AN EQUALITY ACT FOR NSW

Preliminary submission to the NSW Law Reform Commission's review of the *Anti-Discrimination Act 1977* (NSW)

30 August 2023

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ABOUT EQUALITY AUSTRALIA

Equality Australia is a national LGBTIQ+ organisation dedicated to achieving equality for LGBTIQ+ people.

Born out of the successful campaign for marriage equality, and established with support from the Human Rights Law Centre, Equality Australia brings together legal, policy and communications expertise, along with thousands of supporters, to address discrimination, disadvantage and distress experienced by LGBTIQ+ people.

www.equalityaustralia.org.au

We acknowledge that our offices are on the land of the Kulin Nation and the land of the Eora Nation and we pay our respects to their traditional owners.

EXECUTIVE SUMMARY

Equality Australia is grateful for the opportunity to make a preliminary submission to the New South Wales Law Reform Commission's review of the *Anti-Discrimination Act 1977* (NSW) (the **Act**).

Everyone deserves to be treated with dignity and respect, no matter where they work, study or access goods and services.

NSW has the oldest and most out-of-date anti-discrimination law in Australia. NSW needs a new anti-discrimination framework that protects people from discrimination, harassment and vilification, no matter where they work, study or access goods, services and accomodation.

In this submission, we address our priorities for reform so that anti-discrimination laws in NSW work to address and prevent discrimination, harassment and vilification for everyone who experiences it, including LGBTIQ+ people.

Our priorities are:

- **Expanding protections:** Improving and expanding the protected attributes and associated definitions so that all LGBTIQ+ people and others who experience discrimination are protected.
- **Removing unfair exemptions:** Removing unfair exemptions for religious bodies and private educational institutions that allow discrimination against LGBTIQ+ people and those who refuse to hold discriminatory beliefs about us as a condition of employment, education or the general provision of goods, services and accommodation.
- **Bringing NSW into line with best practice:** Addressing outliers in NSW which allow legal discrimination against LGBTIQ+ people or transgender people more specifically in:
  - adoption services,
  - superannuation, and
  - sport in ways which are not reasonable or proportionate.
- **Getting the fundamentals right:** Improving the discrimination framework overall so it works to protect people who have suffered discrimination, harassment and vilification in all areas of public life and shifts the burden from affected individuals to those who have the power, resources and responsibility to prevent discrimination, harassment, vilification and victimisation from happening in the first place.

In our view, given its many fundamental deficiencies, it is time for NSW to repeal and replace the Act with a new Equality Act that reflects best practice and meets contemporary needs.

Given Equality Australia works to ensure equality for LGBTIQ+ people and their families, our submission focusses on the deficiencies in the Act which particularly affect our communities. However, LGBTIQ+ people have many intersecting identities and experiences and we support extending protections to all people who experience discrimination, harassment and vilification, and need these legal protections.

In this preliminary submission, we have not addressed the reforms necessary to the anti-vilification protections in NSW to ensure that they work effectively. We are currently preparing a submission to the Victorian Government consultation on anti-vilification protections in Victoria that we will provide to the Commission when it is completed. We expect it to recommend extensive changes to the way that anti-vilification and anti-hate protections are framed and enforced in Victoria and it may help inform your work in NSW.

Finally, we would be very willing to meet with and discuss our preliminary submission with the New South Wales Law Reform Commission to help inform your research and deliberations, answer your questions and point you towards case studies that illustrate the existing issues in the NSW anti-discrimination framework. Our submission is not intended to be comprehensive or the final word on the reforms which may be necessary in NSW, but we wanted to provide it to you in a timely way to help inform your research and deliberations.

PROTECTING ALL LGBTIQ+ PEOPLE FROM DISCRIMINATION

DISCRIMINATION BASED ON SEXUAL ORIENTATION, GENDER IDENTITY AND SEX CHARACTERISTICS

The Act currently uses outdated definitions of 'homosexuality' and 'transgender status'.[1] These definitions exclude bisexual and asexual people from protections based on sexuality, and non-binary people from protections based on gender identity, among others. In addition, there are currently no separate protections in the Act to protect intersex people from discrimination.[2]

Most other states and territories have now either updated, or are currently considering updating, their definitions to be more inclusive.[3] The Independent Member for Sydney Alex Greenwich MP has introduced a Bill proposing amendments to the Act which would extend protections to bisexual, asexual, non-binary and intersex people until the Act can be properly amended.[4] However, our recent experience of reforms in Victoria, the Northern Territory, Queensland, Western Australia and the ACT have shown the need for a thorough understanding of the LGBTIQ+ population and anti-discrimination law when seeking to define the protected attributes relating to LGBTIQ+ people.

For the reasons we set out below, we recommend amending the Act or ensuring that any future NSW anti-discrimination law protects all LGBTIQ+ people from discrimination by including protections for the following attributes:

- sexual orientation; and
- gender identity and expression; and
- sex characteristics or variations of sex characteristics.

Care should be taken in how these attributes are defined as there have been significant issues (including in cases we have been involved with) in how to apply these definitions in practice, particularly where anti-discrimination laws a require a comparison to be made between those with and without a particular attribute or based on comparing different circumstances. Some of these difficulties will be resolved by simplifying the definitions of discrimination (*see below*), but it is important that the following principles are considered:

- first, definitions of sexual orientation, gender identity and variations of sex characteristics / sex characteristics must protect the diversity within the broader LGBTIQ+ population, recognising that each of these attributes protects different

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[1] *Anti-Discrimination Act 1977* (NSW) ss 4, 38A(a)-(c).

[2] There is arguably a protection for people of 'indeterminate sex' under the definition of transgender status, which is an inappropriate conflation of two different (yet sometimes overlapping) populations.

[3] *Equal Opportunity Act 2010* (Vic) s 4 (definitions of 'sex characteristics', 'sexual orientation' and 'gender identity'); *Discrimination Act 1991* (ACT) Dictionary (definitions of 'sex characteristics', 'sexual orientation' and 'gender identity'); *Anti-Discrimination Act 1992* (NT) s 4 (definitions of 'sex characteristics', 'sexual orientation' and 'gender identity'); *Anti-Discrimination Act 1991* (Qld) Schedule 1 (definitions of 'sex characteristics' and 'gender identity' as updated by the *Births Deaths and Marriages Registration Act 2023* (Qld) s 157). See also Queensland Human Rights Commission (2022) *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (***Building Belonging Report***), recs 22, 23 and 28 and at 272-285, 312-315; Law Reform Commission of Western Australia (2022) *Review of the Equal Opportunity Act 1984 (WA) Project 111 Final Report* (***LRCWA Report***), recs 27-30, 52-54 and at 78-82, 113-117.

[4] Equality Legislation Amendment (LGBTIQA+) Bill 2023 (NSW), Schedule 1.

aspects of a person and that LGBTIQ+ people are not a homogenous group. We address this further below;

- second, definitions of 'sex', 'women' and 'men' (if these terms are used or defined at all) must be inclusive of gender diversity, including recognising trans men and women consistently with their gender identity and ensuring non-binary and other gender diverse people are not excluded from protections through legislation that uses binary gendered language.

Depending on the definition of discrimination that the Commission proceeds with, we would be happy to provide you with further submissions on an appropriate definition of sexual orientation, gender identity and sex characteristics, as current federal, state and territory definitions each have shortcomings and advantages. For example:

- Victoria adopted the definition of 'sexual orientation' in the *Yogyakarta Principles*, leaving it unclear whether asexuals were protected and requiring the Victorian Attorney-General to confirm during parliamentary debate that it was the Government's intention that the definition included asexuality.
- The definitions of 'sex' and 'gender identity' in the Commonwealth *Sex Discrimination Act 1984* (Cth) are currently the subject of litigation testing their application to transgender women.

We would like to see these issues avoided by thorough consultation with people who have expertise in anti-discrimination law and their application to LGBTIQ+ populations. Below are some important principles to bear in mind.

The need for multiple attributes to protect the LGBTIQ+ population

It is important to include separate attributes that cover each of the subpopulations falling within the broader LGBTIQ+ population.

The LGBTIQ+ population includes:

- lesbians, gay men, bi+ and queer people whose sexual orientation is defined by the gender(s) to whom they are emotionally, romantically or sexually attracted;
- asexual and aromantic people whose sexual orientation is defined by varying degrees of romantic or sexual attraction (or lack of attraction) to other people;
- trans and gender diverse people whose gender differs from the one presumed for them at birth, and which includes people who identify as male or female, non-binary, agender and genderfluid, among other gender identities;
- intersex people who have innate variations of physical sex characteristics (such as chromosomal, hormonal or genital variations) that do not conform to medical or social norms for male or female bodies.

People within the broader LGBTIQ+ population may belong to one or more of these subpopulations, depending on their gender, whether they were born with a variation of physical sex characteristics and the genders to whom they are attracted or intimately involved, if attracted to or intimately involved with others at all. That is why separate attributes are used in most federal, state and

territory laws to cover these different aspects of personality. These attributes also recognise that different forms of prejudice, such as homophobia, biphobia, transphobia and discrimination against intersex people, can manifest in different ways, and people who belong to more than one subpopulation may experience intersectional forms of discrimination. For example, a trans woman who is attracted to women may experience discrimination in the provision of services both on the basis of her transgender status and because she is attracted to women.

Gender and gender experience

Many anti-discrimination laws treat 'sex' and 'gender identity' as two different attributes. This led to legal uncertainty regarding the meaning of the attribute of 'sex' and may also have narrowed the discrimination protection given by the ground of 'sex', particularly for women who are trans or intersex. Another legal issue which has arisen is how the attribute of 'gender identity' applies as between cis and trans people who have the same gender identity, particularly when discrimination laws require a comparison to be made between the group with and without the attribute.

There is at least one case before the courts currently considering the legal definition of 'sex' and the application of the attribute of 'gender identity' to transgender women for the purposes of Commonwealth anti-discrimination law,[5] and our view is that the Western Australian Law Reform Commission erred when it assumed that the attribute of 'sex' in Western Australian anti-discrimination law means a person's biological sex at birth.[6] This issue has not been properly tested and multiple authorities in other contexts suggest that the legal concept of 'sex' may not be limited to a person's biological sex assigned at birth when considering the purposes of the legislation in question.[7] The position in NSW under the NSW Act is even less clear, given the Act uses binary gendered language[8] and appears to suggest that only so-called 'recognised' transgender people become treated as members of the same sex as they identify.[9]

In our view, NSW anti-discrimination laws should recognise one inclusive attribute of 'sex' or 'gender', but not both, and a different attribute of 'gender identity' or 'gender experience', that protects people whose gender is different to the one presumed for them at birth. One attribute should

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[5] *Roxanne Tickle v Giggle for Girls Pty Ltd*, Federal Court of Australia, NSW Registry (NSD1148/2022).

[6] Law Reform Commission of Western Australia (2022) *LRCWA Report*, at 113.

[7] A number of authorities have considered the legal definitions of 'sex', 'man' and 'woman' in other legislative contexts, and each has arrived at a position that has rejected the idea of a person's sex being defined solely by biological characteristics observed at birth. For example, see:

- *R v Harris* (1988) 17 NSWLR 158 at 193-194 (Mathews J; Street CJ agreeing). Mathews J (Street CJ agreeing) expressly reject an approach which would regard "biological factors as entirely secondary to psychological ones": at 193 (concerning whether a trans woman was a 'male person' for the purposes of a sexual offence);
- *Secretary, Department of Social Security v SRA* (1993) 43 FCR 299 at 304-305 (Black CJ; Heerey J agreeing), 325-326 (Lockhart J; Heerey J agreeing) (concerning a social security payment);
- *Kevin v Attorney-General (Cth)* (2001) 165 FLR 404 at 475 [329] (Chisholm J), affirmed on appeal in *Attorney-General (Cth) v Kevin* (2003) 172 FLR 300 (concerning whether the meaning of 'man and woman' for the purposes of marriage);
- *AB v Registrar of Births, Deaths and Marriages* (2007) 162 FCR 528 at 531 [4] (considering whether a trans woman is a woman for the purposes of the Western Australia's gender recognition legislation);
- *Attorney-General for NSW v FJG* [2023] NSWCA 34, [71] per Beech-Jones JA with whom Bell CJ and Ward P agreed (in which the court recognised that a person's sex is statutory concept which could have three different meanings in three different statutes which have changed over time).

See also *Registrar of Births Deaths and Marriages (NSW) v Norrie* (2014) 250 CLR 490 and *AB v Western Australia* (2011) 244 CLR 390.

[8] For example, references are made to 'men and women' and people of the 'opposite' (rather than a different) sex.

[9] See e.g., *Anti-Discrimination Act 1977* (NSW), ss 31A(4), 38B(1)(c).

address gender-based discrimination (including characteristics appertaining or imputed to gender), and one attribute should address transgender-based discrimination based on whether a person's gender and gender expression is different to the one assigned for them at birth. These attributes will overlap to some degree, in the same way that gender discrimination and discrimination based on pregnancy, breastfeeding and family responsibilities can overlap.

Sex characteristics

The attribute protecting intersex people from discrimination is defined variously as 'intersex status', 'sex characteristics' and 'variations of sex characteristics' in different laws.

The peak intersex human rights organisation in Australia, Intersex Human Rights Australia, prefers 'sex characteristics' as the protected attribute because it applies to everyone and does not suggest that intersex people have a separate identity or identify other than male or female simply because of their intersex variation. If the comparator test is removed from the definition of discrimination, we would be comfortable with this approach.

Alternatively, Tasmania has taken the approach of protecting intersex people through a specific 'variations of sex characteristics' attribute, which operates in addition to the attribute of gender that extends to characteristics associated or imputed to gender. We can see merit with this approach given it may make it easier to prove intersex discrimination and a characteristics extension to the sex/gender attribute would already include discrimination based on sex characteristics.

Sexual orientation

Some states and territories, including Victoria and the Northern Territory, have moved to define 'sexual orientation' by reference to the *Yogyakarta Principles*.

One of the issues that emerged during the parliamentary debate in Victoria that introduced this definition was whether or not the definition would adequately protect asexual and aromantic people who have limited or no romantic or sexual attraction to other people.[10] The Northern Territory amended its definition of 'sexual orientation' to refer to a person's 'capacity for' sexual and romantic attraction, to address this issue explicitly.[11]

Other jurisdictions, such as the ACT, have taken a different approach to ensuring the attribute relating to 'sexual orientation' is inclusive. The ACT defines 'sexuality' as *including* heterosexuality, homosexuality and bisexuality.[12] The use of the term '*includes*' replaced a previously exhaustive definition limited *only to* heterosexuality, homosexuality and bisexuality.[13]

The main benefit of the ACT approach is its simplicity: people know what it is getting at. Meanwhile, the main benefit of the Yogyakarta Principles approach is its more expansive description of 'sexual orientation' that does not assume particular labels, and therefore speaks to different cultural

[10] Victoria, *Parliamentary Debates*, Legislative Council, 4 February 2021, 247, 303 (Samantha Ratnam).

[11] *Anti-Discrimination Act 1992* (NT), s 4(1) (definition of 'sexual orientation').

[12] *Discrimination Act 1991* (ACT) Dictionary (definition of 'sexuality').

[13] See *Justice Legislation Amendment Act 2020* (ACT) s 65.

understandings of sexuality. We suggest integrating the benefits of both definitions by defining 'sexual orientation' as follows:

> ***sexual orientation*** *means each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of the same gender, a different gender or more than one gender, and includes heterosexuality, homosexuality, bisexuality and asexuality.*

ADDITIONAL PROTECTED ATTRIBUTES

LGBTIQ+ people have intersecting identities and attributes. Accordingly, we would support expanding the discrimination protections afforded to people based on other attributes as many states and territories have done.

In addition to the attributes already recognised in NSW, some attributes which may be relevant to LGBTIQ+ people include:

- irrelevant criminal record;
- expunged historical homosexual convictions – discrimination based on historical offences expunged under NSW, interstate or overseas laws comparable to Part 4A of the *Criminal Records Act 1991* (NSW);
- irrelevant medical history;
- genetic characteristics;
- lawful sexual activity;
- domestic and family violence;
- sex work; and
- religious belief and activity (including having no belief or not engaging or refusing to engage in religious activity) – and provided these protections are properly defined and exemptions do not allow LGBTIQ+ discrimination by another form;
- political belief or affiliation (including holding or not holding a political belief or view).

ATTRIBUTE EXTENSIONS

Consistent with laws in other states and territories (and, to an extent, in NSW), all protected attributes should have the following extensions of protection:

- protections for personal associates (e.g. protection for children who are discriminated against because of the sexual orientation of their parents);[14]

[14] E.g., *Anti-Discrimination Act 1977* (NSW) ss 38B(1) (transgender status), 49ZG(1) (homosexuality). Anti-discrimination legislation in other states and territories include personal associates as its own protected attribute, see: *Discrimination Act 1991* (ACT) s 7(1)(c); *Equal Opportunity Act 2010* (Vic) s 6(q); *Anti-Discrimination Act 1991* (Qld) s 7(p); *Anti-Discrimination Act 1992* (NT) s 19(1)(r); *Anti-Discrimination Act 1998* (Tas) s 16(s).

- protections for people with presumed protected attributes;[15]
- protections for past or future protected attributes (as relevant);[16]
- protections for characteristics generally associated with or generally imputed to each protected attribute (e.g. stereotypes generally associated with a particular attribute).[17]

RECOMMENDATION 1

Subject to ensuring the definitions of discrimination do not import comparator tests (*see below*), ensure that NSW anti-discrimination law includes protections based on the following attributes:

- sexual orientation;
- gender identity (including expression);
- variations of sex characteristics and/or sex characteristics.

RECOMMENDATION 2

Ensure that sex- or gender-based discrimination protections in any future NSW anti-discrimination laws do not discriminate against trans and gender diverse people by ensuring the attribute of 'sex' or 'gender' does not import a gender binary and is not defined only by reference to assigned sex at birth.

RECOMMENDATION 3

In respect of all amendments to the Act or in any future NSW anti-discrimination law, ensure:

- inclusive terms are used wherever protections are intended to apply to all people or relationships regardless of gender (e.g. terms such as 'sibling' instead of 'brother or sister')
- terms such as 'different sex' are preferred over language importing a gender binary such as 'opposite sex'.

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[15] E.g., *Anti-Discrimination Act 1977* (NSW) ss 38A (transgender status), 49ZF (homosexuality). Protected attributes are extended to include presumed protected attributes across Commonwealth and state and territory anti-discrimination legislation, see: *Disability Discrimination Act 1992* (Cth) s 4 (definition of disability); *Discrimination Act 1991* (ACT) s 7(2)(e); *Equal Opportunity Act 2010* (Vic) s 7(2)(d); *Anti-Discrimination Act 1991* (Qld) s 8(c); *Anti-Discrimination Act 1992* (NT) s 20(2)(a); *Anti-Discrimination Act 1998* (Tas) ss 14(2), 15(1)(a); *Equal Opportunity Act 1984* (SA) 29(3)(c) (presumed sexual orientation and intersex status only). See also Law Reform Commission of Western Australia (2022) *LRCWA Report*, rec 14 and at 65-66.

[16] E.g., *Anti-Discrimination Act 1977* (NSW) ss 49A (disability), 49S(2)(c)-(d) (responsibilities as a carer). The position in respect of past and future attributes is inconsistent across anti-discrimination laws at both the Commonwealth level as well as across state and territories, with only some attributes extended to past and future attributes. The Law Reform Commission of Western Australia made recommendations that protected attributes should include both past and future attributes. This recommendation has been broadly accepted by the Western Australian Government. See: Law Reform Commission of Western Australia (2022) *LRCWA Report*, rec 14 and at 65-66. The Hon John Quigley, Attorney General (2022) 'WA's anti-discrimination laws set for overhaul', 16 August.

[17] E.g., *Anti-Discrimination Act 1977* (NSW) ss 7(2) (race), 24(1A)-(1C) (sex, incl. breastfeeding and pregnancy), 38B(2) (transgender status). Anti-discrimination in other states and territories include protections for characteristics associated with or imputed to persons with attributed within the definition of discrimination under the act, see: *Discrimination Act 1991* (ACT) ss 7(2)(a)-(b); *Equal Opportunity Act 2010* (Vic) ss 7(2)(b)-(c); *Anti-Discrimination Act 1991* (Qld) ss 8(a)-(b); *Anti-Discrimination Act 1992* (NT) ss 20(2)(b)-(c); *Anti-Discrimination Act 1998* (Tas) ss 14(2), 15(1)(b).

RECOMMENDATION 4

The Commission should consider additional attributes to be included in the Act or in any future NSW anti-discrimination law. These require careful consideration to ensure the definition and any necessary exemptions work as intended.

In addition to the existing attributes, the following should be considered:

- irrelevant criminal record;
- expunged historical homosexual convictions;
- irrelevant medical history;
- genetic characteristics;
- lawful sexual activity;
- domestic and family violence;
- sex work;
- religious belief and activity (including having no belief or not engaging or refusing to engage in religious activity);
- political belief or affiliation (including holding or not holding a political belief or view).

RECOMMENDATION 5

Ensure discrimination protections based on protected attributes extend to:

- the personal associates of a person with a protected attribute;
- characteristics imputed to or generally appertaining to the attribute;
- presumed, past and future attributes (as relevant).

REMOVING UNFAIR RELIGIOUS AND PRIVATE EDUCATION INSTITUTION EXEMPTIONS

The Act is replete with exemptions that leave people who have suffered discrimination with insufficient protections. For LGBTIQ+ people, the exemptions which are most concerning include:

- sections 38C(3)(c), 38K(3), 49ZH(3)(c) and 49ZO(3) which provide private educational institutions with exemptions that allow them to discriminate against applicants or employees and students on the basis of transgender status or homosexuality;[18]
- section 56(c) which allows religious bodies to discriminate in the appointment of any person in any capacity; and
- section 56(d) which provides a broad exemption in respect of any other act or practice of a religious body that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

In respect of the exemptions for private schools, NSW is an outlier in that the exemptions are available to all private educational institutions. These exemptions should simply be removed from the Act and not included in any future NSW anti-discrimination law.

The religious exemptions under ss 56(c)-(d) apply to any body that is established to propagate religion. These provisions have been interpreted broadly to include, for example, faith-based agencies like Wesley Dalmar that provide state-sanctioned assessment for foster care.[19] There are no equivalent provisions to s 56(c) in any other state or territory laws,[20] and whilst other state and territory laws do have similar provisions to that of s 56(d), those provisions are limited in their application.[21]

Over the last few years Equality Australia has supported many people who have experienced discrimination based on their sexual orientation or gender identity, or because they have affirming religious beliefs concerning sexuality or gender. Among these people are teachers who have lost their jobs, students who have been denied leadership opportunities or who have been forced to move schools, and parents who have been unhappy about religious schools requiring them or prospective staff to affirm discriminatory views about LGBTIQ+ people as conditions of employment or enrolment.[22] These stories must inform not only the narrowing of religious exemptions in the current NSW Act but must also shape the contours of any religious exemptions in a future law that protects

[18] Exemptions also apply to the attributes of sex, martial or domestic status, disability and age.

[19] *OV v QZ (No. 2)* [2008] NSWADT 115 at [68]-[79] (overturned on appeal, but on different grounds); *OV & OW v Members of the Board of the Wesley Council* [2010] NSWCA 155 at [32]; *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293 at [30], [34].

[20] Note: South Australia also has an exception allowing discrimination in relation to the administration of a body established for religious purposes in accordance with the precepts of that religion: s 50(1)(ba). However, this exception is different to s 56(c) and the former Liberal South Australian government was committed to its repeal and replacement with a religious practice exception similar to other states and territories.

[21] See *Equal Opportunity Act 2010* (Vic) ss 39, 61, 82A, 83, 84; *Discrimination Act 1991* (ACT) s 32, 33B, 33C (as amended by *Discrimination Amendment Act 2023* (ACT) ss 9, 10); *Anti-Discrimination Act 1992* (NT) ss 35A, 37A, 40(3)-(6) (as amended by *Anti-Discrimination Amendment Act 2022* (NT) ss 16-18); *Anti-Discrimination Act 1998* (Tas) Pt 5, Div 8. See also Queensland Human Rights Commission (2022) *Building Belonging Report*, rec 38 and at 378; Law Reform Commission of Western Australia (2022) *LRCWA Report*, recs 76-77 and at 176-177.

[22] Some recent case studies are contained in our submission to the Australian Human Rights Commission inquiry into Religious Educational Institutions and Anti-Discrimination Laws. See Equality Australia (2023) *A Simple Ask for Dignity and Respect: Equality Australia's submission to the Australian Law Reform Commission Inquiry into Religious Educational Institutions and Anti-Discrimination Laws* , Sydney at 5-8.

against discrimination based on religious beliefs or activities. We know from the experiences of people who have contacted our office that LGBTIQ+ discrimination is sometimes framed as discrimination based on sexual orientation or gender identity – or more commonly now, discrimination against people who believe that LGBTIQ+ people are whole and valid just as they are.

Based on our experience of recent cases of discrimination against LGBTIQ+ people and the people who support us, in our view:

- there should be no religious exemptions applying to the attributes of sexual orientation, gender identity and sex characteristics in employment, education or the provision of goods, services, facilities or accommodation to the public;
- in respect of any future protected attribute of religious belief or activity, there should be a limited exemption applying to religious bodies only in circumstances where religion is relevant to a role or the service in question, and the discrimination would be reasonable and proportionate in all the circumstances of the case;
- there can be targeted religious exemptions for religious leaders, the education of religious leaders, and for the purposes of participation in religious practice or observances (similar to those in most federal, state and territory laws), consistent with international human rights law.

Religious exemptions of this kind would be in line with recent reforms and recommendations at the state and territory level.[23] We have made many submissions in recent years on the harm caused by religious exemptions to LGBTIQ+ people and their loved ones, which are attached to this submission. We recommend that any future anti-discrimination laws in NSW address this long-standing gap in protections for LGBTIQ+ people and their families.

RECOMMENDATION 6

All exemptions only available to private educational authorities should be removed from the Act and not included in any future NSW anti-discrimination law.

[23] See, above n21.

RECOMMENDATION 7

The Act should be amended and any future NSW anti-discrimination law should ensure that:

- there are no exemptions that allow religious bodies to discriminate on the basis of sexual orientation, gender identity and variations in sex characteristics/sex characteristics in employment, education or the provision of goods, services, facilities or accommodation to the public;
- if religious belief or activity is added as a protected attribute, then any exemption applying to religious bodies should be limited to where religion is relevant to a role or the service in question and where it would be reasonable and proportionate in the circumstances of the case;
- targeted religious exemptions for religious leaders, the education of religious leaders, and for the purposes of participation in religious practice or observances are consistent with international human rights law.

ADDRESSING OUTLIERS IN NSW DISCRIMINATION LAW

ADOPTION SERVICES (SECTION 59A)

Section 59A was introduced into the Act to coincide with adoption equality for same-sex couples, when two of the four adoption agencies in NSW – Anglicare and CatholicCare (now Family Spirit) – threatened to withdraw their adoption services if they were required to facilitate adoption to same-sex couples.[24]

Anglicare and Family Spirit continue to discriminate based on sexual orientation or marital status in their adoption eligibility requirements, meaning same-sex and unmarried couples have fewer agencies willing to assess their eligibility for adoption and offer relinquishing parents the broadest choice of potential parents for their child.[25]

For these reasons, we suggest repealing s 59A from the Act entirely and not introducing a similar provision in any future NSW anti-discrimination law.

TRANSGENDER INCLUSION IN SPORT (SECTION 38P)

The exception allowing discrimination in sport against transgender people is broader than comparable laws, including under Commonwealth laws.[26]

We suggest amending s 38P (or replacing this exemption in any future anti-discrimination law) with a narrower exemption that:

- prohibits discrimination against children under 12 years old (consistent with Commonwealth, Victorian, Queensland, the Northern Territory and Tasmanian law);[27]
- limits the exemption to competitive sporting activities, rather than any sporting activity (consistent with Commonwealth, Victorian, Queensland, Western Australian, South Australian, the Northern Territory, Tasmanian and ACT law);[28]
- ensures the exemption does not apply to umpiring or refereeing (consistent with Commonwealth, Victorian, Queensland, Western Australian, the Northern Territory, Tasmanian and ACT law);[29]

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[24] NSW Standing Committee on Law and Justice (2009) *Adoption by same-sex couples*, at [6.43]-[6.52].

[25] See, for example: Eligibility and fees (anglicare.org.au).

[26] See, for example: *Sex Discrimination Act 1984* (Cth), s 42; *Equal Opportunity Act 2010* (Vic), s 72; *Anti-Discrimination Act 1991* (QLD), s 111; *Equal Opportunity Act 1984* (WA), s 35; *Equal Opportunity Act 1984* (SA), s 48; *Anti-Discrimination Act 1992* (NT), s 56; *Anti-Discrimination Act 1998* (Tas), s 29; *Discrimination Act 1991* (ACT), s 41.

[27] *Sex Discrimination Act 1984* (Cth), s 42(2)(e); *Equal Opportunity Act 2010* (Vic), s 72(3); *Anti-Discrimination Act 1991* (QLD), s 111(2); *Anti-Discrimination Act 1992* (NT), s 56(2); *Anti-Discrimination Act 1998* (Tas), s 29.

[28] *Sex Discrimination Act 1984* (Cth), s 42(1); *Equal Opportunity Act 2010* (Vic), ss 72(1)-(2); *Equal Opportunity Act 2010* (Vic), ss 72(1)-(2); *Anti-Discrimination Act 1991* (QLD), s 111(1); *Equal Opportunity Act 1984* (WA), s 35(1); *Equal Opportunity Act 1984* (SA), s 48; *Anti-Discrimination Act 1992* (NT), s 56(1); *Anti-Discrimination Act 1998* (Tas), s 29; *Discrimination Act 1991* (ACT), s 41(1).

[29] *Sex Discrimination Act 1984* (Cth), s 42(1); *Equal Opportunity Act 2010* (Vic), ss 72(1)-(2); *Equal Opportunity Act 2010* (Vic), ss 72(1)-(2); *Anti-Discrimination Act 1991* (QLD), s 111(1); *Equal Opportunity Act 1984* (WA), s 35(1); *Equal Opportunity Act 1984* (SA), s 48; *Anti-Discrimination Act 1992* (NT), s 56(1); *Anti-Discrimination Act 1998* (Tas), s 29; *Discrimination Act 1991* (ACT), s 41(1).

- adds a requirement that any exclusion only be permitted to the extent that the strength, stamina or physique of competitors is relevant and reasonable and proportionate in all the circumstances of the case (building upon the approach taken under Commonwealth, Victorian, Queensland, Western Australian, South Australian, the Northern Territory and ACT law).[30] The reason for adding the proportionality requirement is to bring the exemption in line with international human rights law, and would also be consistent with the principles set out in Australian Sports Commission's *Transgender & Gender Diverse Inclusion Guidelines for High Performance Sport.*[31]

TRANSGENDER INCLUSION IN SUPERANNUATION (SECTION 38Q)

The Commonwealth *Sex Discrimination Act 1984* does not include an exemption allowing discrimination in superannuation on the basis of gender identity (nor do most other state or territory laws). Accordingly, it is already unlawful to discriminate against transgender people in superannuation in NSW under Commonwealth law.

Section 38Q should therefore be repealed, being inconsistent with federal law (and most comparable state and territory laws) and should not be included in any future NSW anti-discrimination law.

RECOMMENDATION 8

Sections 59A and 38Q should be repealed from the Act, and not included in any future NSW discrimination law.

RECOMMENDATION 9

Sections 38P of the Act and any transgender sports exemption in a future NSW discrimination should:

- not apply to children under 12 years or to umpiring or refereeing; and
- only apply to competitive sporting activities to the extent that the strength, stamina or physique of competitors is relevant and the exclusion is reasonable and proportionate in all the circumstances of the case.

[30] *Sex Discrimination Act 1984* (Cth), s 42(1); *Equal Opportunity Act 2010* (Vic), ss 72(1); *Anti-Discrimination Act 1991* (QLD), ss 111(1)(a) and (3); *Equal Opportunity Act 1984* (WA), s 35(1); *Equal Opportunity Act 1984* (SA), s 48(a); *Anti-Discrimination Act 1992* (NT), s 56(1)(a); *Discrimination Act 1991* (ACT), s 41(1).

[31] Australian Sports Commission (2023) *Transgender & Gender Diverse Inclusion Guidelines for High Performance Sport* at 6-8.

IMPROVEMENTS TO THE OVERALL DISCRIMINATION FRAMEWORK

The underlying legal infrastructure of the Act needs a significant overhaul. In this section, we address fundamental issues with the infrastructure of the Act as a whole, which should be addressed in any future NSW anti-discrimination law.

SIMPLER DEFINITIONS OF DISCRIMINATION

The current definitions of 'direct' and 'indirect' discrimination in the Act are complex and out of date with best practice definitions in other federal, state and territory laws. They make it difficult for people who experience discrimination to seek a remedy, particularly if intersectional forms of discrimination are alleged.

For example:

- the current definition of 'direct discrimination' requires complaints to prove their treatment was less favourable than a comparator in the same or materially similar circumstances.[32] This introduces significant uncertainty and legal complexity in how a complaint of direct discrimination is framed. The ACT and Victoria have both removed the comparator test from their definitions of direct discrimination, preferring a simpler *"because of"* test.[33] The ACT also clarifies that discrimination can be framed on a combination of attributes e.g. age *and* gender.[34] The Queensland Human Rights Commission and Western Australian Law Reform Commission have made similar recommendations for reform in Queensland and Western Australia, which have been broadly accepted by state governments working on these reforms.[35]
- to establish indirect discrimination, the Act requires complainants to prove that they are unable to comply with a requirement, condition, or practice with which a 'higher proportion' of people without the attribute are able to comply.[36] The inability to comply and higher proportion tests are out of step with contemporary definitions of indirect discrimination. The ACT, Victoria, Tasmania and the Commonwealth *Age Discrimination Act* and *Sex Discrimination Act* have implemented a 'disadvantaging' test, which involves considering of whether an requirement, condition or practice has, or is likely to have the effect of disadvantaging people with the protected attribute.[37] The Queensland Human Rights Commission and Western Australian Law Reform Commission have made similar

[32] *Anti-Discrimination Act* (NSW) ss 7(1)(a), 24(1)(a), 38B(1)(a), 39(1)(a), 49B(1)(a), 49T(1)(a), 49ZG(1)(a), 49ZYA(1)(a).

[33] *Discrimination Act 1991* (ACT) s 8(2); *Equal Opportunity Act 2010* (Vic) s 8(1). See also *Slattery v Manningham CC (Human Rights)* [2013] VCAT 1869 at [51]-[53]; *Tsikos v Austin Health* [2022] VSC 174 at [47] where the Supreme Court of Victoria endorsed the decision in *Slattery*.

[34] *Discrimination Act 1991* (ACT) ss 8(2)-(3).

[35] Queensland Human Rights Commission (2022) *Building Belonging Report*, recs 3.1-3.3 and at 88-95; Queensland Government (2022) *Final Queensland Government response to the Queensland Human Rights Commission's report, Building belonging: Review of Queensland's Anti-Discrimination Act 1991*, items 3.1-3.3; Law Reform Commission of Western Australia (2022) *LRCWA Report*, recs 5 and 13 and at 52-55, 63-64; The Hon John Quigley, Attorney General (2022) 'WA's anti-discrimination laws set for overhaul', 16 August.

[36] *Anti-Discrimination Act* (NSW) ss 7(1)(c), 24(1)(b), 38B(1)(b)-(c), 39(1)(b), 49B(1)(b), 49T(1)(b), 49ZG(1)(b), 49ZYA(1)(b).

[37] See *Discrimination Act 1991* (ACT) s 8(3); *Equal Opportunity Act 2010* (Vic) s 9(1)(a); *Anti-Discrimination Act 1998* (Tas) s 15(1); *Age Discrimination Act 2004* (Cth) s 15(1)(c); *Sex Discrimination Act 1984* (Cth) s 7B(1).

recommendations for reform in Queensland and Western Australia, which have been broadly accepted by state governments working on these reforms.[38]

HARASSMENT

Whilst the Act currently only provides protections against sexual harassment,[39] harassment based on other protected attributes may be recognised as a form of discrimination under the Act.[40] At the Commonwealth level, the *Sex Discrimination Act 1984* (Cth) and *Disability Discrimination Act 1992* (Cth) provide separate harassment protections based on sex, sexual harassment, and disability respectively.[41] Western Australia, Tasmania and the Northern Territory also have protections against harassment based on protected attributes, in addition to sexual harassment, in their discrimination laws.[42] These protections may make it simpler to bring a discrimination case when it only involves harassment, avoiding the need to rely on the more complex definitions of discrimination.

When comparing the results of the 2012 *Private Lives 2* and 2020 *Private Lives 3* studies, it appears that there has been an increase in the proportion of people who have experienced violence and harassment due to their sexual orientation or gender identity.[43] The latest *Private Lives* study showed that around 1 in 4 LGBTIQ people experienced harassment (such as being spat at or offensive gestures) in the past 12 months because of their sexual orientation or gender identity.[44] Among young same sex attracted and gender questioning young people, the *Writing Themselves In 3* report shows that 61% have experienced verbal abuse and 18% have experienced physical abuse, with 80% of all abuse reported having occurred at school.[45] This data suggests that standalone harassment protections would help reinforce that harassment in public life constitutes a form of discrimination.

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[38] Queensland Human Rights Commission (2022) *Building Belonging Report*, rec 3.5 and at 96-101; Queensland Government (2022) *Final Queensland Government response to the Queensland Human Rights Commission's report, Building belonging: Review of Queensland's Anti-Discrimination Act 1991*, item 3.5; Law Reform Commission of Western Australia (2022) *LRCWA Report*, rec 9 and at 57-58; The Hon John Quigley, Attorney General (2022) 'WA's anti-discrimination laws set for overhaul', 16 August.

[39] See *Anti-Discrimination Act* (NSW) Pt 2A.

[40] See *Hall v A & A Sheiban Pty Ltd* (1988) 20 FCR 180 at [235], [250] (per Wilcox J); *O'Callaghan v Loder* [1983] 3 NSWLR 89 at [92]; *Elliot v Nanda* (2001) 111 FCR 240 at [107]-[110]; *Daniels v Hunter Water Board* (1994) EOC at [92]-[626]; *Qantas Airways v Gama* (2008) 157 FCR 537 at [73]-[78] (as per French and Jacobson JJ).

[41] *Sex Discrimination Act 1984* (Cth) ss 28A, 28AA; *Disability Discrimination Act 1992* (Cth) ss 35, 37, 39.

[42] See *Equal Opportunity Act 1984* (WA) ss 49A-49D (racial harassment); *Anti-Discrimination Act 1998* (Tas) s 17(1) (harassment based on race, age, sexual orientation, lawful sexual activity, gender identity, intersex variations, marital status, relationship status, pregnancy, breastfeeding, parental status, family responsibilities and disability); *Anti-Discrimination Act 1992* (NT) s 20(1)(b) (all protected attributes).

[43] Leonard et al (2012) *Private Lives 2: The second national survey of the health and wellbeing of gay, lesbian, bisexual and transgender (GLBT) Australians* (***Private Lives 2***), Melbourne: ARCSHS, La Trobe University at 47; Hill et al (2020) *Private Lives 3: The health and wellbeing of LGBTIQ people in Australia* (***Private Lives 3***) at 40. For example, 25.5% of participants in *Private Lives 2* reported verbal abuse, compared to 34.6% in *Private Lives 3;* 15.5% reported harassment such as being spat at or offensive gestures in *Private Lives 2*, compared to 23.6% in *Private Lives 3*; 2.9% reported sexual assault in *Private Lives 2*, compared to 11.8% in *Private Lives 3*; and 1.8% reported experiencing a physical attack or assault with a weapon in *Private Lives 2*, compared to 3.9% in *Private Lives 3*. While the surveys each asked slightly different questions which makes it difficult to draw direct comparisons, this data suggests an increase in the proportion of LGBTIQ people reporting recent experiences of violence and harassment based on their sexual orientation (and in 2020 also based on their gender identity).

[44] Hill et al (2020) *Private Lives 3* at 40.

[45] Hillier et al (2010) *Writing Themselves In 3: The third national study on the sexual health and wellbeing of same sex attracted and gender questioning young people*, Melbourne: ARCSHS, La Trobe University at 39.

STATE LAWS AND PROGRAMS

The Act does not protect people against discrimination in the administration of state laws and programs, other than in the area of sexual harassment.[46] This leaves a gap in protection where powers or discretions are exercised in discriminatory ways in contexts where it is not possible to identify the provision of a service (such as in the exercise of police powers).[47]

All federal anti-discrimination laws prohibit discrimination in the administration of laws and programs, as do a number of state and territory laws, such as in the exercise of powers or functions under a state law.[48] Equality Australia has recently relied on such provisions to bring a complaint under the *Sex Discrimination Act 1984* (Cth) in relation to failure to properly collect data from LGBTIQ+ people in Census 2021.

POSITIVE DUTIES TO PREVENT DISCRIMINATION

The Act does not currently include positive duties requiring duty holders under the Act to take reasonable steps to prevent harassment, discrimination, vilification or victimisation. By contrast, under Commonwealth law, certain entities have a positive duty to prevent sex discrimination and sexual harassment in workplaces.[49] Victoria, the Northern Territory and the ACT have also introduced positive duties in their anti-discrimination framework and Queensland and Western Australia are currently considering similar reforms.[50]

Positive duties reduce the burden on individuals who experience discrimination by seeking to prevent discrimination before it happens. They would make a tangible difference where practices and policies could be reviewed to address systemic issues and eliminate unlawful discrimination before it happens.

SHIFTING THE BURDEN OF PROOF

A person who has been discriminated against often does not know the reason why they have been denied a job, opportunity or treated unfavourably. However, they currently have the burden of establishing all the elements to make out a case of direct discrimination.

In the UK, where a proceeding is brought for a contravention of the *Equality Act*, if a prima facie case has been found by the court, the court must hold that the contravention occurred, except where the respondent persuades the court otherwise.[51] This addresses the imbalance of knowledge when a person is treated unfairly but cannot show – without more evidence from the defendant – that

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[46] *Anti-Discrimination Act 1977* (NSW) s 22J.

[47] See *Commissioner of Police v Mohamed* [2009] NSWCA 432 cf *Robinson v Commissioner of Police, NSW Police Force* [2013] FCAFC 64.

[48] *Sex Discrimination Act 1984* (Cth) ss 26, 28L; *Disability Discrimination Act 1992* (Cth) s 29; *Racial Discrimination Act 1975* (Cth) s 10(1); *Age Discrimination Act 2004* (Cth) s 31; *Anti-Discrimination Act 1998* (Tas) s 22(1)(f); *Anti-Discrimination 1992* (NT) s 28(g); *Anti-Discrimination Act 1991* (Qld) s 101.

[49] *Sex Discrimination Act 1984* (Cth) s 47C.

[50] *Equal Opportunity Act 2010* (Vic) Part 3; *Anti-Discrimination Act 1992* (NT) Part 2A; *Discrimination Act 1991* (ACT) Part 9; Queensland Human Rights Commission (2022) *Building Belonging Report*, rec 15 and at 230; Queensland Government (2022) *Final Queensland Government response to the Queensland Human Rights Commission's report, Building belonging: Review of Queensland's Anti-Discrimination Act 1991*, items 15.1-15.3. Law Reform Commission of Western Australia (2022) *LRCWA Report*, recs 121, 125 and at 239, 241; The Hon John Quigley, Attorney General (2022) 'WA's anti-discrimination laws set for overhaul', 16 August.

[51] *Equality Act 2010* (UK) s 136; See also *Ayodele v Citylink Ltd & Anor* [2017] EWCA Civ 1913 at [93].

discrimination was a real reason for the unfavourable treatment. Reviews into Queensland and Western Australian anti-discrimination laws have made similar recommendations.[52]

COMPLAINTS PROCESS

Under the current Act, the complaints process is initiated by filing a complaint with the NSW Anti-Discrimination Board (**ADB**). If a complaint cannot be resolved following a conciliation conference, the ADB may then refer the matter to the New South Wales Civil and Administrative Tribunal (**NCAT**). This reflects the position in all other Australian jurisdictions where, except in Victoria,[53] an individual cannot go directly to a court or tribunal but must first lodge a complaint with the relevant agency.

However, reviews into the Queensland and Western Australian anti-discrimination laws have made recommendations that the complaints process should be more flexible, with a focus on dispute resolution.[54]

We support a complaints process that allows for more pathways for resolving complaints, including providing the ADB with a discretionary power allowing it to permit a complainant or respondent to take their complaint directly to a tribunal, where appropriate.

Additionally, we consider not-for-profit representative organisations that advocate for a particular group (such as a union, disability rights organisations or LGBTIQ community organisation) should be able to lodge representative complaints on behalf of their affected community. Such pathways are available to varying degrees under ACT law and recommended in Queensland and Western Australia.[55] This ensures systematic discrimination can be addressed other than through individual complaints.

COSTS PROTECTION

Where a discrimination complaint is brought in NCAT, each party to the proceedings in the Tribunal is to pay their own costs.[56] However, where a matter is appealed against a decision of the NCAT to the District or Supreme Courts, complainants may be liable for an adverse costs orders if they are ultimately unsuccessful.[57]

Discrimination complaints go to fundamental injustices and harms to dignity. For this reason, the usual costs recovery approach that might work well in a commercial dispute, or a dispute where monetary damages are likely to be higher or more readily calculable, are not appropriate in the discrimination context and discourage worthy complaints from people who have been discriminated against. Further, it still costs money to obtain legal advice and representation when someone has been discriminated against, and those costs are really part of the harm that the complainant has

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[52] Queensland Human Rights Commission (2022) *Building Belonging Report*, rec 13 and at 203; Law Reform Commission of Western Australia (2022) *LRCWA Report*, rec 97 and at 211-212.

[53] *Equal Opportunity Act 2010* (Vic) s 122.

[54] Queensland Human Rights Commission (2022) *Building Belonging Report*, recs 9.1-9.15 and at 165-172; Law Reform Commission of Western Australia (2022) *LRCWA Report*, recs 143, 152 and at 258-259, 266-268.

[55] *Discrimination Act 1991* (ACT) s 121A; Queensland Human Rights Commission (2022) *Building Belonging Report*, recs 11.1-11.4 and at 180-186; Law Reform Commission of Western Australia (2022) *LRCWA Report*, recs 135-140 and at 252-255.

[56] *Civil and Administrative Tribunal Act 2013* (NSW) s 60(1).

[57] Uniform Civil Procedure Rules 2005 (NSW) r 42.1.

suffered and would not have been incurred but for the discriminatory conduct. A model which requires successful complainants to bear their own costs, and worse, consider the risk of an adverse costs order if their matter is appealed beyond NCAT, is a barrier to justice.

We support a costs regime similar to section 1317AH of the *Corporations Act 2001* (Cth) for discrimination complaints. This would ensure that successful complainants can recover their reasonable legal costs while unsuccessful complainants are protected from adverse costs orders unless they have instituted the proceedings vexatiously or without reasonable cause or have caused the respondent to incur costs through unreasonable acts or omissions. This should apply throughout the life of the matter, including appeals.

This is sometimes referred to as an asymmetric costs regime and recognises that:

- a complainant is unlikely to be insured (while the respondent is likely to have insurance and/or greater financial resources);
- a complainant may have no choice but to proceed to court (particularly if the respondent has filed an appeal against an NCAT decision);
- a complainant is not always able to reliably predict the prospects of the claim at the outset, given information is often held by the respondent and the respondent decides what evidence they will lead in defence; and
- a respondent can significantly increase the risks of an adverse costs order on the complainant by offering a relatively modest settlement offer in an appeals process.

ENFORCEMENT POWERS AND REMEDIES

The current discrimination framework in NSW largely places the burden of policing compliance on the individuals most affected when that burden could be lessened by giving more powers to a regulatory agency to investigate a potential breach and take appropriate steps where a contravention has occurred. This is particularly important if a positive duty is to be introduced in NSW.

We recommend that the ADB (or a similar body) be given appropriate regulatory powers and funding to perform functions similar to other regulatory bodies, such as the Victorian Human Rights and Equal Opportunity Commission, where serious or systemic discrimination has occurred,[58] or where positive duties are in place. These functions should include:

- the power to undertake investigations, including compel the production of documents or information from witnesses;
- the power to enter enforceable undertakings;
- the power to issue lower-level fines as part of a compliance notice power; and
- the power to seek larger civil penalties from a court for failure to comply with the law or an enforceable undertaking.

[58] *Equal Opportunity Act 2010* (Vic) s 127.

These functions should be exercisable subject to standard duties to afford procedural fairness to all parties and should be appropriately reviewable by a court.

RECOMMENDATION 10

Either by amending the Act or in any future NSW anti-discrimination law, the definitions of direct and indirect discrimination should be made consistent with best practice, including:

- removing the comparator test for direct discrimination;
- implementing the disadvantage test for indirect discrimination; and
- ensuring discrimination based on a combination of attributes (intersectional discrimination) is recognised within the definitions of discrimination.

RECOMMENDATION 11

Standalone harassment protections should be introduced into the Act or included in any future NSW discrimination law for all protected attributes.

RECOMMENDATION 12

Protections against discrimination in the administration of state laws and programs should be introduced into the Act or included in any future NSW anti-discrimination law.

RECOMMENDATION 13

Either by amending the Act or in any future NSW anti-discrimination law, a positive duty to take all reasonable steps to eliminate discrimination, harassment, vilification and victimisation should be introduced that extends to all protected attributes, and to all duty holders wherever they have existing obligations.

RECOMMENDATION 14

Either by amending the Act or in any future NSW anti-discrimination law, the evidentiary burden in discrimination complaints should be reversed once a complainant has established a prima facie case of discrimination.

RECOMMENDATION 15

Either by amending the Act or in any future NSW anti-discrimination law, the complaints process should allow more pathways for resolving complaints, including:

- providing the ADB with a discretionary power allowing it to permit a complainant or respondent to take their complaint directly to NCAT, where appropriate; and
- allowing representative organisations to lodge complaints on behalf of their affected community.

RECOMMENDATION 16

Either by amending the Act or in any future NSW anti-discrimination law, a costs regime similar to section 1317AH of the *Corporations Act 2001* (Cth) should apply to discrimination complaints.

RECOMMENDATION 17

Either by amending the Act or in any future NSW anti-discrimination law, the regulatory body overseeing the discrimination framework should have sufficient funding and appropriate investigative and enforcement powers to proactively respond to instances of serious or systemic discrimination, including breaches of the positive duty.

A SIMPLE ASK FOR DIGNITY AND RESPECT:

EQUALITY AUSTRALIA'S SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION INQUIRY INTO RELIGIOUS EDUCATIONAL INSTITUTIONS AND ANTI-DISCRIMINATION LAWS

28 FEBRUARY 2023

CONTENTS

ABOUT EQUALITY AUSTRALIA

Equality Australia is a national LGBTIQ+ organisation dedicated to achieving equality for LGBTIQ+ people.

Born out of the successful campaign for marriage equality and established with support from the Human Rights Law Centre, Equality Australia brings together legal, policy and communications expertise, along with thousands of supporters, to address discrimination, disadvantage and distress experienced by LGBTIQ+ people.

www.equalityaustralia.org.au

We acknowledge that our offices are on the land of the Kulin Nation and the land of the Eora Nation and we pay our respects to their traditional owners.

EXECUTIVE SUMMARY

Everyone deserves to be treated with dignity and respect no matter where they work or study.

However, LGBTQ+ people and others in Australia can be legally discriminated against by religious educational organisations because of exemptions in federal anti-discrimination laws. Religious educational institutions use these legal carve-outs to fire, deny opportunities to and treat less favourably LGBTQ+ teachers, staff and students and the people who love or affirm us. Our submission begins with some recent cases where legal carve-outs for religious educational organisations have allowed this unfair treatment to continue.

FOUR OVERRIDING PRINCIPLES

We thank the Australian Law Reform Commission (**ALRC**) for its consultation paper and detailed work leading up to it. We are grateful for the opportunity to provide submissions on the proposals contained in the ALRC's Consultation Paper.

In responding to the ALRC's proposals, four overriding principles have underpinned our submission:

1. As significant employers and educators in Australia, religious educational institutions should comply with the same laws as other organisations, unless an exception can be justified in accordance with international human rights law.
2. LGBTQ+ people, alongside others who are protected by the *Sex Discrimination Act 1984* (Cth), should be protected from discrimination under law no matter in which educational institution they work or study.
3. No worker or student should lose protections as a result of the ALRC's recommendations, including that there can be no overriding of existing state and territory anti-discrimination protections.
4. The *Fair Work Act 2009* (Cth) should conform to the highest standard set by anti-discrimination laws in Australia to ensure the same rules apply regardless of the forum in which a person seeks a remedy for discrimination against them.

Accordingly, **we broadly support** most of the proposals put forward by the ALRC in the *Religious Educational Institutions and Anti-Discrimination Laws* consultation paper. We thank the ALRC for the detailed work it has done to put these proposals forward, having heard the clear evidence of ongoing discrimination against members of our communities. We also seek some improvements to some of these proposals, which we support.

However, **we do not support** proposals that would exempt curriculum content from the application of the *Sex Discrimination Act 1984* (Cth) or that would create a new right to terminate workers who *"undermine the ethos of the institution"*. That is because these new exceptions are unnecessary. They would also allow discrimination to occur through ill-defined concepts that hand power back to school administrators, allowing them to reintroduce discriminatory requirements into their policies and practices under a different guise.

GETTING THE DETAIL RIGHT

Our submission principally responds to the ALRC's 14 technical proposals because the detail of the proposed reform is critically important to achieving reforms that remove discrimination against LGBTQ+ people and others, which the Government has committed to protect from discrimination.

We also make some comments in respect of the general propositions expressed by the ALRC where we take issue, but caution that high level principles can obfuscate where the real issues lie. For example, language like "ethos" is used by religious educational institutions variously to mean very different things, some of which is worthy of protection and some of which is a means by which to hide discrimination against LGBTQ+ people and others.

As the following case studies demonstrate, discrimination is insidious and can be framed in a number of ways. That is why, discrimination based on religious belief must not be allowed to be used as a proxy for discrimination against people who affirm LGBTQ+ people, including LGBTQ+ people themselves.

Further, as a recent letter sent to the Commonwealth Attorney-General and released publicly also demonstrates, some religious educational institutions intend to use the federal laws to evade their obligations under state and

territory anti-discrimination laws.[1] The consequences of amending the *Sex Discrimination Act* and *Fair Work Act* on state and territory anti-discrimination frameworks must therefore be considered, and no overriding of state and territory laws should be permitted by the ALRC's recommendations.

A SIMPLE ASK FOR DIGNITY AND RESPECT

This is another inquiry that is putting LGBTQ+ people's lives up for public debate, when the ask has always been simple and the same.

Everyone deserves to be treated with dignity and respect no matter where they work or study. LGBTQ+ people are simply asking for the freedom to express who they are and whom they love, in a manner which is equal to their colleagues and peers, without adverse consequences for their employment or education.

We are asking the ALRC to be precise and principled in its recommendations and deliver us a pathway to realising that long-held aspiration of our community.

[1] "Religious schools in those States rely upon the current exemptions in section 38 of the Sex Discrimination Act and depend upon those exemptions overriding the State laws in order to maintain their religious ethos": Letter dated 13 February 2023 from Rt Reverend Dr Michael Stead, Anglican Bishop of South Sydney to The Hon Mark Dreyfus MP, Attorney-General.

UNDERSTANDING THE PROBLEM

1 in 3 students[2] and almost 2 in 5 staff[3] are enrolled or employed in non-government schools, most of which are religiously affiliated as part of the Catholic or independent school system.

Over the past few years, Equality Australia has supported many people who have experienced discrimination by faith-based educational institutions because of their sexual orientation, gender identity, or their religious beliefs about matters concerning sexual orientation or gender identity. We have provided an overview of the experiences of a few of these people below.

Their stories and experiences must guide the ALRC's recommendations so that reforms do not allow discrimination which has been permitted to continue, including under other guises or exemptions.

1. OBSERVATIONS ARISING FROM THE CASE STUDIES

The following cases demonstrate that:

- Discrimination by religious educational institutions may be framed based on a person's personal attributes, such as their sexual orientation or gender identity, or their religious beliefs about an attribute (such as whether they believe homosexuality is sinful or marriage can only be between a man and a woman). In this way, discrimination by religious educational institutions is not always directed at LGBTQ+ people, but also those who love and affirm us, such as our parents, children and allies who stand with us.
- Religious educational institutions may disguise discrimination in various ways, including through insistence on conformity with religious beliefs or doctrines regarding sexual orientation and gender identity which may be imposed through statements of belief, enrolment contracts or other policies. Discriminatory requirements may also be updated and imposed retrospectively on existing employees or students.
- Religious educational institutions go to great lengths to hide or deny their discrimination, meaning many communities of faith are not given a fair opportunity to show their opposition to continuing discrimination against LGBTQ+ people.
- When religious educational institutions talk about hiring people of their own faith, they can mean hiring people with discriminatory views on matters concerning sexual orientation or gender identity. Religious educational institutions may discriminate *among* people of the same faith where a person's views on matters concerning sexual orientation and gender identity do not align with those of administrators that control the school, even where those views are not shared by the broader school community.
- The extent and nature of the expression prohibited by religious educational institutions can be extreme, extending to very private aspects of life and deeply held personal and religious beliefs. The school's faith-based community may not get a say in the setting of these requirements, and are sometimes not told about the real reasons why their favourite teacher is no longer working at the school.
- Faith communities have a diversity of views on matters concerning sexual orientation and gender identity, including among people within the same faith community. The freedom of thought, conscience and belief is a human right enjoyed by everyone, and includes the right for a person of faith or no faith to have their own beliefs on these matters without unjustified discrimination.

[2] Australian Bureau of Statistics (2022) *Schools, Australia 2021*, Data release dated 23 February 2022.

[3] Australian Bureau of Statistics (2022) *Schools, Australia 2021: Table 50a In-school Staff (Number), 2006-2021*, Data release dated 23 February 2022.

2. SOME RECENT CASE STUDIES

STEPH LENTZ

In 2021, Steph Lentz was fired from her role as an English teacher at a Christian school in Sydney after she came out as a lesbian. Despite being a Christian and attending a Christian church, the school fired Steph because she would not affirm the *'immorality'* of homosexuality, which the school argued breached an *'inherent, genuine occupational requirement'* of her role. This was despite Steph offering to respond to any questions raised by her students about sexuality by presenting the school's strong convictions while acknowledging that some Christians hold different views.[4]

In paragraph 5 of your letter of 28 December you have stated, with respect to the church you attend, that your church's doctrinal position is consistent with the beliefs and ethos of the School and the School's Summary Statement of Beliefs, except for the issue of its position on LGBTQIA+ people and relationships. The School repeats that the issue relating to your church is solely whether you maintain an active commitment to and involvement with a Christian church holding a doctrinal position consistent with the beliefs of the School, as required by clause 35.1(c) of the MEA. However, on your repeated admissions, you attend a church which does not hold a doctrinal position consistent with the beliefs of the School because it affirms homosexual relationships.

In paragraphs 2, 3, 5 and 6 of your letter of 28 December, you have asserted that you believe the School's issue is your sexual orientation or sexuality. The School again assures you that is not the case. The School's questions to you have at all times been directed to whether you fulfil the inherent, genuine occupational requirement of clause 35.1(c) of the MEA. The School accepts that there are

faithful Christians who see their sexual orientation as homosexual or who experience same sex attraction, and yet who recognise that it would be wrong to act on their temptations and who prayerfully live a celibate life. Accordingly, the issue is not your sexual orientation but whether you fulfil the inherent, genuine occupational requirement of clause 35.1(c) of the MEA.

Above: Extracts from the letter dated 13 January 2021 terminating Ms Lentz's employment

KAREN PACK

Karen Pack is a committed Christian and an ordained pastor. In 2020, she was fired from her role as a teacher at a Baptist tertiary college in Sydney after she became engaged to her same-sex partner. Karen was employed by the college in February 2018 and lectured in chaplaincy and spiritual care, a post-graduate program she had been engaged by the college to develop. In a statement emailed to Karen's students after her employment was terminated, the college admitted that Karen had a *'deep and abiding faith in Jesus'* and was an *'excellent and committed educator'*. It explained that the decision to end her role was made by the Principal with the support of the College Board and Leadership Team, based on the position held by the college on same-sex marriage.[5]

Above: Karen Pack and her wife, Bronte

[4] B Schnieders and R Millar (2021) 'Steph Lentz was sacked this year for being gay, it was perfectly legal' *Sydney Morning Herald*, 10 August.

[5] M Vincent and LKewley (2021) 'Karen Pack was praised as an 'excellent' educator, but she says she was sacked by her employer Morling College for being gay - but the College disputes this', *ABC News*, 8 April.

As some of you may already be aware, Karen is in a committed same-sex relationship. Recently her and her partner decided to formalise this commitment by getting engaged to be married. Over the past month or so, Karen, myself, [redacted], [redacted] and our Principal [redacted] have met (together and in smaller groups) to discuss what this means for Karen's role at College. The decision for Karen to end her lecturing role was made by the Principal, with the knowledge and support of the Morling College Board and College Leadership Team. It was based on the position on same-sex marriage held by the College as stated in our Community Code as well as the Baptist Association's position and ongoing discussions.

In no way does this decision indicate that we question Karen's deep and abiding faith in Jesus and her desire to live with integrity and honesty. She is an excellent and committed educator. She has taught you to think deeply about your faith and be further equipped with skills which will impact many. She has made a significant contribution to Morling, particularly in the establishment and flourishing of the Chaplaincy and Spiritual Care programs over the past two and a half years. She has become a good friend, teacher and colleague to many of us. Karen will still be warmly welcomed on campus and we thank her for serving you and our community so well.

Above: Extract from the statement sent to Ms Pack's students by the college

Despite the school's statement at the time which stated that the *'decision was made by the Principal, with the knowledge and support of the… College Board and College Leadership Team'*, the Principal of the college publicly denied firing Karen and asserted that she had agreed to resign from her role because she could no longer adhere to a key value of the college about the nature of marriage.[6] The Principal of the College further explained his decision to terminate Karen's employment to the Parliamentary Joint Committee on Human Rights as him having *'entered a very strong pastoral conversation'* with Karen, in which *'**we*** [sic]*came to the conclusion that this was not where should continue to exercise her gift, which is a very strong gift'*.[7]

RACHEL COLVIN

Rachel Colvin is a committed Christian and mother of three married to a male partner. In 2019, she was constructively dismissed from her role as a teacher at a non-denominational Christian School in Ballarat after 10 years' service. Rachel was forced to resign after she refused to agree to and abide by an amended statement of faith, contrary to her own religious beliefs, that marriage *'can only be between a male and a female'*. Rachel was forced to resign notwithstanding her offer to teach in accordance with the schools' beliefs. The matter was brought before the Victorian Civil and Administrative Appeals Tribunal,[8] and was settled in 2020.[9]

Above: Rachel Colvin and her family

[6] M Vincent and LKewley (2021) 'Karen Pack was praised as an 'excellent' educator, but she says she was sacked by her employer Morling College for being gay - but the College disputes this', *ABC News*, 8 April.

[7] Commonwealth of Australia, Parliamentary Joint Committee on Human Rights (Official Committee Hansard) 21 December 2021, at 43.

[8] H Elg (2019) 'Ballarat Christian College under fire for same-sex marriage views', *The Courier*, 16 September. See also https://equalityaustralia.org.au/rachel-colvin-files-discrimination-complaint-against-ballarat-christian-college/.

[9] R Ferguson (2020) 'Ballarat Christian College settles case with former teacher Rachel Colvin over same-sex beliefs', *The Australian*, 5 March.

OTHER CASE STUDIES

In addition, Equality Australia has also assisted or is aware of the following examples of discrimination against LGBTQ+ people by religious educational institutions:

- **Nathan Zamprogno** is a gay man who lost his job as a teacher at a Christian School in Sydney in 2020 after 20 years' service because the school discovered his sexuality.[10]
- **Craig Campbell** is a committed Christian who lost his job as a teacher at a Christian college in Western Australia in 2017 after he told senior staff he was in a relationship with a man. He was never told the reason for his dismissal directly but the school principal confirmed it was due to an *'inconsistency with his beliefs on sexuality and the college's beliefs'*.[11]
- **Elise Christian** is a teacher and committed Christian who worked in a learning support role with children aged between 10 and 12 at a Christian school in NSW in 2016 and 2017. She believes she lost her job because she tried to support students who were seriously bullied by classmates and by senior staff because of their suspected sexuality.[12]
- **Evie MacDonald** is a trans girl who attended a religious school in the Mornington Peninsula between 2011 and 2015. In 2015, when Evie was 10 years old, a teacher divided the class into boys and girls. When Evie said she wanted to be with the girls the teacher physically dragged her to the group of boys. She was also forced to attend seven sessions of chaplaincy counselling intended to prevent her affirming her gender as a girl, without her parents' knowledge.[13]
- **Olivia Stewart** is a trans girl who attended a co-ed Sydney Anglican school in year 7. When she informed the school of her intention to start year 8 as a girl, Olivia's family were told that if she stayed at the school they would write to the parents of other students to inform them there was a trans student at the school. Olivia changed schools.[14]
- **Sam Cairns** is a lesbian teacher who lost her job at a Christian school in Victoria in 2012 after 7 years' service because the school became aware of her 'choice of sexuality'.[15]
- **John Connors** is a gay man who worked as a teacher and principal at various schools in the Catholic education system for 37 years. He was threatened by an ex-partner of being outed to his employer, which he strongly believes would have resulted in him losing his job. He always kept his sexuality a secret out of fear and felt he could not talk about it with his colleagues.
- **Michael*** is a gay man and committed Catholic who worked as a principal in a Catholic school in Victoria but kept his sexuality a secret for fear of losing his job. When he disciplined a staff member over unprofessional practice that staff member threatened to out him to the school community. He met with the Victorian Attorney-General during the debate on reforms in Victoria, who spoke about his story in Parliament.[16]
- **Peter*** is a gay man who worked as a teacher at a religious school for many years. Following a leadership change at the school, Peter was overlooked for a promotion for a role that he was already performing despite being the most qualified applicant for the position and had an

[10] Commonwealth of Australia, Senate Legal and Constitutional Affairs Legislation Committee (Official Committee Hansard) 21 January 2022, at 9; T McIlroy (2022) '"Don't ask, don't tell" on gay teachers being sacked', *Australian Financial Review*, 21 January.

[11] C Moodie (2018) 'Teacher who lost school job after revealing he was in same sex relationship warns of impact of religious review', *ABC News*, 12 October.

[12] Commonwealth of Australia, Senate Legal and Constitutional Affairs Legislation Committee (Official Committee Hansard) 21 December 2021 at 78; D Giannini and A Brown (2021) 'Teacher's tears at religious laws inquiry', *The Canberra Times*, 21 December.

[13] F Tomazin (2018) 'Religious leaders and health practitioners could face prosecution for gay "conversion"', *Sydney Morning Herald*, 16 May.

[14] C Fitzsimmons (2021) '"I'm still the same person inside": Olivia's journey coming out as a transgender teen', *Sydney Morning Herald*, 17 January.

[15] B Schnieders and R Millar (2021) 'Steph Lentz was sacked this year for being gay, it was perfectly legal', *Sydney Morning Herald*, 10 August.

[16] Parliament of Victoria, Legislative Council Parliamentary Debates (Hansard) 3 December 2021 at 5138.

exemplary teaching record. Peter's sexual orientation had recently become known to a member of the school leadership who was involved in the hiring process.

- **Citipointe Christian College** in Brisbane forced parents to sign a declaration of faith in 2022 to keep their children enrolled. The declaration included the statement that '*any form of sexual immorality (including but not limited to; adultery, fornication, homosexual acts, bisexual acts, bestiality, incest, paedophilia, and pornography) is sinful and offensive to God and is destructive to human relationships and society*'. Teachers were also forced to accept that it was *'a genuine occupational requirement'* of their role to ensure they did not express their sexuality except through heterosexual, monogamous relationships, expressed intimately through marriage. A group of Citipointe students and parents are now represented in a legal complaint to the Queensland Human Rights Commission.[17]
- **Foundation Christian College** in Western Australia told a 7-year-old student in 2015 that she could only stay at the school if she did not speak about her father's sexuality or relationship with a male partner. The father was told by that school that his child would never have been admitted if they had known he was gay.[18]
- **St Catherine's School** in Sydney advertised a role for a new principal which required them to affirm they believed marriage as between a man and a woman. Most parents in the school community opposed the requirement and wrote to the school council. Separately, several Sydney Anglican principals wrote to the Diocese with concerns over the requirement, including its impact on gay students and parents.[19]

[17] S Chenery and K Murray (2022) 'How Citipointe Christian College's "sexuality contract" brought queer students out of the shadows and onto the national stage', *ABC News*, 2 November; B Smee (2022) 'Citipointe Christian College teachers threatened with dismissal for expressing homosexuality', *The Guardian*, 21 March.

[18] N Hondros (2015) 'Gay man's daughter not welcome at Mandurah Christian School', *WAToday*, October 29.

[19] J Baker (2022) 'St Catherine's appoints 'active Christian' principal amid same-sex marriage row', *Sydney Morning Herald*, 28 June.

THE PATH FORWARD

Equality Australia broadly supports many of the ALRC's technical proposals. However, some proposals need refinement to properly protect LGBTIQ+[20] people, their families and loved ones. We also oppose proposals that are unnecessary and would, in our view, weaken current discrimination protections, including the creation of a new right to terminate workers for supposedly *'undermining the ethos of the school'*.

3. PROPOSALS WE SUPPORT

(a) Ensuring religious educational institutions play by the same rules under the *Sex Discrimination Act* (Technical proposals 1-5)

Equality Australia supports the prohibition of discrimination against staff and students in religious educational institutions based on sexual orientation or gender identity (as well as other attributes protected under the *Sex Discrimination Act 1981*).[21] The ALRC proposes to achieve this prohibition through technical proposals 1, 2, 3, 4 and 5, which we support. These technical proposals are the legally sound way to achieve these reforms.

Technical proposals 1 and 2 would remove exemptions in section 38 of the *Sex Discrimination Act 1984* (Cth) (**SDA**) which allow discrimination against LGBTQ+ staff and students in religious educational institutions (among others). Technical proposals 3 and 4 would ensure the broad exemption for religious bodies in sections 37(1)(d) or 23(3)(b) of the SDA cannot then be impliedly construed to allow this discrimination by religious educational institutions to continue once section 38 has been removed. Technical proposal 5 ensures there is consistency between the SDA and the *Fair Work Act 2009* (Cth) (**FWA**).

These changes are crucial to addressing recent examples of discrimination by religious institutions, making it clear that discrimination experienced by LGBTQ+ staff and students is unlawful.[22]

Removing exemptions for religious educational institutions in section 38 of the SDA would also bring national laws into line with similar standards set by the majority of Australian states and territories, including the Australian Capital Territory, the Northern Territory, Tasmania, and Victoria,[23] and recommended in Western Australia and Queensland.[24] South Australia and Queensland have also already implemented reforms protecting LGBTQ+ students.[25]

The reforms proposed to section 37(1)(d) of the SDA by the ALRC also provide a pathway to addressing discrimination in the delivery of goods, services, facilities and accommodation by religious organisations other than educational institutions. We suggest these reforms should be adopted at the same time as reforms on educational institutions so that there are consistent rules in employment and in the provision of education and other goods and services, such as the provision of healthcare, disability services, homelessness services, family violence support and other similar services. While appreciate that this goes beyond the term of reference for the ALRC inquiry, we would welcome it being referred to in the final report as an area for further reform.

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[20] In this submission, we predominantly use the term 'LGBTQ+' as s 38 of the SDA does not allow discrimination against intersex people by religious educational institutions. However, in some cases we use the term 'LGBTIQ+' where reform proposals would also address areas that concern discrimination protections for intersex people.

[21] See Australian Law Reform Commission (2023) *Consultation paper: Religious educational institutions and anti-discrimination laws*, Propositions A.1, B.1 at 17, 20.

[22] For example, see the case studies of discrimination experienced by Karen Pack, Steph Lentz, Nathan Zamprogno, Evie McDonald, Olivia Stewart, Sam Cairns and the students of Citipointe Christian College.

[23] *Discrimination Act 1991* (ACT) s 46; *Anti-Discrimination Act 1992* (NT) as amended by the Anti-Discrimination Amendment Bill 2022 (NT) cl 17; *Anti-Discrimination Act 1998* (Tas) ss 51-52; *Equal Opportunity Act 2010* (Vic) ss 83-83A.

[24] Queensland Human Rights Commission (2022) *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991*; The Law Reform Commission of Western Australia (2022) *Review of the Equal Opportunity Act 1984 (WA) – Project 111 Final Report*.

[25] *Equal Opportunity Act 1984* (SA) s 37; *Anti-Discrimination Act 1991* (Qld) Div 3 ss 37-44, and 109(2).

(b) Making the rules clear and allowing oversight of the changes (Technical proposals 11-13)

We also support changes to the *Australian Human Rights Commission Act 1986* (Cth) which would allow the Australian Human Rights Commission (**AHRC**) to monitor the proposed changes to the SDA and FWA, as set out in technical proposal 11.

We have no issue with the requirements proposed in technical proposals 12 and 13 that the AHRC review the Commission Guidelines in line with the reforms and develop detailed guidance to assist educational institution administrators to understand and comply with changes to the SDA and FWA. We would suggest that these guidelines be developed in consultation with affected stakeholders, including educational institutions, unions and LGBTIQ+ organisations. This will also ensure that the Guidelines address the key areas of concern which have been raised in previous cases of discrimination experienced by LGBTIQ+ people.

RECOMMENDATION 1

The ALRC should adopt its technical proposals 1-5 and 11 in its final report, and should adopt technical proposals 12-13 in its final report subject to a recommendation that the Australian Human Rights Commission consults with affected stakeholders, including educational institutions, unions and LGBTIQ+ organisations, before it issues guidance.

RECOMMENDATION 2

The ALRC should recommend that section 37(1)(d) of the *Sex Discrimination Act 1984* (Cth) also be reviewed and amended to prohibit discrimination against LGBTIQ+ people in employment and service delivery by other religious organisations providing goods, services, facilities and accommodation to the general public.

4. PROPOSALS WE SUPPORT BUT NEED FURTHER REFINEMENT

(a) Protecting those who love and support LGBTIQ+ people (Technical proposal 6)

People who are personally connected to LGBTIQ+ people, such as our children, parents, relatives, carers, friends or colleagues, deserve to be protected if they experience discrimination based on their relationship to someone who is LGBTIQ+. These broader protections are needed to protect people like Elise Christian and the parents and staff at Citipointe Christian College and St Catherine's School who stood up for their children, family members, friends and other students who were unrelated to themselves.[26] They are also especially needed for the children of rainbow families, like the 7-year-old student at Foundation Christian College who was told in 2015 she was not to speak about her gay dads at school.[27]

None of these people are currently protected under the SDA because, unlike the *Racial Discrimination Act 1975* (Cth) and *Disability Discrimination Act 1992* (Cth), the personal associates of a person with a protected attribute have no discrimination protections. Accordingly, we support technical proposal 6 which ensures students with a family member or carer who has a protected attribute are also protected from discrimination.[28] However, as the

[26] See section 2 of the submission above.

[27] See section 2 of the submission above.

[28] See Australian Law Reform Commission (2023) *Consultation paper: Religious educational institutions and anti-discrimination laws*, Proposition A.1, at 17.

recent cases of Elise Christian and the teachers at Citipointe Christian College show, we believe these protections need to go further in two important ways.

First, the proposed protections should not be limited to family members and carers but extend to all personal associates, consistently with definition of an 'associate' in the *Disability Discrimination Act 1992* (Cth).[29] There is no basis for creating a legal distinction between carers or family members and other personal associates, or for creating inconsistency between federal anti-discrimination acts. Discrimination by a religious educational institution against a student because their friend, rather than a parent, is LGBTQ+ is no less insidious or harmful.

Secondly, the protections for associates must extend across all areas in the SDA (including in employment), as nobody should be discriminated against because of their relationship to someone who is LGBTIQ+. The general proposition put forward by the ALRC concerning discrimination against and the preferencing of staff should be amended to reflect this.[30] Otherwise people like Elise Christian or Rachel Colvin, who bravely speak out to protect LGBTIQ+ students being bullied at their school, can continue to lose their jobs without recourse. These protections will be particularly necessary if the ALRC presses forward with reforms that would allow discrimination in the school curriculum and erode protections for workers, which we oppose and which are discussed below.

RECOMMENDATION 3

Ensure personal associates, defined consistently with the *Disability Discrimination Act 1992* (Cth), are protected from discrimination under the SDA, and this protection is extended across all areas in the SDA – not only limited to students who have family members or carers with a protected attribute.

(b) Protecting the freedom of religion, thought and conscience of all staff in religious educational institutions (Technical proposals 8 to 10, General Propositions C.1 and D)

We accept the government's policy is to enable selective preferencing of staff in religious educational institutions based on their religious belief or activity.[31] This would be implemented through technical proposal 8, which would allow favourable treatment of staff on religious grounds in certain circumstances, and technical proposal 10, which prevents future religious discrimination laws from preventing such favourable treatment from being unlawful. It also underpins aspects of technical proposal 9, which is addressed in more detail later in this submission. These technical proposals are underpinned by the principles outlined in General Propositions C and D.

To start with, we agree with the ALRC's proposal that the power of religious educational institutions to preference staff based on their religion:

- should be linked to some genuine occupational requirement (that is, the person's religious beliefs or activities must actually be relevant to the role in question);
- should not amount to discrimination based on grounds other than religious belief or activity; and
- must include a proportionality test, so that the employee's own freedom of thought, conscience and religion, alongside their other human rights, are appropriately considered if they are to be limited by their employer.

However, we wish to make a number of submissions regarding the importance of properly articulating how these proposals should be framed in law and operate in practice, particularly given some assumptions underlying the framing of General Propositions C and D that we believe are liable to allowing discrimination to continue.

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[29] *Disability Discrimination Act 1992* s 4 (definition of 'associate').

[30] See Australian Law Reform Commission (2023) *Consultation paper: Religious educational institutions and anti-discrimination laws*, Propositions B.1, C.1 at 20, 22.

[31] See Australian Law Reform Commission (2023) *Consultation paper: Religious educational institutions and anti-discrimination laws*, Propositions C.1 at 22.

Employment conditions framed to allow discrimination

First, we agree with the ALRC that a requirement for proportionality is crucial, as a *'genuine occupational requirement'* test alone is not sufficient. This is because it is not clear what a *'genuine occupational requirement'* actually means, and there is authority which suggests that a *'genuine occupational requirement'* might mean the same thing as an *'inherent requirement'*.[32] If that is correct, then as highlighted in *X v Commonwealth* [1999] HCA 63, whether something is an inherent or essential requirement may be determined by the terms and conditions of employment set by the employer.[33] That is, the employer may largely be able to construct the requirements of the role specifically in order to allow them to discriminate based on religious belief or activity.

As seen in the cases concerning Steph Lentz, Rachel Colvin and Citipointe Christian College, religious educational institutions have attempted to evade protections against discrimination based on sexual orientation or gender identity by simply imposing requirements on employees to have certain religious beliefs that are not affirming of LGBTQ+ people. Without an objective proportionality requirement, an employee's own freedoms of thought, conscience and religion, as well as other human rights, are entirely subsumed by the power given to their employers to 'write in' disproportionately discriminatory religious requirements into their role descriptions.

Framing proportionality properly

Secondly, while we support a requirement for proportionality, the various formulations of that requirement proposed by the ALRC in General Propositions C and D that underpin technical proposals 8-10 give too much weight to a religious ethos (whatever it is or may be), thereby stacking the proportionality assessment by a prior assumption that protecting a religious ethos is always the ultimate objective.[34]

The ALRC should proceed using a true proportionality standard conforming with international human rights law. In cases involving discrimination, proportionality requires there to be a genuine consideration of all the circumstances of the case to ensure that the discrimination is justified by some legitimate objective, and that the proposed conduct is the least restrictive means necessary to achieve that legitimate objective. Proportionately requires a careful assessment of intersecting rights and interests, including those of the staff member, the institution and other persons involved.

The error in General Propositions C and D, which underpins technical proposals 8-10, appears to be the repeated framing of proportionality by reference to an ultimate objective of upholding the religious ethos of an organisation – no matter what that ethos is or whose rights it trammels upon. But some aspects of a religious ethos may not be worthy of ultimate protection when considered against countervailing interests, such as the employee's own freedom of thought, conscience and religion, their freedom of expression, their right to marry and found a family of their own choosing, or their right to work (and be promoted in their job) without discrimination.[35] Communities of faith may also disagree as to what their ethos is and the relative importance of certain parts of that ethos to the community as a whole. As demonstrated in the St Catherine's School case, the governing authorities of a school may also not represent the will of the school community as to what its ethos is or should be.

The need for a well-framed proportionality standard is particularly important given the ALRC has apparently rejected the religious conformity and religious sensitivities/susceptibilities tests used in state and territory laws, and currently used in the SDA and FWA. These tests have previously been used (sometimes successfully, and sometimes not) to inject a degree of scrutiny against claims by religious organisations that their proposed discrimination is necessary to protect some overriding religious objective.[36] They provide a basis to ask questions

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[32] *Chivers v Queensland* [2014] QCA 141.

[33] *X v Commonwealth* [1999] HCA 63 at [31]-[33], [37] per McHugh J, and [102]-[103] and [105]-[106] per Gummow and Hayne JJ (with whom Gleeson CJ and Callinan J agreed, see also [173]); cf at [105]-[151] per Kirby J dissenting.

[34] See Australian Law Reform Commission (2023) *Consultation paper: Religious educational institutions and anti-discrimination laws*, Propositions C.1 at 22.

[35] International Covenant on Civil and Political Rights (**ICCPR**) arts 2(1), 18-20, 23; International Covenant on Economic, Social and Cultural Rights (**ICESCR**) arts 2(2), 6.

[36] See e.g. *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* [2014] VSCA 75; *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155 ('*OV & OW*').

about how closely connected an organisation's leadership is to its community of faith, given that – ultimately – the freedom of thought, conscience and religion is a freedom owed to human beings not legal entities, and including the right of those individuals to create a community of faith together. By leaving out these tests, the ALRC's proposal appears to take at face value that:

- a school's religious ethos will always conform with religious doctrines, beliefs and tenets; and
- failures to maintain a particular aspect of that ethos would always injure the religious susceptibilities of adherents of a religion.

By leaving out these tests, this leaves the proportionality test with all the work to do in ensuring the intersecting rights and freedoms of employee are properly considered, including the freedoms of people of faith to internally debate matters of religious doctrine or interpretation and still be part of the community of faith to which they belong. This is why the proportionality test must be properly framed in any final recommendations allowing the preferencing of people based on their religious beliefs or activities. If that is not done properly the discrimination faced by LGBTQ+ and LGBTQ+-affirming people of faith, such as Steph Lentz, Karen Pack or Rachel Colvin, will remain lawful under another guise.

Spell out what should happen to the FWA exemptions

Finally, technical proposals 8 and 10 also need to address what should happen to the *'inherent requirements'* exemptions in sections 153(2)(a), 195(2)(a), 351(2)(b) and 772(2)(a) of the FWA that otherwise apply to the same attributes covered by the SDA and which may be covered by a future Commonwealth religious discrimination law. Otherwise, religious educational institutions will be able to bypass the protections offered by any narrower exemptions in these laws by relying on pre-existing exemptions in the FWA that do not have these additional requirements. In our view, where a Commonwealth law regulates discrimination, the FWA should be brought up to the best standard which is consistent with that law, including any limitations in how its exceptions are framed. This ensures that employees will have the same rights and protections regardless of the forum in which they seek to bring a complaint regarding discrimination.

RECOMMENDATION 4

Ensure the proportionality principles outlined in General Proposition C and D and underpinning technical proposals 8-10 require a true proportionality test conforming with international human rights law. That is, a proportionality test that starts with prohibiting discrimination unless it can be justified by a legitimate objective which cannot be achieved using less restrictive means.

Ensure all the circumstances of the case include consideration of all relevant human rights considerations, including those of the employees' and other affected persons, as well as the legitimate interests of a religious educational institution.

RECOMMENDATION 5

With the passage of religious discrimination laws, the ALRC should recommend that:

- the 'inherent requirements' exemptions in sections 153(2)(a), 195(2)(a), 351(2)(b) and 772(2)(a) of the FWA be amended so that they are only available if, and to the extent that:
  - a relevant Commonwealth anti-discrimination law protecting the attribute also allows this exception; or
  - the discrimination is based on the employee's political opinion, national extraction or social origin (being attributes not otherwise protected under another Commonwealth anti-discrimination law);
- a 'genuine occupational requirements' exemption (with the requirement for proportionality in respect of any religious preferencing requirements) is reflected in the FWA if, and to the extent, that this exception is allowed in a relevant Commonwealth anti-discrimination law protecting that attribute.

5. PROPOSALS WE OPPOSE

(a) Allowing discrimination in the school curriculum (Technical proposal 7)

We do not support amending the SDA to clarify that the content of the curriculum is not subject to the SDA, as articulated in technical proposal 7. This proposal has consequences which go beyond religious educational institutions and we oppose this proposal for two reasons.

A SOLUTION IN SEARCH OF A PROBLEM

Amending the SDA to exempt the content of a school's curriculum from discrimination protections is a solution in search of a problem. The ALRC has conceded that this is the case in their consultation paper.[37]

Religious schools that teach the curriculum are highly unlikely to offend the SDA, even if they provide views as to their religious beliefs in respect of protected attributes such as sexual orientation or gender identity. This is because:

- These beliefs may be communicated to all students regardless of their personal attributes, and therefore would not amount to direct discrimination;
- If the beliefs are not presented in a way which is (in the words of the *Equality Act 2010* (UK) Department Guidance) *'haranguing, harassing or berating a particular pupil or group of pupils'*, such communications are not likely to be unreasonable requirements, policies or practices and will not amount to indirect discrimination. Based on the approach taken in *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82 at [171], there may not even be a case of disadvantage that can be made out under the definition of indirect discrimination.

In any event, the distinction between the curriculum and the way it is communicated is highly artificial and difficult to draw. This will lead to more complicated technical legal arguments in discrimination complaints about discriminatory treatment in the classroom.

FURTHER CONSEQUENCES

Removing the content of the curriculum from the scope of the SDA would also remove obligations from government schools, and from authorities that set the curriculum that may constitute service providers and

[37] Australian Law Reform Commission (2023) *Consultation paper: Religious educational institutions and anti-discrimination laws*, 32 [91].

administrators of Commonwealth laws and programs for the purposes of the SDA.[38] For example, this would exempt the Australian Curriculum Assessment and Reporting Authority (**ACARA**) from its obligations under the SDA to provide a service or administer Commonwealth laws and programs without discrimination. One of the functions ascribed to ACARA under Commonwealth law is to develop and administer a national school curriculum.[39]

RECOMMENDATION 6

Do not proceed with technical proposal 7.

(b) Eroding protections for workers in religious educational institutions (Technical proposals 9 and 10)

We strongly oppose the formulation of a new right to terminate workers for supposedly *'actively undermining the ethos'* of a religious educational institution as set out in technical proposals 9 and 10. Depending on how these recommendations may be drafted into law (which itself is not clear), this vaguely-defined proposal may represent a worse position for LGBTQ+ workers and others than the existing exemptions to anti-discrimination law for religious educational institutions in section 38 of the SDA. As articulated below, there are a number of technical reasons for this.

However, this proposal should also be entirely abandoned for three simple reasons beyond the technical issues it presents. They are:

- **It is not necessary.** If a worker acts in a manner that contravenes the reasonable conduct rules of a religious educational institution which are applied consistently, then their termination would not be unlawful discrimination.
- **It would provide a perverse incentive** for religious educational institutions to terminate workers rather than consider other steps (such as cautions, mediations, etc) in order to take advantage of the protections offered by this clause. This is because the new right applies only to termination, and not other forms of adverse treatment.
- **It is pleasing no one.** Catholic schools and religious leaders have already rejected the ALRC's proposals.[40] They don't see this proposal working, and neither do we.

MISUSE BY RELIGIOUS EDUCATIONAL INSTITUTIONS

Depending on how this proposal is enacted, a new right to terminate workers who supposedly *'actively undermine the ethos'* of a religious educational institution would be open to misuse because a religious ethos can be code for discriminatory beliefs regarding gender identity and sexual orientation.

Allowing discrimination based only on religious belief and not on other protected attributes does not solve this problem as it provides no protection against discrimination based on a requirement to hold discriminatory religious beliefs regarding sexual orientation and gender identity as a condition of employment.

For example, a religious educational institution might require workers to declare a religious belief that marriage is between a man and a women in order to demonstrate their commitment to the ethos of the institution, as was the case for Rachel Colvin. A religious educational institution might also require their employees to attend a church that aligns with their own non-affirming religious views on LGBTQ+ people, as was the case for Steph Lentz.

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[38] SDA ss 22, 26.

[39] See, *Australian Curriculum, Assessment and Reporting Authority Act 2008* (Cth) s 6(a).

[40] See P Karp (2023) 'Catholic schools to oppose LGBTQ+ teacher and student law reform proposal' *The Guardian*, 31 January; J Kelly (2023) 'Churches versus state to save faith school rights' *The Australian*, 14 February; Letter dated 13 February 2023 from Rt Reverend Dr Michael Stead, Anglican Bishop of South Sydney to The Hon Mark Dreyfus MP, Attorney-General;

In both these cases, Rachel and Steph lost their jobs notwithstanding that they were willing to remain silent about their personal religious beliefs that were affirming of LGBTQ+ people or to present the religious beliefs of the school alongside their own, if they were asked questions by their students.

You only need to read the letter to the Attorney-General dated 13 February 2023 signed by several religious leaders affirming that they rely on Commonwealth laws to override their state and territory anti-discrimination obligations,[41] or the comments which have been made by religious leaders and administrators of educational institutions defending the treatment of people like Karen Pack, Steph Lentz and the parents and students of Citipointe Christian College,[42] or the response of some organisations to the ALRC's consultation paper, to recognise that religious educational institutions often fail to comprehend the potential for LGBTQ+ discrimination in their practices and the associated harm which accompanies it.

It is critical to recognise that many of these administrators and religious leaders are often the same people who set or inform the employment policies that bind ordinary staff in religious educational institutions. They can decide what the religious ethos of the institution is (sometimes at odds with their own community of faith[43]), and they can decide whom they consider has '*actively undermined*' it. That is why laws protecting people from discrimination must not be so vaguely framed. People of faith who are LGBTQ+ or who affirm LGBTQ+ people, like Rachel Colvin and Karen Pack, deserve the same dignity and respect in their workplaces which are afforded to others, including the freedom to maintain and respectfully express their religious beliefs on matters of sexuality and gender in a proportionate and reasonable way.

TURNING A SHIELD FOR THE WORKER INTO A SWORD FOR THE EMPLOYER

Depending on how technical proposals 9 and 10 are enacted into law, there is a risk that these proposals will undermine other procedural safeguards offered under anti-discrimination laws, thereby turning what is now a shield against discrimination for the worker into a sword allowing discrimination by the employer.

Workers are currently shielded from termination on discriminatory grounds in two main ways under anti-discrimination laws. *First*, a worker can generally expect to be treated *consistently* because of the protections against direct discrimination. *Secondly*, a worker can expect to be treated *reasonably* because of the protections against indirect discrimination. Currently, an employer also bears the burden of showing the termination of a worker is either subject to a conduct or policy requirement which was reasonable (for the purpose of indirect discrimination), or subject to an exemption from discrimination protections. Typically, exemptions for religious organisations to terminate workers on discriminatory grounds require conformity with religious doctrine, injury to religious sensitivities/susceptibilities, or both.

A right for religious educational institutions to terminate workers under federal law may bypass many of these protections by either enlivening different legal exemptions regarding compliance with an award,[44] or because a federal right to terminate renders inconsistent (and thereby inoperative under section 109 of the Constitution) a state or territory prohibition on discriminatory terminations. Either way, the proposal may effectively override protections in state and territory laws. It is clear that some religious leaders and administrators will be relying on such provisions exactly for this purpose.[45]

Anti-discrimination law circumscribes the power to contract, meaning that the duty of fidelity cannot be framed as requiring the employee to accept a discriminatory term. Depending on how it is enacted into law, this proposed

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[41] "Religious schools in those States rely upon the current exemptions in section 38 of the Sex Discrimination Act and depend upon those exemptions overriding the State laws in order to maintain their religious ethos": Letter dated 13 February 2023 from Rt Reverend Dr Michael Stead, Anglican Bishop of South Sydney to The Hon Mark Dreyfus MP, Attorney-General.

[42] See, eg, 7 News (2022) 'Citipointe Christian College principal response safter enrolment contract petition grows', *7 News*, 31 January; Michael Koziol (2021) '"Her views no longer aligned": Anglicans defend sacking of gay teacher', *Sydney Morning Herald*, 29 December; Commonwealth of Australia, Parliamentary Joint Committee on Human Rights (Official Committee Hansard) 21 December 2021, at 43.

[43] See, eg, the St Catherine's school example above.

[44] See, eg, *Anti-Discrimination Act 1992* (NT) s 53; *Anti-Discrimination Act 1991* (Qld) s 106.

[45] See Letter dated 13 February 2023 from Rt Reverend Dr Michael Stead, Anglican Bishop of South Sydney to The Hon Mark Dreyfus MP, Attorney-General.

right to terminate workers may enlarge the ability of an employer to impose discriminatory contractual requirements on an employee.

It is also unclear how the proposed right to terminate a worker interacts with section 29 of the FWA, which preserves state and territory anti-discrimination laws.

LEGAL CONCERNS WITH THE PROPOSAL

In place of current protections, this proposal appears to give inferior protections to employees. This is because:

- It reasserts the primacy of an ethos above all other considerations, in circumstances where that ethos is undefined, unpinned to any requirement for conformity with religious doctrine and unconstrained by any requirement for inquiry into the views of adherents of the religion. This is discussed above in part 4(b) of this submission.
- Depending on how it is enacted into law, this proposal may make what would currently be a defence for an employer, who currently may have the burden of proof,[46] into a positive right to terminate. Few workers challenge their terminations notwithstanding these existing procedural protections. Even fewer would do so when faced with an open-ended debate over proportionality, that begins by asserting the primacy of an ethos (whatever it is, whoever determined it, and whether it has the support of the school community).
- It relies on the inferior discrimination protections in the FWA, which may not extend to indirect discrimination.[47] Most examples of religious ethos that discriminate based on sexual orientation or gender identity are forms of indirect discrimination. This is because religious educational institutions assert that their doctrines apply to everyone, regardless of their sexual orientation or gender identity. For example, a religious doctrine that all people must only maintain sexual relations in the confines of a marriage between one man and one woman, they would argue is not a form of direct discrimination because it applies to heterosexuals and non-heterosexuals alike. This means that the requirement that the treatment not amount to discrimination for the purposes of sections 153 or 195 of the FWA may amount to a very hollow protection.
- It puts in place an inferior proportionality test, privileging the religious ethos of an educational institution and not referring to many of the relevant rights of the worker, including their freedoms of expression,[48] thought, conscience and belief,[49] and rights to work,[50] marry and found a family.[51] The only right enumerated in the test is a 'right to privacy', which effectively means a new 'don't ask, don't tell' requirement where employees must stay silent about who they are, whom they love or what they believe in order to maintain their employment. This test would be unlikely to achieve the ALRC's stipulation in General Proposition D.3, that employees should not be expected to hide their own sexual orientation or gender identity, or refrain from supporting another person with these attributes.

[46] See, eg, SDA s 7C.

[47] See Australian Law Reform Commission, *Religious Educational Institutions and Anti-Discrimination Laws: Consultation Paper*, at para 40.

[48] ICCPR arts 19 and 20.

[49] ICCPR art 18.

[50] ICESCR art 6.

[51] ICCPR art 23.

RECOMMENDATION 7

Do not proceed with technical proposal 9 and the second bullet point in proposal 10 – relying instead on standard anti-discrimination laws.

6. FURTHER REFORMS

'STAGE 1' REFORMS

We agree with the ALRC that further reforms are needed in this area, including to address the inconsistency between federal anti-discrimination laws arising from this reform. However, we think some of the 'Stage 2' reforms described in paragraph 106 of the ALRC Consultation Paper should be addressed as part of 'Stage 1'. This is because they go to fundamental issues that detract from the effectiveness of the protections in the *Sex Discrimination Act* and *Fair Work Act*.

We suggest considering the following as part of Stage 1:

- **Making the following technical improvements to the *Sex Discrimination Act*:**
    - updates to the definitions of direct and indirect discrimination, the removal of the comparator test wherever it remains, and ensuring harassment protections apply consistently across all protected attributes in the SDA;
    - updates to the definitions of protected attributes (including those currently described as sexual orientation, gender identity and intersex status) in line with contemporary best practice;
    - ensuring protections apply to people who are presumed to have a protected attribute, such as those who are presumed to be LGBTIQ+;
    - ensuring other religious organisations that employ or provide goods, services, facilities and accommodation to the general public cannot discriminate on the basis of sexual orientation, gender identity or intersex status (among other attributes);
    - removing or phasing out section 43A of the SDA, which allows discrimination against non-binary people in requests for information and the keeping of records;
    - considering the possibility of improving the burden of proof by adopting a prima facie evidentiary standard like that now in place in the UK[52] and recently recommended by the Queensland Human Rights Commission; and
    - improvements to the complaints process, including addressing the inconsistency in the representative complaints regime introduced by the recent Respect@Work reforms.
- **Harmonising the FWA and Australian anti-discrimination framework so that workers have the same highest standard of anti-discrimination protection regardless of the forum in which they bring their employment discrimination complaint**, including by:
    - amending the FWA to clarify that the meaning of discrimination can carry the same enlarged meaning as it does in anti-discrimination law, including protections against indirect discrimination and for associates;
    - ensuring the FWA intersects effectively with discrimination laws by resolving the uncertain interpretation of section 351(2)(a) and ensuring the FWA provides no

[52] *Equality Act 2010* (UK), s 136.

additional exemptions which are not otherwise be permitted under (at least) other Commonwealth anti-discrimination laws.

The pressing need for these reforms is evident in the proposals of the ALRC which grapple with the structural inconsistencies and technical deficiencies in the existing federal anti-discrimination regime. These deficiencies need urgent review and remedy as these issues go to the underlying effectiveness of the protections in the *Sex Discrimination Act* and *Fair Work Act* and, unless resolved, may undermine the effectiveness of new protections recommended by the ALRC.

We also agree with the ALRC that a full review of Commonwealth anti-discrimination law is warranted even if these quick fixes can be prioritised now, given there is room for further harmonisation or consolidation of Commonwealth anti-discrimination law and bringing it up to best practice.

HUMAN RIGHTS ACT

We also agree and support the enactment of a federal Human Rights Act which would have different work to do to Commonwealth anti-discrimination laws. Anti-discrimination laws prohibit discrimination by both public and private organisations and individuals, while a Human Rights Act generally regulates the conduct of public authorities to better conform with human rights. They both have different, yet important work, to do.