not expressed a view on the merits of the existing provisions, or the merits of the proposed reforms. Many others have expressed firm views on these matters to the *Religious Freedoms Review*, other review bodies and in public forums.<sup>198</sup> All interested parties will now have the opportunity to have their say as part of the ALRC consultation process. The purpose of this article to equip commentators, scholars and members of the community with some background information than can inform their views on the implications of the proposed changes for the laws in their respective jurisdictions. It is hoped that as we move forward into the next stage of the debate on these issues, which appears to contemplate the need for a 'nationally consistent' approach, the qualities of fairness, equality and respect that define our community play a central role in defining the boundaries of anti-discrimination law across Australia.

<sup>198</sup> Human Rights Law Centre, Media Release, 'Explainer: Religious Discrimination in Schools', 23 October 2018, <<https://www.hrlc.org.au/news/2018/10/23/explainer-religious-discrimination-in-schools>>; Luke Beck, 'Why Australia does not need a Religious Discrimination Act' *The Conversation*, Online, 12 July 2018 <<https://theconversation.com/why-australia-does-not-need-a-religious-discrimination-act-99666>>.