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Our Ref: NSWLRC
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29 September 2023

New South Wales Law Reform Commission
Email: nsw-lrc@dcj.nsw.gov.au

Dear Commissioners

RE: Anti-Discrimination Act review: call for preliminary submissions

I write in response to your call for preliminary submissions to the Anti-Discrimination Act review. I am a scholar and practitioner that focusses upon the law of religion.

At this early stage, as no concrete proposal for reform has been mooted, I would like to draw your attention to the following resources which may be of assistance as you consider the scope of the exceptions granted to religious institutions and schools within the *Anti-Discrimination Act 1977* (NSW).

Fowler, Mark 'Can a Faith-Based Public Benevolent Institution Have a Purpose of 'Advancing Religion'? (2023) 1 Third Sector Review (forthcoming).	This article demonstrates that the settled common law consensus is that faith-based benevolent institutions are to be included within the definition of 'body established to propagate religion' at section 56 of the Act.
Fowler, Mark 'The Position of Religious Schools Under International Human Rights	This article canvasses the law applying to religious schools, demonstrating that genuine occupational requirements /

Law' (2023) 2 *The Australian Journal of Law and Religion* 36.	qualifications / inherent requirements tests are not consistent with international human rights law.
Fowler, Mark 'Judicial Apprehension of Religious Belief under the Commonwealth Religious Discrimination Bill', in Michael Quinlan and A. Keith Thompson (eds) Inclusion, Exclusion and Religious Freedom in Contemporary Australia, (Shepherd Street Press, 2021).	This article focusses on the settled judicial consensus that holds that determinations of belief should be made according to a 'genuineness' or 'sincerity' test.
Fowler, Mark, 'Identifying Faith-Based Entities for the Purpose of Anti-Discrimination Law' in Neville G. Rochow and Brett G. Scharffs Paul T. Babie (eds), Freedom of Religion or Belief: Creating the Constitutional Space for Fundamental Freedoms (Edward Elgar Publishing Limited, 2020)	This article demonstrates that the settled consensus of human rights law supports inclusion of faith-based charities within the definition of 'body established to propagate religion' at section 56 of the Act.

I have also attached my submission to the Australian Parliament Legal and Constitutional Affairs Legislation Committee concerning the *Religious Discrimination Bill 2021* and related legislation. That submission applies the various arguments made in the above publications to the context of the protection of persons from discrimination on the basis of religious belief and activity.

In respect of faith-based schools, I have further attached my submission to the Australian Law Reform Commission Inquiry on Religious Educational Institutions and Anti-Discrimination Laws.

I would be pleased to discuss any of the above at your convenience.

Yours faithfully
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The Position of Religious Schools under International Human Rights Law

Mark Fowler*

This article considers the application of international human rights law to the employment of persons by Australian religious schools. In particular, it considers the claim, increasingly made in support of Australian domestic legislative reform, that the application of 'inherent requirements' tests to employees within religious schools appropriately gives effect to the requirements of international law. Part One observes that that law is found in two primary protections: the protection provided to religious schools as the collective manifestations of the religious beliefs of individuals, including parents and guardians, and the protection against discrimination. Part Two illustrates the domestic implications of these regimes by considering the human rights rationales offered by the governmental proponents of the Victorian Equal Opportunity (Religious Exceptions) Amendment Bill 2021. It concludes that the Equal Opportunity (Religious Exceptions) Amendment Act 2021*(Vic) is an inadequate implementation of relevant international human rights law and that similar legislation in development in other States and the Commonwealth should be scrutinised carefully.*

INTRODUCTION

This article considers the application of international human rights law principles in the context of employment decisions made by religious schools. In particular, it considers the claim, increasingly made in support of Australian domestic legislative reform, that the application of an 'inherent requirements' test to employees within religious schools appropriately gives effect to the requirements of international law. The article observes that two primary international law protections are relevant in this context: (1) the protection provided to religious schools as the collective manifestations of the religious beliefs of individuals, including parents and guardians; and (2) the protection against discrimination. The article illustrates the domestic implications of these protections by considering, as an example, the human rights rationales offered by the State government proponents of the Equal Opportunity (Religious Exceptions) Amendment Bill 2021 (Vic) ('EOREA Bill'). It concludes that the EOREA Bill failed to conform with important principles of international human rights law and that, more generally, closer scrutiny should be given to proposed legislation which would affect the right of private schools to maintain a religious ethos.

Australian discrimination law is a complex interaction of prohibition and exemption, operating within differing, but interacting, overlays of Commonwealth, State, and Territory law. Until recently, all Australian jurisdictions provided exemptions in variant forms to religious educational institutions in both the areas of employment[1] and the supply of services to

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[1] *Discrimination Act 1991* (ACT) ss 33(1), 44(a); *Anti-Discrimination Act 1977* (NSW) ss 25(3)(c), 38C(3)(c), 40(3)(c), 49ZH(3)(c); *Anti-Discrimination Act 1992* (NT) s 35(1)(b)(i) (although this is a general exemption not specifically addressed to the circumstances of religious schools, it will also apply to those circumstances); *Anti-Discrimination Act 1991* (Qld) s 25; *Equal Opportunity Act 1984* (SA) s 34(3); *Anti-Discrimination Act 1998* (Tas) s 51; *Equal Opportunity Act 2010* (Vic) s 83A; *Equal Opportunity Act 1984* (WA) ss 66(1)(a), 73(1).

students.[2] In the past year alone these exemptions have been the subject of a proliferation of reform proposals.

The Commonwealth Attorney-General has requested the Australian Law Reform Commission ('ALRC') to draft Commonwealth reforms that would 'ensure that' a religious educational institution 'must not discriminate against a member of staff on the basis of sex, sexual orientation, gender identity, marital or relationship status or pregnancy' while also permitting such institutions to 'continue to build a community of faith by giving preference, in good faith, to persons of the same religion as the educational institution in the selection of staff.'[3] In January of 2023 the ALRC released a Consultation Paper[4] that prompted prominent religious leaders to write an open joint letter to the Commonwealth Attorney-General expressing their 'deep disappointment' with the 'severe limits' proposed therein.[5] As the present article went to press, the ALRC's final recommendations are yet to be delivered.

Developments in the states and territories have continued as well. In May and in July of 2022, respectively, the Law Reform Commission of Western Australia ('LRCWA') and the Queensland Human Rights Commission ('QHRC') issued reports that propose reforms to the exceptions for religious educational institutions currently granted under Western Australia and Queensland law.[6] The ALRC, LRCWA, and QHRC proposals claim to replicate amendments to the *Equal Opportunity Act 2010* (Vic) ('*EOA*') that came into effect on 14 June 2022.[7] As the LRCWA recognised, those amendments 'substantially narrowed' the religious exceptions in Victoria. If enacted, they would have the same effect in Commonwealth, Western Australian, and Queensland law.[8] In November 2022, the Northern Territory became the first Australian jurisdiction to remove the distinct exemption that pertains to religious schools in respect of both staff and students. In that jurisdiction such schools may only have regard to the 'genuine occupational qualification' exception available to all employers when seeking to maintain their religious ethos.[9]

In their 2018 report, the Commonwealth Expert Panel on Religious Freedom ('Expert Panel') emphasised 'the pivotal role of exceptions to discrimination laws in the protection of freedom of religion'.[10] In recommending the retention of existing exceptions, with some minor curtailments, the Expert Panel affirmed the legitimacy of the positions expressed to it by religious schools. These included that many schools 'consider that the freedom to select, and

[2] *Discrimination Act 1991* (ACT) ss 33(2), 46; *Anti-Discrimination Act 1977* (NSW) ss 38K, 46A, 49ZO; *Anti-Discrimination Act 1991* (Qld) s 41(a); *Equal Opportunity Act 1984* (SA) s 35(2b); *Anti-Discrimination Act 1998* (Tas) s 51A; *Equal Opportunity Act 2010* (Vic) ss 39(a), 61(a), 83; *Equal Opportunity Act 1984* (WA) ss 66(1)(a), 73(3). This article focusses only on the employment context.

[3] Australian Law Reform Commission, 'New ALRC Inquiry: Religious Educational Institutions and Anti-Discrimination Laws' (Media Release, 4 November 2022) <https://alrc.gov.au/news/new-alrc-inquiry/>.

[4] Australian Law Reform Commission *Consultation Paper, Religious Educational Institutions and Anti-Discrimination Laws* (Consultation Paper, 27 January 2023) ('ALRC Paper').

[5] Letter from Michael Stead, Anglican Bishop of South Sydney on behalf of thirty-three signatories to Mark Dreyfus, Commonwealth Attorney-General, 13 February 2023 <https://sydneyanglicans net/files/2302013_Letter_Faith_Leaders_AG_ALRC_Consultation_Paper.pdf>.

[6] Western Australia Law Reform Commission, *Review of the Equal Opportunity Act 1984* (WA) (Final Report Project 111, August 2022) 16–7, 178–84 ('LRCWA Report'); Queensland Human Rights Commission, *Building Belonging* (Report, July 2022) 467, 575–83 ('QHRC Report').

[7] *Equal Opportunity Act 2010* (Vic) amended by the *Equal Opportunity (Religious Exceptions) Amendment Act 2021* (Vic).

[8] LRCWA Report (n 6) 168.

[9] *Anti-Discrimination Act 1992* (NT) s 35(1)(b)(i).

[10] *Religious Freedom Review* (Report, 18 May 2018) 104 [1.419] ('*Religious Freedom Review*').

to discipline staff who act in a manner contrary to the religious teachings of the school, is essential to their ability to foster an ethos that is consistent with their religious beliefs'.[11] The Expert Panel noted that '[a] key theme in these discussions, was the need for staff to model the religious and moral convictions of the community, and to uphold or at least not to undermine, the religious ethos of the school. The Panel heard repeatedly that faith is "caught not taught".'[12] The Expert Panel recognised that '[f]or some religious schools … the only way to create a community consistent with the teachings of the faith is to be selective in employment, including with respect to non-teaching staff, who are also important members of the school community.'[13]

As we will see, these propositions lie at the very heart of the recent contention inspired by legislative reforms that affect religious schools. These assertions by religious schools frame the context for the key consideration of this article: are such practices by religious schools in accordance with the relevant international human rights law?

PART I: INTERNATIONAL HUMAN RIGHTS LAW

A. UNITED NATIONS JURISPRUDENCE

The right to establish private schools is protected by international human rights law that Australia has ratified. The starting place for the consideration of the rights of religious schools is the protection to the right to manifest religion contained in art 8 of the *International Covenant on Civil and Political Rights* ('*ICCPR*'):

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.[14]

[11] Ibid 62 [1.245].
[12] Ibid 56 [1.210].
[13] Ibid 56 [1.212].
[14] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18 ('*ICCPR*'). See also *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, GA Res 36/55, Un Doc A/RES/36/55 (18 January 1982, adopted 25 November 1981) art 6 ('*Religious Declaration*'); Human Rights Committee, *Views: Communication No 1249/2004*, 85th sess, UN Doc CCPR/C/85/D/1249/2004 (18 November 2005).

The right to found religious schools is protected under each of the above sub-articles. As the Expert Panel recognised: '[a] key aspect of the right to manifest one's belief in art 18(1) of the *ICCPR* is a right for religious groups to establish their own private schools conducted according to the beliefs of their religion'.[15] As Taylor further notes, art 18(4) protects the freedom to establish independent religious schools: 'Private religious schools may be seen as a means of supporting the religious and moral education of children in conformity with parental convictions'.[16] The United Nations Special Rapporteur on Freedom of Religion or Belief has also recognised that 'private denominational schools' are 'one way for parents to ensure' their art 18(4) rights.[17] In his commentary on the *ICCPR*, Nowak also concludes that '[w]ith respect to the express rule in art 13(3) of the *International Covenant on Economic, Social and Cultural Rights* and the various references to this provision by the delegates in the Third Committee of the General Assembly during the drafting of art 18(4), it may be assumed that the parental right covers the freedom to establish private schools.'[18] The *United Nations Universal Declaration of Human Rights* (*'UNDHR'*),[19] the *International Covenant on Economic, Social and Cultural Rights* ('*ICESCR*')[20] and the *Convention on the Rights of the Child*[21] ('*CRC*') also provide relevant protections to children and their parents.

In *Delgado Páez v Colombia*,[22] the United Nations Human Rights Committee ('UNHRC') considered a complaint by a teacher within the Colombian Catholic schools system who had received differential treatment by his employer due to his advocacy of 'liberation theology'. In finding that the complainant's 'right to profess or to manifest his religion has not been violated' the UNHRC stated 'that Colombia may, without violating [Article 18], allow the Church authorities to decide who may teach religion and in what manner it should be taught.'[23] Similarly, the UNHRC found no breach of Article 19, concerning the right to freedom of expression by the employee. Subsequently in its General Comment on Article 18 the Committee emphasised the foundational importance of Article 18(4) when it recognised that, unlike the general protection to religious manifestation in Article 18(3), 'the liberty of the parents and guardians to ensure religious and moral education cannot be restricted.'[24]

In 2010 former United Nations Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt concluded that 'private schools constitute a part of the institutionalised diversity within a modern pluralistic society'.[25] In 2013 he emphasised that 'the right of persons and

[15] *Religious Freedom Review* (n 10) 59 [1.225].
[16] Paul Taylor, *A Commentary on the International Covenant on Civil and Political Rights* (Cambridge University Press, 2020) 533.
[17] Heiner Bielefeldt, *Report of the Special Rapporteur on Freedom of Religion or Belief*, UN Doc A/HRC/16/53 (15 December 2010) [55].
[18] Manfred Nowak, *UN Covenant on Civil and Political Rights:CCPR Commentary* (N P Engel, 2nd rev ed, 2005) 443.
[19] *Universal Declaration of Human Rights*, GA Res 217A(III), UN GAOR, UN Doc A/810 (10 December 1948) art 26(3) ('*UNDHR*').
[20] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) arts 13(3)–(4) ('*ICESCR*').
[21] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (signed and entered into force 2 September 1990) arts 5, 14(2) ('*CRC*'). See also Julian Rivers, *The Law of Organized Religions* (Oxford University Press, 2010) 243.
[22] Human Rights Committee, *Views: Communication No. 195/198*, 39th sess, UN Doc CCPR/C/39/D/195/1985 (12 July 1990) ('*Delgado Páez v Colombia'*).
[23] Ibid [5.7].
[24] Human Rights Committee, *General Comment No 22:The Right to Freedom of Thought, Conscience and Religion (Art 18)*, 48th sess, UN Doc CCPR/C/21/Rev 1/Add.4 (30 July 1993).
[25] Bielefeldt (n 17) [54].

groups of persons to establish religious institutions that function in conformity with their religious self-understanding … is not just an external aspect of marginal significance.' Without 'an appropriate institutional infrastructure … their long-term survival options as a community might be in serious peril'. In respect of their treatment of staff he acknowledged that for many 'questions, such as the appointment of religious leaders or the rules governing monastic life, directly or indirectly derive from the tenets of their faith.' The means by which they 'institutionalize religious community life can have a significance that goes far beyond mere organizational or managerial aspects.'[26] While recognising that 'religious institutions must be accorded a broader margin of discretion when imposing religious norms of behaviour at the workplace' than secular institutions he emphasised that 'much depends on the details of each specific case.' For these reasons the Special Rapporteur concluded that '[t]he autonomy of religious institutions thus undoubtedly falls within the remit of freedom of religion or belief.'[27] These principles also apply to religious schools, as he noted that limitations on the ability to incorporate private religious schools 'may have negative repercussions for the rights of parents or legal guardians to ensure that their children receive religious and moral education in conformity with their own convictions.'[28]

The exercise of control by religious schools over the appointment of staff entails competing rights. Chief among these is the right to equality of staff under Article 26, and the right to maintain a religious school as an effectuation of the rights granted to individuals under Article 18. Other rights that may be enlivened include the right to privacy, the right to family life, and the rights to work and education, where the actions of a religious school would deprive persons of employment opportunities. As the immediate past Special Rapporteur has noted, in such cases 'every effort must be made, through a careful case-by-case analysis, to ensure that all rights are brought in practical concordance or protected through reasonable accommodation'.[29] However, acknowledging that religious institutions comprise a 'special category' distinct from secular institutions because 'their *raison d'être* is, from the outset, a religious one', successive

[26] Heiner Bielefeldt, *Interim Report of the Special Rapporteur on Freedom of Religion or Belief*, UN Doc A/68/290 (7 August 2013) [57].
[27] Heiner Bielefeldt, *Interim Report of the Special Rapporteur on Freedom of Religion or Belief*, UN Doc A/69/261 (5 August 2014) [41].
[28] Heiner Bielefeldt, *Report of the Special Rapporteur on Freedom of Religion or Belief*, UN Doc A/HRC/19/60 (22 December 2011) [47]. Ireland is the sole State Party that the Human Rights Committee has called to reform its discrimination law as applies to religious educational institutions: Human Rights Committee, *Concluding Observations on the Fourth Periodic Report of Ireland*, UN Doc CCPR/C/IRL/CO/4 (19 August 2014) [21]. That recommendation can be considered to be situation-specific, applying to a country in which genuine alternative employment opportunities for teachers that do not uphold the ethos of religious schools are not available. As O'Toole reports, shortly before the Committee's recommendation 'approximately 96% of primary schools remain under denominational patronage.' Barbara O'Toole '1831–2014: an opportunity to get it right this time? Some thoughts on the current debate on patronage and religious education in Irish primary schools' (2015) 34:1 *Irish Educational Studies* 89, 91. Similarly, the Human Rights Committee did not reiterate the recommendations for similar reform made by the Committee on Economic, Social and Cultural Rights in its 2018 *Concluding Observations on the Seventh Periodic Report of Germany* CCPR/C/DEU/CO/7 (30 November 2021), see Human Rights Committee *Concluding Observations on the Seventh Periodic Report of Germany* CCPR/C/DEU/CO/7 (30 November 2021). Neither the Human Rights Committee nor the Committee on Economic, Social and Cultural Rights have rendered any conclusion in their Periodic Reviews that Australia is non-compliant with the ICCPR or the ICESCR as a result of the current exemptions for religious educational institutions within Federal law.
[29] Ahmed Shaheed, *Report of the Special Rapporteur on Freedom of Religion and Belief*, UN Doc A/HRC/37/49 (28 February 2018) [47]. See also Asma Jahangir, *Report of the Special Rapporteur on Freedom of Religion or Belief: Civil and Political Rights, Including the Question of Religious Intolerance*, UN Doc E/CN.4/2006/5 (9 January 2006) 'contentious situations should be evaluated on a case-by-case basis' and 'the competing human rights and public interests put forward in national and international forums need to be borne in mind': at [51]–[52].

Special Rapporteurs have confirmed that the applicable standard for determining the permissible limitations upon religious institutions in respect of their employment practices is the strict standard set by Article 18(3).[30] While regard to 'the details of each specific case'[31] is required in determinations of whether the conduct of religious institutions constitutes a permissible limitation on the rights of others, as we will see, much turns on the precise means adopted within domestic law by which those specific circumstances are incorporated.

B. EUROPEAN JURISPRUDENCE

The European Court of Human Rights (ECtHR) provides the most developed body of applied human rights law at an international level. This includes its treatment of the right to maintain private schools. However, important distinctions between the jurisprudence of the ECtHR and that developed under the *ICCPR* should not be overlooked. The UNHRC has specifically eschewed the jurisprudence of the ECtHR in several respects, and in some cases has imposed more stringent protections for religious manifestation.[32] Chief among these distinctions is the UNHRC's eschewal of the margin of appreciation doctrine.[33] As Taylor shows, the UNHRC has also been less willing to adopt the 'progressive' conception of its chief enabling treaty as a 'living instrument' than has the ECtHR.[34]

In domestic reform efforts reliance is also at times placed upon the jurisprudence of the Court of Justice of the European Union applying European Council Directive 2000/78.[35] However, as the United Nations High Commissioner for Human Rights has made clear, that jurisprudence is to be distinguished as 'distinct among international and regional instruments', including on account of its 'limited exceptions' for religious institutions.[36] Aroney and Taylor have recently summarised the key points of the Directive's departure from the relevant human rights law enshrining Australia's obligations.[37] Accordingly, the Directive need not be further considered in this account of those obligations.

1. *Religious Institutional Autonomy*

Returning to the ECtHR, and following the approach of that Court itself, consideration of its jurisprudence concerning religious schools must commence with its framing of the broad

[30] Bielefeldt (n 27) [41] see also [38]; Bielefeldt (n 28) [60]; Ahmed Shaheed, *Report of the Special Rapporteur on Freedom of Religion or Belief*, UN Doc A/HRC/43/48 (24 August 2020) [59], [66], [74].
[31] Bielefeldt (n 27) [41].
[32] See, eg, Human Rights Committee, *Views*: *Communication No 185/2008*, 106th sess, CCPR/C/106/D/1852/2008 (1 November 2012) ('*Bikramjit Singh v France'*) [8.6]; Cf *Ranjit Singh v France (dec.)* (European Court of Human Rights, Fifth Section, Application No 27561/08, 30 June 2009).
[33] Human Rights Committee, *Views: Communication No 511/92*, 52nd sess, CCPR/C/52/D/511/1992 (8 November 26 October 1994) [7.13], [9.4]; *Bikramjit Singh v France* (n 28).
[34] Taylor (n 16) 19.
[35] See, eg, ALRC Paper (n 4) [53], [55], [60], [66], [103] and [A.47]; *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation* [2000] OJ L 303/16, as considered in *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* (Court of Justice of the European Union, Grand Chamber, C-414/16, ECLI:EU:C:2018:257, 17 April 2018); *IR v JQ* (Court of Justice of the European Union, Grand Chamber, C-68/17, ECLI:EU:C:2018:696, 11 September 2018).
[36] Office of the United Nations High Commissioner for Human Rights, *Protecting Minority Rights: A Practice Guide to Developing Comprehensive Anti-Discrimination Legislation* (United Nations and Equal Rights Trust, 2022) 54.
[37] Nicholas Aroney and Paul Taylor, 'The Politics of Freedom of Religion in Australia' (2020) 47(1) *University of Western Australia Law Review* 42.

philosophical correlation between religious institutional autonomy and plural democratic society. In *Hasan and Chaush v Bulgaria*, the Court stated:

> [T]he believer's right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully free from arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which article 9 affords. … Were the organisational life of the community not protected … all other aspects of the individual's freedom of religion would become vulnerable.[38]

In respect of members' rights, in *Sindicatul "Păstorul Cel Bun" v Romania*, the Grand Chamber of the ECtHR stated that:

> In accordance with the principle of autonomy, the State is prohibited from obliging a religious community to admit new members or to exclude existing ones … in the event of a disagreement over matters of doctrine or organisation between a religious community and one of its members, the individual's freedom of religion is exercised through his freedom to leave the community.[39]

In that matter the Court stated:

> [R]eligious communities are entitled to their own opinion on any collective activities of their members that might undermine their autonomy and this opinion must in principle be respected by the national authorities. However, a mere allegation by a religious community that there is an actual or potential threat to its autonomy is not sufficient … It must also show, in the light of the circumstances of the individual case, that the risk alleged is real and substantial and that the impugned interference with freedom of association does not go beyond what is necessary to eliminate that risk and does not serve any other purpose unrelated to the exercise of the religious community's autonomy.[40]

The Court's consideration of the employment practices of faith-based institutions proceeds from these broad principles of democratic liberal political philosophy. A further developed account of this jurisprudence is provided in Part II, where the consistency of reforms within Australian law with that jurisprudence is considered.

2. *Right to Establish Private Religious Institutions*

The provision corresponding to the parental rights protection at Article 18(4) of the *ICCPR* is contained within Article 2 of the First Protocol to the *European Convention on Human Rights* ('*ECHR*'):

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[38] *Hasan and Chaush v Bulgaria* [2000] XI Eur Court HR 117, 137-8 [61] ('*Hasan and Chaush v Bulgaria*'). See also *Serif v Greece* [1999] IX Eur Court HR 73. See also Nicholas Aroney, 'Freedom of Religion as an Associational Right' (2014) 33(1) *University of Queensland Law Journal* 153.

[39] *Sindicatul "Păstorul Cel Bun" v Romania* [2013] V Eur Court HR 41, 63 [137] (citations omitted) ('*Sindicatul "Păstorul Cel Bun" v Romania*').

[40] Ibid 67–8 [159] (citations omitted).

> No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.[41]

The seminal ECtHR judgement in *Kjeldsen, Busk Madsen and Pedersen v Denmark* ('*Kjeldsen*')[42] concerned the right of parents to remove children from sex education. Therein the European Court of Human Rights held that Article 2 'aims in short at safeguarding the possibility of pluralism in education which possibility is essential for the preservation of the "democratic society" as conceived by the Convention.'[43] The Court considered this right took effect as 'the discharge of a natural duty towards their children — parents being primarily responsible for the "education and teaching" of their children — [whereby] parents may require the State to respect their religious and philosophical convictions.'[44] The Court noted the important role private schools play in ensuring parents may excuse their children from education that does not align with their religious or philosophical convictions:

> [T]he Danish State preserves an important expedient for parents who, in the name of their creed or opinions, wish to dissociate their children from integrated sex education; it allows parents either to entrust their children to private schools … or to educate them or have them educated at home.[45]

In *Ingrid Jordebo Foundation of Christian Schools v Sweden*,[46] the European Commission on Human Rights further articulated the principles set out in *Kjeldsen* with specific application to the context of independent schools. Therein the Commission acknowledged that the *travaux preparatories* [the records of the deliberations of State Parties that led to the *ECHR*] recognise:

> that the principle of the freedom of individuals, forming one of the corner-stones of the Swedish society, requires the existence of a possibility to run and to attend private schools … In particular, it was pointed out that … the activity in a private school should be allowed 'within very wide ranges to bear the stamp of different views and values'.[47]

In light of these principles the Commission criticised the Swedish Government, which:

> [S]eem[ed] to regard the right to keep a school as something entirely within 'le fait du Prince' [permissible acts of government]. … The Government seem[ed] to look

[41] *Convention for the Protection of Human Rights and Fundamental Freedoms,* opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as supplemented by *Protocol No1 to the Convention for the Protection of Human Rights and Fundamental Freedoms,* opened for signature 20 March 1952, 213 ETS No 009 (entered into force 18 May 1954).
[42] *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1979-80) 1 EHRR 711 ('*Kjeldsen*').
[43] Ibid [21]. Also affirmed in *Folgero and Others v Norway* (European Court of Human Rights, Grand Chamber, Application No 15472/02, 29 June 2007) [84(b)]. See also Rivers (n 21) 245, commenting upon the decision of *Kjeldsen* (n 42).
[44] *Kjeldsen* (n 42) [22].
[45] Ibid [24].
[46] *Ingrid Jordebo Foundation of Christian Schools v Sweden* (European Commission of Human Rights, Application No 11533/85, 6 March 1987) *('Ingrid Jordebo').*
[47] *Ingrid Jordebo* (n 46). See also Klaus Beiter, *The Protection of the Right to Education in International Law* (Martinus Nijhoff, 2006).

> at schooling the same way as at military service, where of course no competing 'private regiments' could be tolerated.[48]

In a lengthy analysis, the Commission was critical of the unitary nature of the Swedish schooling system, linking diversity in private schooling to a flourishing democratic State:

> In Sweden it is a basic political idea, which has governed the political leaders for a long time, that the State and the local municipal authorities must control the education: what the children have to learn and in which ways they have to receive the education must in every instance be decided by the political majority of the country … The whole Swedish school system is very close to violating Article 9 of the Convention [freedom of religion or belief] when it says that everyone is guaranteed the right to think freely. The idea is that the Swedish school children are in principle led to think only in the directions that are decided by the political majority of the Parliament.[49]

In its conclusion, the Commission held 'the right to start and run a private school' had been breached.[50]

C. SUMMARY OF PART I

In summary, the above rulings, fashioned as extensions of the foundational philosophical conceptions underpinning democratic society, support the offering of strong protections for faith-based schools in respect of their employment decisions. Legislative reforms that fail to afford religious educational associations the ability to maintain their ethos through restrictions on their ability to employ persons who share their beliefs require strict scrutiny to ensure they do not evince a movement towards a society in which children are 'led to think only in the directions that are decided by the political majority of the Parliament', breaching 'the 'guaranteed … right to think freely'.[51] This is because, as the application of these principles to domestic legislation in Part II considers, such limitations may jeopardise the ability of religious schools to offer students a holistic religious education in accordance with the human right that protects the ability of parents to choose a school consistent with their religious and moral convictions. Under both the *ICCPR* and the *ECHR*, regard must be had to the specific circumstances of each case in balancing the rights of individuals to freedom from discrimination, the rights of religious individuals to form collective institutions, and parental rights. However, the limitations standard applicable to the employment practices of the 'special category'[52] of religious educational institutions remains that under Article 18. As will be seen in Part II, the precise means adopted to incorporate the specific circumstances can have a significant impact on the ability of schools to maintain their unique ethos.

PART II: DOMESTIC APPLICATION

[48] Ibid.
[49] Ibid.
[50] Ibid (citations omitted). Having set out these this general statement of rights, the Commission held that on the particular facts that the education provided did not meet the quality control requirements legitimately imposed by the Government.
[51] Ibid. See also *Verein Gemeinsam Lernen v Austria* (European Commission of Human Rights, First Chamber, Application no 23419/94, 6 September 1995).
[52] Bielefeldt, (n 27) [41].

Having outlined the general principles applying to the religious institutional autonomy of Australian private schools under international human rights law, this article now considers the alignment of domestic Australian legislation with that law. The enactment of the EOREA Bill limited the 'exemptions' available to religious institutions and schools found within the *EOA.* The Victorian model is proving to provide somewhat of a template for reform. The ALRC makes the claim that the proposals contained in its January 2023 Consultation Paper are 'generally consistent with amendments to the law … in force in Victoria'.[53] In its May 2022 Final Report, the LRCWA concludes that 'the approach taken in the Victorian Religious Exceptions Act should be adopted.'[54] The Western Australian Attorney-General has confirmed that the Government 'has broadly accepted the recommendations' with reforms 'strengthening equal opportunity protections for LGBTIQA+ staff and students in religious schools' being one of 'several key reforms … expected to be included'.[55] In its response to a review commissioned by the Queensland Attorney-General, in July 2022 the Queensland Human Rights Commission recommended a reform closely aligning with the EOREA Bill.[56] At the time of writing the Queensland Government is yet to release its response to the Commission's '*Building Belonging'* report.

The following discussion considers the extent to which the Victorian model can be said to be consistent with international human rights law. The Statement of Compatibility ('SoC') provided with the EOREA Bill sets out its key function:

> The Bill promotes the right to equality by amending the religious exceptions in the EO Act to remove the ability for religious bodies and educational institutions to discriminate on the basis of a person's sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity in employment, education and the provision of goods and services.[57]

Under s 83A of the amended *EOA* a religious school can only 'discriminate' if an employee has an inconsistent 'religious belief' or engages in an inconsistent religious 'activity'. To the extent that this provision permits religious institutions and religious educational institutions to continue to maintain their religious ethos in respect of their employment practices, institutions must now satisfy a three-fold test:

> [C]onformity with the doctrines, beliefs or principles of the religion is an inherent requirement of the particular position, the person cannot meet that inherent requirement because of their religious belief or activity, and the discriminatory action is reasonable and proportionate.[58]

[53] ALRC Paper (n 4) [53], [60].
[54] LRCWA Report (n 6) 182.
[55] John Quigley, 'WA's Anti-discrimination Laws Set for Overhaul (Media Statement, 16 August 2022 <https://www mediastatements.wa.gov.au/Pages/McGowan/2022/08/WAs-anti-discrimination-laws-set-for-overhaul.aspx>.
[56] QHRC Report (n 6).
[57] Victoria, *Parliamentary Debates*, Legislative Assembly, 28 October 2021, 4368 (Natalie Hutchins) ('*Parliamentary Debate* EOREA')
[58] Ibid 4369. See also 4370.

As the SoC outlined: 'This replaces the current blanket exception with an exception that is tailored to the specific position and restricts the discrimination to only those positions where it is necessary.'[59]

These reforms rely on a particular interpretation of international human rights law in two key respects. First, that non-religious activity can be irrelevant to the suitability of an employee of a religious institution under that law. Second, that an 'inherent requirements test' is consistent with that law. It is noteworthy that for both contentions that the SoC that accompanied the EOREA Bill failed to provide one citation expressing reliance on the judgements of international human rights bodies for its interpretation. The following discussion considers the accuracy of these claims.

A. The Relevance of an Employee's Inconsistent, but Non-Religious Conduct

The EOREA Bill sparked significant concerns for religious institutions. One of the primary concerns was associated with the legislation's attempt to limit a religious institution's consideration of non-religious conduct that is inconsistent with the teachings of a religious institution when determining the suitability of employees. While the SoC states that it preserves the ability of faith communities to 'exclude individuals who do not share their faith',[60] it also states that it removes

> the ability of religious organisations and schools to discriminate on the basis of sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity in employment. Teachers and other employees at religious organisations and educational institutions should not need to hide their identity in order to avoid risking their livelihoods.[61]

Prima facie, these two statements could appear to be in tension. What guiding principles are we provided with that could reconcile these competing demands? The SoC states the clear intention to allow some ongoing form of discretion to schools when it posits:

> [T]he Bill also limits the right to equality by allowing religious organisations and educational institutions to continue to discriminate against individuals on the basis of a religious belief or activity (a protected attribute under the EO Act) in employment, education and the provision of government-funded goods and services. The purpose of this limitation is to protect the ability of religious organisations and educational institutions to demonstrate their religion or belief as part of a faith community, and exclude individuals who do not share their faith. The formation of religious schools and organisations is an important part of an individual's right to enjoy freedom of religion with other members of their community.[62]

However, again in apparent tension with that statement in her second reading speech, Natalie Hutchins stated:

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[59] Ibid 4369. See s 83A(2) *Equal Opportunity Act 2020* (Vic) ('*EOA*').
[60] Ibid 4373.
[61] Ibid 4369.
[62] Ibid 4368–9.

> A person being gay is not a religious belief. A person becoming pregnant is not a religious belief. A person getting divorced is not a religious belief. A person being transgender is not a religious belief. Under the Bill, a religious body or school would not be able to discriminate against an employee only on the basis that a person's sexual orientation or other protected attribute is inconsistent with the doctrines of the religion of the religious body.[63]

However, the Minister then goes on to note:

> Many religions have specific beliefs about aspects of sex, sexuality, and gender. For example, some religions believe marriage should only be between people of the opposite sex. If a particular religious belief about a protected attribute is an inherent requirement of the role, and a person has an inconsistent religious belief, it may be lawful for the religious organisation to discriminate against that person.[64]

In calling into question the extent to which private conduct of a non-religious nature is relevant to the determination of an employee's suitability, the resulting interaction between non-religious 'activity' and religious 'belief' introduced into the *EOA* has the potential to cause significant uncertainty, both for schools and their employees. Each will now need to consider the extent to which belief can be informed by action that is not inherently religious, but which nonetheless is inconsistent with religious belief. This uncertainty calls into question the ability of the *EOA* to satisfy the requirement that limitations on human rights be 'prescribed by law' under Article 18(3) of the *ICCPR*. The *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* interprets this requirement as encompassing the dual obligation that '[l]aws imposing limitations on the exercise of human rights shall not be arbitrary or unreasonable' and that '[l]egal rules limiting the exercise of human rights shall be clear and accessible to everyone.'[65]

The judgement of the ECtHR in *Obst v Germany*[66] also raises serious questions for the compliance of this aspect of the *EOA* with international human rights law. That matter concerned the director for Europe of the public relations department of the Mormon Church who had engaged in an extramarital affair. No question was raised of any activity or views that would fall within the definition of 'religious belief or activity' under the *EOA*. The private activity of the employee, which would (absent an exemption) fall within the protected attribute of 'lawful sexual activity' under the *EOA*, was not a 'religious activity'. The Court held that the Church was justified in dismissing him, on the ground that to do so was vital for its credibility.[67] The private nature of the conduct was not a decisive factor, as the special nature of the professional requirements imposed on the Applicant was due to the fact that they were established by an employer whose ethos is based on religion or belief.[68] To the extent that the *EOA* requires that a religious institution disregard the same activities of a similarly placed

[63] Ibid 4375.
[64] Ibid.
[65] UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 41st sess, E/CN.4/1985/4 (28 September 1984) Annex 4 [16]–[17].
[66] *Obst v Germany* (European Court of Human Rights, Fifth Section, Application No 425/03, 23 September 2010).
[67] Ibid [51].
[68] Ibid.

employee of a religious institution, it is inconsistent with the recognition provided to religious institutional autonomy by the ECtHR.

Fernández Martínez v Spain[69] concerned a Catholic priest and scripture teacher in public schools who, in the context of a campaign against Catholic teaching on clergy celibacy, disclosed to the media that he was married. The decision provides a further illustration of the Court's recognition that, in the case of religious institutions, private conduct may impact upon the ability of an employee to perform their professional activities:

> In the present case the interaction between private life *stricto sensu* and professional life is especially striking as the requirements for this kind of specific employment were not only technical skills, but also the ability to be 'outstanding in true doctrine, the witness of Christian life, and teaching ability', thus establishing a direct link between the person's conduct in private life and his or her professional activities.[70]

In the context of religious schools, it is of particular interest that the Court considered that the concerns of the Church in ensuring alignment between its representatives' private lives and its teachings 'were all the more important as the applicant had been teaching adolescents, who were not mature enough to make a distinction between information that was part of the Catholic Church's doctrine and that which corresponded to the applicant's own personal opinion.'[71]

Travaš v Croatia also raises significant concerns as to the compliance of the *EOA* with international human rights principles.[72] That matter concerned a religious teacher at a state school who divorced and remarried, in contravention of Catholic canon law. However, unlike *Fernández Martínez v Spain* where the applicant had voluntarily disclosed the inconsistency in his private life to the media, in *Travaš v Croatia* the applicant teacher's private conduct was not publicly disclosed. The Court noted that the question of the public awareness of the actions of the teacher was not relevant:

> [T]he question is rather whether a particular religious doctrine could be taught by a person whose conduct and way of life were seen by the Church at issue as being at odds with the religion in question, especially where the religion is supposed to govern the private life and personal beliefs of its followers.[73]

In answering that question in the negative, the Court concluded 'it does not appear that the decision to withdraw his canonical mandate, justified by the interest of the Church to preserve the credibility of its teachings, was in itself excessive'.[74] In reaching that conclusion the Court reasoned:

> [I]n order for a religion to remain credible, the requirement of a heightened duty of loyalty may relate also to questions of the way of life of religious teachers. Lifestyle may be a particularly important issue when the nature of an applicant's professional

[69] *Fernández Martínez v Spain* (2014) II Eur Court of HR 449 (extracts).
[70] Ibid [111].
[71] Ibid [142].
[72] *Travaš v Croatia* (European Court of Human Rights, Application no 75581/13, 4 October 2016) [97]-[98] . See also *Fernández Martínez v Spain* (n 59) [137], in the context of teachers of religious doctrine.
[73] *Travaš v Croatia* (n 72) [97].
[74] Ibid [107].

> activity results from an ethos founded in the religious doctrine aimed at governing the private life and personal beliefs of its followers, as was the case with the applicant's position of teacher of Catholic religious education and the precepts of the Catholic religion. In observing the requirement of heightened duty of loyalty aimed at preserving the Church's credibility, it would therefore be a delicate task to make a clear distinction between the applicant's personal conduct and the requirements related to his professional activity.[75]

Finally, attention is drawn to *Siebenhaar v Germany*,[76] a decision concerning the German Protestant Church's dismissal of a member of a religious community called the 'Universal Church/Brotherhood of Humanity' from employment as 'a childcare assistant in a day nursery … and later in the management of a kindergarten'.[77] In that matter the Court upheld the determination of the domestic court that

> the applicant did not have the right to belong to or participate in an organization whose objectives were in conflict with the mission of the Protestant Church, which could require its employees to abstain from activities that put in doubt their loyalty to it and to adopt both professional *and private conduct* that conforms to these requirements.[78]

The crucial point arising from the preceding cases is that the ECtHR has emphasized that the credibility of religious institutions whose moral code governs private conduct requires that such institutions be entitled to discipline employees whose conduct does not conform to that moral code, regardless of whether that conduct is inherently religious or publicly known.

If private non-religious activity is not determinative under the newly-amended Victorian regime, even the prominent position occupied by a Church public relations director would not justify disciplinary action, if the conduct complained of was in the employee's personal life (as in *Obst v Germany*) and where the protagonist continued to affirm the beliefs of the religious institution notwithstanding their conduct. Practically speaking, the Anglican Church could not act where a bishop was discovered to have a porn addition, the Catholic Church could not act where a bishop was discovered to be covertly married, and an Islamic institution could not act where an imam was discovered to be in an extra-marital affair (whether heterosexual or otherwise), so long as each of those protagonists were repentant. In this respect, the relevant amended provisions of the *EOA* are not compatible with international human rights law.

B. INHERENT REQUIREMENTS TEST

The second contentious issue contained in the Victorian legislation is the limitation of the exemption for religious institutions and schools to an 'inherent requirements' test for certain roles.[79] In her second reading speech Natalie Hutchins explicated the distinctions that this aspect of the EOREA Bill seeks to draw:

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[75] Ibid [98].
[76] *Siebenhaar v Germany* (European Court of Human Rights, Fifth Section, Application No 18136/02, 3 February 2011).
[77] Ibid.
[78] Ibid [44] [tr author] (emphasis added).
[79] Section 83A *EOA.*

> In most religious schools it would be an inherent requirement of a religious education position that employees must closely conform to the doctrines, beliefs or principles of the school's religion. On the other hand, a support position, such as a gardener or maintenance worker, is unlikely to have religious conformity as an inherent requirement of their role.[80]

The test is intended to protect persons from being 'discriminated against for reasons that have nothing to do with their work duties'.[81] Similar statements have been made by the LRCWA.[82] The QHRC has recommended the adoption of a 'genuine occupational requirements test', with the complementing clarification that '[t]he Act should include examples to demonstrate that the exception does not permit discrimination against employees who are not involved in the teaching, observance or practice of a religion, such as a science teacher in a religious educational institution'.[83] For the purposes of Queensland law 'there is no relevant distinction between the two tests of 'genuine occupational requirements' and 'inherent requirements'.[84] The ALRC's Consultation Paper claims that the imposition of a 'genuine requirement'[85] test (later described as a 'genuine occupational qualification'[86] and a 'genuine occupational requirement' test[87]) or 'inherent requirements'[88] test on religious educational institutions is consistent with Australia's international obligations.[89]

That the Victorian provision introduces significant uncertainty both for schools and employees is accentuated by the following selection of examples provided within the SoC:

> [A] teacher changes their religious beliefs and becomes accepting of marriage equality. They now hold an inconsistent religious belief. The teacher continues to promote the religious views of the school on [traditional] marriage to students but also tells students that there are those in the broader community that hold different views. Depending on the circumstances, it *may not* be reasonable and proportionate to dismiss a teacher who is willing to convey the religious views of the school, even if they differ from their own.[90]

and

> [A] religious school may state that it is an inherent requirement of all teaching positions that conformity with the religion of the school is required because all teachers carry pastoral care duties. However, it may be that for various reasons, the

[80] *Parliamentary Debate* EOREA (n 57) 4374.
[81] Ibid.
[82] LRCWA Report (n 6) 182.
[83] QHRC Report (n 6) 583.
[84] *Toganivalu v Brown and Department of Corrective Services* [2006] QADT 13. See also *Chivers v Queensland* [2014] QCA 141; 244 IR 102 [40]. For the position outside of Queensland see Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) [11.2.32]–[11.2.33], where an argument is also made for a subtle distinction between an 'inherent requirement' and a 'genuine occupational qualification'. However, as they say, regard to the 'character of the work', is common to both tests.
[85] ALRC Paper (n 4) 22.
[86] Ibid [66], [A.36].
[87] Ibid [93], [97].
[88] Ibid [96].
[89] Ibid [51].
[90] Ibid 4375 (emphasis added).

> school hires several teachers who are unable to meet this inherent requirement. This would suggest that religious conformity may not be an actual inherent requirement of the teaching roles.[91]

The latter example illustrates a key effect of the 'inherent requirements' test. If the temporary occupation of a teaching position by a person who is not able to perform religious devotions can provide evidence that such an activity is not an 'inherent requirement', there is nothing limiting that evidence from applying to all equivalent teaching positions.[92] Thus, any equivalent teacher that no longer shares the religious beliefs of the school could assert the temporary employment of an equivalent teacher as evidence for their subsequent unlawful dismissal. Over time such a test has the distinct potential to 'white-ant' an institution through the amassing of evidence arising from the temporary placement of non-adherents in response to transitory staff shortages. With the passage of time, the maintenance of the school's ethos would be relegated to roles such as the chaplain and the leadership of the school (presuming such persons also retain the religious beliefs of the school). This risk is particularly pronounced for those schools experiencing difficulty in recruiting suitably-qualified persons who hold the relevant faith.[93] Such an outcome would risk frustrating the operations of those schools who seek, as recorded by the Expert Panel, to inculcate an institutional ethos by applying a *preference* for staff that share their faith across the employee cohort wherever possible, operating on the notion that faith is 'caught not taught'.[94]

Further, through their vague and imprecise application, inherent requirements tests risk running afoul of the requirement that limitations on religious exercise be 'prescribed by law', which incorporates the obligation that they be sufficiently clear to enable application. Given these effects, serious consideration is required as to whether the 'inherent requirements' test sufficiently acquits the obligations Australia has accepted under international human rights law. Again, the SoC is notably scant on detail. As noted above, the Special Rapporteur has commented that under the *ICCPR* 'much depends on the details of each specific case'.[95] Similarly, although not ratified by Australia, the ECtHR jurisprudence recognizes that, amongst a range of factors, 'the nature of the post occupied by those persons is an important element to be taken into account when assessing the proportionality of a restrictive measure taken by the State or the religious organisation concerned'.[96] However, as the following analysis demonstrates, both of these recognitions do not equate to an assertion that the adoption of an 'inherent requirements' test will assure compliance with the applicable human rights law. Indeed, if the jurisprudence of the ECtHR is to provide any guide, the adoption of such a test will lead to non-compliance. This is because, as Aroney and Taylor have summarised:

> In its determinations in a number of cases the ECtHR has found there to have been no violation of the rights of the employee, without applying narrow occupational

[91] Ibid 4375.
[92] Such an approach was adopted by the Queensland Anti-Discrimination Tribunal in *Walsh v St Vincent de Paul Society Queensland (No.2)* [2008] QADT 32.
[93] Greg Walsh, 'The Right to Equality and Employment Decisions of Religious Schools' (2014) 16 *University of Notre Dame Australia Law Review* 107, 123-4.
[94] *Religious Freedom Review* (n 10) 56 [1.210]
[95] Bielefeldt (n 27) [41].
[96] *Fernández Martínez v Spain* (n 69) [130]. See also *Obst v Germany* (n 66) [48]-[51]; *Schüth v Germany* [2010] V Eur Court HR 397, 427 [69].

> requirements, even when the ethos requirements of the employer organisation impinge on the employee's fundamental human rights.[97]

In contrast, in their review of decisions of the ECtHR, Hilkemeijer and Maguire claim that:

> Since the right to manifest religion expressly protects the right to teach religion, the ECtHR has held that religious organisations may expect a high level of loyalty from persons employed to teach religion. However, employees of religious organisations such as administrators, teachers of non-religious subjects, gardeners and bus drivers, are less likely to owe a heightened duty of loyalty that extends to living their private lives in accordance with religious precepts.[98]

However, as the following analysis shows, the authorities do not accord with the simplistic distinction between teaching roles that demonstrate an inherent requirement and those more functional non-teaching roles that do not.

Siebenhaar v Germany[99] directly refutes the assertion that a determinative 'inherent requirements' test that only looks to the functions performed by the particular role in question, the 'work duties' to use the terminology employed by the Victorian Minister,[100] will satisfy the requirements of international human rights law. The matter concerned the dismissal of person employed as 'a childcare assistant in a day nursery … and later in the management of a kindergarten'[101] run by the German Protestant Church. Critically, the Court recorded that the terms of the contract of employment provided:

> Service in the church and in the diakonia is determined by the mission to proclaim the gospel in word and deed. The employees and the employer put their professional skills at the service of this objective and *form a community of service regardless of their position or of their professional functions* ...[102]

The dismissal related to behaviour outside of work hours, namely Ms Siebenhaar's membership of, and proselytisation for, the Universal Church/Brotherhood of Humanity. The Court restated its jurisprudence that 'except in very exceptional cases, the right to freedom of religion as understood by [lit. "such as intended by"] the Convention excludes any assessment on the part of the State of the legitimacy of religious beliefs or of the methods of expressing them'.[103] From that jurisprudence flowed the Court's affirmation of the Church's own conception of the conduct or beliefs of its employees that would detrimentally impact on its ability to 'form a community of service *regardless of their position or professional functions*'.[104] That jurisprudence is consistent with the frequently adopted approach that courts should apprehend the genuineness, or sincerity, of the religious beliefs in question.[105] The Court saw fit to have

[97] Aroney and Taylor (n 37) 58.
[98] Anja Hilkemeijer and Amy Maguire, 'Religious Schools and Discrimination Against Staff on the Basis of Sexual Orientation: Lessons from European Human Rights Jurisprudence' (2019) 93(9) *Australian Law Journal* 752, 758.
[99] *Siebenhaar v Germany* (n 76).
[100] *Parliamentary Debate* EOREA (n 57) 4374.
[101] *Siebenhaar v Germany* (n 76).
[102] Ibid [9] [tr author] (emphasis added).
[103] Ibid. See also *Hasan and Chaush v Bulgaria* (n 31) 137–8 [62], 140–1 [78].
[104] *Siebenhaar v Germany* (n 76) [9] [tr author] (emphasis added).
[105] See Mark Fowler, 'Judicial Apprehension of Religious Belief under the Commonwealth Religious Discrimination Bill' in Michael Quinlan and A Keith Thompson (ed), *Inclusion, Exclusion and Religious Freedom*

regard to the self-conception of the Protestant Church as to the impact Ms Siebenhaar's private conduct and belief would have on the ethos of the relevant childcare centres. In affirming that the actions taken on the basis of the employment contract (and its clarification that the Church's assessment could be made 'regardless of their position or professional functions'),[106] the Court expressly disavowed an 'inherent requirements' test as a determinative feature of the law concerning religious institutional autonomy. It is also of particular note that the Court specifically referenced both the administrative and managerial duties engaged in by Ms Siebenhaar when acknowledging the Church's concern for the impact on the credibility of the Protestant Church 'in the eyes of the public and the parents of the children'. Regardless of her ability to perform these functions, the credibility issue also arose because of the perceived 'risk of influence' Ms Siebenhaar might pose, notwithstanding the young age of the children. The Court's regard for a religious institution's own assessment of what will impact upon the maintenance of its ethos, and its engagement with the wider public, is in opposition to an 'inherent requirements' style test that would have regard to the particular 'work duties'[107] assigned to a role without regard to the wider institutional context in which the employee is placed, as is proposed by the SoC. Instead, the Court acknowledged that 'the particular nature of the professional requirements imposed on the applicants resulted from the fact that it was established by an employer whose ethos [lit. 'ethic'] is founded on religion or beliefs'.[108]

In *Rommelfanger v Germany*,[109] the ECtHR found no violation in respect of a Catholic hospital's discipline of staff that had publicly criticized the Catholic Church's position on abortion. The judgement provides a further example of the Court giving credence to the self-conception of a religious institution concerning the fitness of a person to fulfill the responsibilities of their employment, and the impact of their extra-work activities on the religious ethos of an institution. Therein the ECtHR held:

> If, as in the present case, the employer is an organisation based on certain convictions and value judgments *which it considers as essential* for the performance of its functions in society, it is in fact in line with the requirements of the Convention to give appropriate scope also to the freedom of expression of the employer. An employer of this kind would not be able to effectively exercise this freedom without imposing certain duties of loyalty on its employees. As regards employers such as the Catholic foundation which employed the applicant in its hospital, the law in any event ensures that there is a reasonable relationship between the measures affecting freedom of expression and the nature of the employment *as well as the importance of the issue* for the employer.[110]

The applicant in question was a physician whose employment contract provided that his conduct would

> be governed by … the duties which flow from charity (Caritas) as an essential expression of Christian life. The employees are required to perform their services in loyalty and to show a behaviour *inside and outside their professional functions*

in Contemporary Australia (Shepherd Street Press, 2021); Neil Foster, 'Respecting the Dignity of Religious Organisations' (2020) 47(1) *University of Western Australia Law Review* 175.

[106] *Siebenhaar v Germany* (n 76) [9] [tr author].

[107] *Parliamentary Debate* EOREA (n 57) 4374.

[108] *Siebenhaar v Germany* (n 76) [46] [tr author].

[109] Human Rights Commission, Application No 12242/86, 6 September 1989.

[110] Ibid (emphasis added).

> which, as a whole, corresponds to the responsibility which they have accepted. It is presupposed that in performing their professional duties they will be guided by Christian principles.[111]

Again, the decision defies the proposition that an inherent requirement test that looks only to the 'work duties'[112] of the role is determinative. Finally, as noted above, in the decision of *Fernández Martínez v Spain,*[113] concerning a Catholic priest and scripture teacher, the Court recognized that 'the requirements for this kind of specific employment were *not only technical skills*, but also the ability to be "outstanding in true doctrine, the witness of Christian life, and teaching ability"'.[114]

C. SUMMARY OF PART II

In applying the broad philosophical principles outlined in Part II, rather than the 'inherent requirements' or 'genuine occupational qualifications' tests, the ECtHR has focused on a range of factors, including whether a 'heightened degree of loyalty' exists;[115] the impact of the impugned conduct or belief on the ethos of the religious institution;[116] 'the proximity between the applicant's activity and the Church's proclamatory mission';[117] whether procedural fairness according to the rules of the religious institution has been afforded;[118] whether the relevant documents sufficiently clarified the expectations of the employer;[119] whether the applicant had knowingly placed themselves in a position of conflict;[120] whether the domestic courts had conducted 'a detailed assessment of all the competing interests and provided sufficient reasoning when dismissing the applicant's complaints';[121] and the availability of alternative employment,[122] all to be exercised with the understanding that the Court is not to engage in an exercise of assessing the legitimacy of the asserted beliefs of the institution, or the means by which they are expressed.[123] In particular, as noted above, the ECtHR's jurisprudence recognizes that personal conduct engaged in within the 'private life' of an employee can impact upon the ethos of a religious institution.[124]

The foregoing authorities establish that the 'real and substantial' risk to religious autonomy test[125] does not preclude a religious community from considering that the private life and beliefs of employees may give rise to a legitimate concern that its religious ethos would be undermined. Further, as *Travaš v Croatia* demonstrates, while the public nature of acts undertaken in the private life of an employee may be relevant, the importance of fidelity to teachings means that for some religious institutions, inconsistent acts need not be public, having regard to the conception of the religious institution employer. As the Court stated in

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[111] Ibid (emphasis added).
[112] *Parliamentary Debate* EOREA (n 57) 4374.
[113] *Fernández Martínez v Spain* (n 69).
[114] Ibid [111] (emphasis added).
[115] *Travaš v Croatia* (n 72); *Obst v Germany* (n 66) [51]; *Schüth v Germany* (n 96).
[116] *Siebenhaar v Germany* (n 76).
[117] *Schüth v Germany* (n 96); *Fernández Martínez v Spain* (n 69) [139].
[118] *Schüth v Germany* (n 96).
[119] *Travaš v Croatia* (n 72) [93]; *Siebenhaar v Germany* (n 76).
[120] *Fernández Martínez v Spain* (n 69) [144]-[145]; *Siebenhaar v Germany* (n 76).
[121] *Travaš v Croatia* (n 72) [69] summarising *Schüth v Germany* (n 96).
[122] *Schüth v Germany* (n 96); *Fernández Martínez v Spain* (n 69).
[123] *Hasan and Chaush v Bulgaria* (n 38).
[124] *Siebenhaar v Germany* (n 76).
[125] *Sindicatul "Păstorul Cel Bun" v Romania* (n 39); *Fernández Martínez v Spain* (n 69) [131].

Obst v Germany 'the absence of media coverage … cannot be decisive … the special nature of the professional requirements imposed on the applicant were due to the fact that they were established by an employer whose ethos is based on religion or belief'.[126] Further, as *Siebenhaar v Germany* demonstrates, even where an employee is engaged in managerial tasks and the education provided is directed to small children the Court is willing to recognize that 'the particular nature of the professional requirements imposed on the applicants resulted from the fact that it was established by an employer whose ethos is founded on religion or beliefs' and that the detrimental impact of the employee's beliefs on the credibility of the institution 'in the eyes of the public and the parents' may be a sufficient factor.[127] Seen as a whole, the Court has placed great weight on the effect of the conduct or private belief on the credibility of the religious institution, having regard to the self-conception of the institution, against the backdrop of the principle that the Court is not competent to undertake 'any assessment on the part of the State of the legitimacy of religious beliefs or of the means of expressing them'.[128] As Aroney and Taylor summarise, an 'inherent requirements test exists to meet the generic needs of all organisations, whatever their nature or purpose. It is not a substitute for the specific protections accorded to religious organisations under the *ECHR* as interpreted by the ECtHR.'[129] As the Special Rapporteur acknowledges in interpreting the jurisprudence of the *ICCPR*, the means by which religious bodies 'institutionalize religious community life can have a significance that goes far beyond mere organizational or managerial aspects.'[130]

CONCLUSION

This article has set out the primary international human rights law that pertains to religious schools. The right to found and maintain private schools is protected by the international human rights law that Australia has ratified, primarily found in Article 18 of the *ICCPR*. It has also considered the developed application of that right, as enunciated within the jurisprudence of bodies exercising jurisdiction under the *European Convention on Human Rights.* In the light of the foundational principles of democratic political philosophy articulated particularly by the latter, it has argued that close scrutiny of any legislative proposals that may impact upon the ability of private education associations to maintain their distinct religious ethos is required. It has considered how restrictions on the ability of a private faith-based school to ensure that those persons appointed as its representatives also share its faith can impact upon its ability to maintain a unique religious identity, and thus breach the right to establish private religious schools. It has demonstrated the domestic application of these principles by consideration of the Victorian Equal Opportunity (Religious Exceptions) Amendment Bill 2021 which has framed the recent recommendations for reform provided by the Australian Law Reform Commission, the Law Reform Commission of Western Australia and the Queensland Human Rights Commission. That now enacted Bill has served as an important illustration of how domestic legislation may fail to adequately acquit the obligations of international human rights law.

[126] *Obst v Germany* (n 66) [51] [tr author].
[127] *Siebenhaar v Germany* (n 76) [46] [tr author].
[128] Ibid. See also *Hasan and Chaush v Bulgaria* (n 38) 137–8 [62], 141–2 [78].
[129] Aroney and Taylor (n 38).
[130] Bielefeldt (n 27) [57].

SUBMISSION TO THE AUSTRALIAN PARLIAMENT LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

CONCERNING THE

RELIGIOUS DISCRIMINATION BILL 2021

HUMAN RIGHTS LEGISLATION AMENDMENT BILL 2021 AND

THE RELIGIOUS DISCRIMINATION (CONSEQUENTIAL AMENDMENTS) BILL 2021

Associate Professor Mark Fowler

1. This submission is made to the Australian Parliament Legal and Constitutional Affairs Legislation Committee. It is made in respect of the legislative package containing the *Religious Discrimination Bill 2021* (the Bill), the *Human Rights Legislation Amendment Bill 2021* and the *Religious Discrimination (Consequential Amendments) Bill 2021*, which package was referred for inquiry by the Senate on 02 December 2021 and for which the Committee is to report by 04 February 2022. It is made in my personal capacity.

2. This submission focusses on the human rights implications of the Bill and addresses the following matters, a summary of which is contained in the executive summary. Paragraph 3 of the executive summary provides an overview of the strengths of the Bill. Paragraph 4 provides a list of technical amendments that are proposed as improvements to the Bill.

Contents

Executive Summary

Strengths of the Bill

3. The Bill has many strengths, a summary of which is as follows.
    a. The Bill affords protection against religious discrimination in Commonwealth law across a range of public fields, consistent with other Commonwealth discrimination law (for example, education, employment, goods and services, Commonwealth laws and programs and State and Territory programs funded by the Commonwealth). Currently no protection against religious discrimination exists in New South Wales and South Australia. The Explanatory Memorandum (EM) provided with the Bill contains various examples illustrative of the Bill's scope: a Catholic who is 'aggressively' asked to leave a restaurant and 'banned' after saying grace; a Hindu told there is no place for 'someone who believes in things so different' in the football team; an Islamic childcare operator declined Commonwealth funding because the approving official 'dislikes Muslim people'. That such acts are not currently unlawful under Commonwealth law serves to demonstrate the pressing need for this legislation.
    b. Clause 5(1) - The Bill utilises a test for 'religious belief' that has regard to the claimant/respondent's 'genuine' religious convictions, thus avoiding judges having to act as theologians to interpret religious doctrines to determine if a belief 'conforms' to an identified religious doctrine (clause 5(1), definition of 'statement of belief'; EM para 39). This is consistent with the settled position developed by the highest courts in Australia, England, Canada and the United States as a means to prevent judicial determination of doctrinal disputes, as outlined in Mark Fowler 'Judicial Apprehension of Religious Belief under the Commonwealth Religious Discrimination Bill', in Michael Quinlan and A. Keith Thompson (eds) *Inclusion, Exclusion and Religious Freedom in Contemporary Australia*, (Shepherd Street Press, 2021).
    c. Clause 7 - The Bill recognises the long-standing principle of international law that when a religious body acts in accordance with its beliefs it is not discriminating. Clause 7 accords with the alignment between Article 18 and Article 26 of the *International Covenant on Civil and Political Rights* (ICCPR). Where a religious body acts in accordance with its religious precepts it is exercising a 'differentiation' that is 'reasonable and objective', where 'the aim is to achieve a purpose which is legitimate under the Covenant', being the manifestation of religious practices as protected by the Covenant, consistent with a democratic and plural society.[1] As such, clause 7 is correct when it states that a religious body 'does not discriminate' when it exercises rights as outlined therein (see paragraphs 14 to 19).
    d. Clause 7 - The Bill now encompasses all faith-based charities within the exclusion to discrimination in respect of employment. This is consistent with international human rights law, as I outline in 'Identifying Faith-Based Entities for the Purpose of Anti-Discrimination Law' in Neville G. Rochow and Brett G. Scharffs Paul T. Babie (eds), *Freedom of Religion or Belief: Creating the Constitutional Space for Fundamental Freedoms* (Edward Elgar Publishing Limited, 2020) (see also Appendix I providing an analysis of international human rights law concerning religious institutions and schools).

[1] UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989, available at: http://www refworld.org/docid/453883fa8 html.

e. Clause 7 - The Bill clarifies that a public benevolent institution may be 'conducted in accordance the doctrines, tenets, beliefs or teachings of a particular religion'. This is important, given judicial pronouncements that a faith-based welfare body cannot be a religious institution (see paragraph 11 and Appendix I).
f. Clause 7 - The Bill protects the freedom to establish independent religious schools. This human right has been recognised by the United Nations Human Rights Committee in *William Eduardo Delgado Páez v Colombia*[2] and is grounded in the long-standing international human right of parents to 'ensure the religious and moral education of their children in conformity with their own convictions'[3] (see paragraphs 20 to 23 see also paragraphs 40 to 43 in respect of the proposed override of Victorian legislation at clause 11. An analysis of the international human rights law supporting these provisions is provided at Appendix I).
g. Clause 12 - The Bill protects statements of religious belief against complaints in State and Territory anti-discrimination law, provided a series of tests are met, including that the statements are non-vilifying and made in 'good faith'. The protection is posed as a shield against discriminatory complaints against 'moderately' expressed religious views, not a sword. It can be seen as an exercise attempting to conserve the tolerant approach to religious discourse that has long been characteristic of our open and liberal democracy and operates with neutrality between religious and non-religious worldviews in a manner that is consistent with international law (see paragraphs 44 to 47). Appendix II considers the wider interaction of clause 12 with the internationally protected right of freedom of expression and with protections to religious speech.
h. Clause 15 - The Bill protects professionals and tradepersons against regulatory bodies imposing discriminatory limitations on the exercise of their religious beliefs outside of the course of their profession or trade where such limitations do not pertain to 'essential requirements' of the profession or trade.
i. Clause 16 - The Bill prohibits discrimination against groups and organisations (which are organised around religious convictions) as well as against individuals. For example, a school or charity that is subjected to discrimination because of the religious views of its associate will be able to seek protection under the Bill, provided its actions are not unlawful and the discrimination occurs in an area of public life protected by the Bill (see paragraphs 57 to 62 below and the analysis of international law in support of this provision at Appendix III).
j. The legislative package protects institutions that hold a traditional view of marriage from loss of their charity status, as has occurred abroad (*Human Rights Legislation Amendment Bill 2021* clause 3). The amendment addresses both the requirement that charities conform with 'public policy'[4] and also that they exist for the public benefit. The rationale for addressing both requirements is stated in the enclosed article Mark Fowler, 'Attaining to Certainty: Does the Expert

[2] *William Eduardo Delgado Páez v. Colombia*, Communication No. 195/1985, U. N. Doc. CCPR/C/39/D/195/1985 (1990).
[3] *International Covenant on Civil and Political Rights, opened for signature on 16 December 1966 (entred into force 23 March 1976)*, ('*ICCPR*'). Article 18(4). In the European context the equivalent right is contained in Article 2 of the First Protocol to the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, ('*ECHR*').
[4] *Charities Act 2013* (Cth), s 11.

Panel's Proposal for Reform of the Charities Act Sufficient to Protect Religious Charities?' (2020) 2 *Third Sector Review* 87 (paragraph 64).

Various of these strengths are further elaborated upon in the body of this submission.

Areas for Further Improvement

4. Notwithstanding the foregoing strengths, there are several areas in which the Bill could be improved. These are further detailed in the body of this submission. They may be summarised as follows:
    a. Clause 5(1) – definition of religious body. Consideration should be given to removing not-for-profit bodies from the excluded category of bodies 'that engage solely or primarily in commercial activities' (see paragraphs 6 to 10 and Appendix I concerning the international human rights law concerning religious bodies (see particularly paragraph 78)). This would be consistent with international human rights law, as I outline in 'Identifying Faith-Based Entities for the Purpose of Anti-Discrimination Law' in Neville G. Rochow and Brett G. Scharffs Paul T. Babie (eds), *Freedom of Religion or Belief: Creating the Constitutional Space for Fundamental Freedoms* (Edward Elgar Publishing Limited, 2020) (see also Appendix I providing an analysis of international human rights law concerning religious institutions and schools).
    b. Clause 5(1) – definition of educational institution. The definition purports to include 'child care centres and early learning centres at which education or training is provided.' However, as highlighted by the *Charities Definition Inquiry* in 2001, there is serious doubt as to the extent to which such entities provide 'education', as understood at law. To address this concern early learning and child care centres would need to be recognised as being able to be 'conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion' regardless of whether they are recognised as providing 'education' or not (paragraphs 12 to 13 and Appendix I concerning the international human rights law concerning religious bodies (see particularly paragraph 78)).
    c. Clauses 7, 9, 40 – Various clauses that require determination of the beliefs of a religious body have retained a test which requires a decision-maker to ascertain whether 'a person of the same religion as the religious body could reasonably consider [the conduct in question] to be in accordance with the doctrines, tenets, beliefs or teachings of that religion'. The Bill thus requires that judges act as theologians to interpret religious doctrines to determine if a belief 'conforms' to an identified religious doctrine, a proposal that has been directly criticised by the most senior courts within Australia, the United States, Canada and the United Kingdom. This test should be replaced with a rule of attribution that has regard to the genuine beliefs of the leaders of the institution, its documents and its conduct, a concept which is shown to enjoy wide-ranging judicial and academic support. The Bill also risks imposing an artificial restriction on the ability of religious institutions to evidence their beliefs by requiring that reference be had to 'foundational documents' of an institution (see EM paras 98, 125, 448) (paragraphs 24 to 37).
    d. Clauses 7(7), 9(3)&(7), 40(3) - The Ministerial ability to determine requirements for a policy issued by faith-based schools, religious hospitals, aged care, accommodation providers, disability service providers, religious camps and conference sites should be removed. It delegates a significant discretionary power to a future Minister, which power may conceivably encompass limitations

that would frustrate the effective operation of the applicable exclusions (paragraphs 38 to 39).

e. Clause 14 - To avoid a disjunct between the Bill and international law, clause 14(2) concerning factors to be fulfilled in satisfying the 'reasonableness test' for indirect discrimination should require reference to the 'necessary' standard imposed under Article 18(3) of the ICCPR (paragraphs 50 to 52, and also 40 to 43).
f. Clause 14 - consistent with existing Commonwealth anti-discrimination law[5] the burden of proof should lie with the person seeking to establish that a condition requirement or practice is reasonable (paragraphs 53 to 54).
g. Clause 14 - Consistent with the Report of the Former United Nations Special Rapporteur on Freedom of Religion or Belief titled *Elimination of all forms of religious intolerance*,[6] a 'reasonable adjustments' clause similar to that contained in the *Disability Discrimination Act 1992* would provide a means to deal with the 'comparator test' issue highlighted by *Purvis* judgement. Further examples of the kinds of attributes that would ordinarily be attributed or imputed to religious believers would also assist address this concern (see paragraphs 55 to 56).
h. Clause 20 - To be consistent with existing Commonwealth law, the prohibition on discrimination within partnerships should only operate in respect of partnerships of 6 or more persons (paragraph 63).

[5] See for example *Sex Discrimination Act 1984*, s 7C.
[6] Interim report of the United Nations Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt, *Elimination of all forms of religious intolerance*, A/69/261, 5 August 2014 https://www.ohchr.org/documents/issues/religion/a.69.261.pdf

Introductory Remarks

5. The Government is to be commended for introducing this legislation, in fulfilment of its response to the recommendations of the Expert Panel on Religious Freedom. Protection of persons against discrimination on the basis of religious belief is the missing piece in the constellation of Australian equality legislation. Of the five main equality rights recognised in the international law to which Australia is a signatory — being race, age, disability, sex and religion — only religion fails to receive dedicated protection in Commonwealth law. The introduction of a Commonwealth *Religious Discrimination Bill* completes the suite of Australian equality protections. In its 2017 Periodic Review of Australia, the United Nations Human Rights Committee expressed 'concern' at 'the lack of direct protection against discrimination on the basis of religion' and called upon Australia to address this deficiency by enacting Commonwealth discrimination protections.[7] The following comments are made according to the numbering of the relevant clauses within the Bill. They are not ranked in order of importance. Where my comments on a particular clause expand into a detailed analysis of the applicable human rights law, the analysis is contained in an Appendix. Detailed comments on international human rights law are made in respect of clause 7 (religious bodies and religious schools – Appendix I), clause 12 (statements of belief – Appendix II) and clause 16 (protection of religious corporations from discrimination – Appendix III).

Clause 5(1) – Definition of Religious Body

6. The Second Exposure Draft excluded charities that engage primarily in commercial activities. The definition of 'religious body' at clause 5(1) of the Bill now encompasses all charities that are 'conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion', but excludes not-for-profit bodies (NFPs) that engage solely or primarily in commercial activities. NFPs are, for the purposes of anti-discrimination law, effectively to be considered as analogous to charities, being purpose-based voluntary associations undertaking community-servicing acts. As a purpose-based sector, associational freedom remains at the core of the sector's ability to deliver social good.

7. The application of a commercial activities test to the not-for-profit sector draws a novel distinction, one completely alien to the understanding that it is the *purpose* of an entity that matters in the charity and NFP sector, not the *intrinsic character* of the activity they undertake. A similar framework that excluded charities that engage in commercial activities was found within the proposal for an unrelated business income tax by the Rudd/Gillard Governments in 2011-2013. The proposal failed due to opposition from the charity sector, which primarily located upon the arbitrariness of the attempt to exclude for purpose entities on the basis of the intrinsic character of their activity. To illustrate the difficulty, should we allow that because commercial fundraising and lamington drives comprised 51% of the activity of a faith-based book reading club across a year the club should be automatically excluded from the definition and lose the ability to preserve its religious ethos?

8. Both the not-for-profit sector and charity sector exist as for-purpose sectors. Indeed the charity sector is a subset of the not-for-profit sector, as all charities are required to be

[7] United Nations Human Rights Committee, 121st session 16 October-10 November 2017, *Concluding observations on the sixth periodic report of Australia*, CCPR/C/AUS/CO/6, 09 November 2017, https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/AUS/INT_CCPR_COC_AUS_29445_E.pdf

'not-for-profit'.[8] To exclude not-for-profits that undertake commercial activities would introduce a novel test that runs contrary to the law of not-for-profits and charities. As the High Court confirmed in *Word Investments Ltd v Commissioner of Taxation*[9] in determining whether an undertaking is carried out in furtherance of a charitable purpose attempts to delineate between intrinsically commercial or intrinsically charitable acts comprise a *reductio ad absurdum*. The application of an 'activities' measure to a 'purpose' sector calls for the reconciliation of two independent and mutually exclusive criteria, leading to uncertainty in application and illogical and erroneous results.

9. The foregoing leaves open the question as to how many not-for-profit bodies will be affected by the proposal to exclude bodies 'that engage solely or primarily in commercial activities'. The following considers the composition of the Australian NFP sector, with a view to investigating whether any NFPs would be prejudiced by the exclusion of bodies that 'engage solely or primarily in commercial activities'.
    a. At the time of writing there are 59,807 Australian charities registered with the Australian Charity and Not-for-profits Commission. There is limited data on the composition of the Australian NFP sector beyond the charity sector. From the following summary it can be seen that there is a very large number of NFPs operating within Australia:
        i. In 2010, the Productivity Commission estimated that there were 600,000 NFPs (inclusive of charities within Australia). The Commission included entities 'generating revenue to support charitable activities' within this grouping.[10]
        ii. In 2018 the Review of the ACNC Legislation summarised evidence provided by the Australian Taxation Office, based upon 2017 Business Activity Statement data, as follows:

> Currently, most not-for-profits not registered under the ACNC Act self-assess their tax status and ability to access tax concessions. Business Activity Statement data provided by the ATO estimates there are 130,000 entities that self-assess to be income tax exempt, with approximately 580 not-for-profits having annual Goods and Services Tax (GST) turnover greater than $5 million.[11]

        iii. In its 2018 submission to the Review of the ACNC Legislation the ACNC offered the following analysis:

> It is difficult to accurately estimate the number of not-for-profit entities in Australia. However the ACNC-AUSTRAC risk assessment of Australia's not-for-profit sector identified approximately 257,000 not-for-profit entities operating in Australia, not including unincorporated associations that are not registered with the ATO or the ACNC. There are approximately 190,000 not-for-profit entities endorsed by the ATO for tax concessions, of which approximately 54,000 are registered charities. The ACNC estimates that there are approximately

[8] *Charities Act 2013* (Cth), s 5, definition of charity.
[9] *Commissioner of Taxation of the Commonwealth v Word Investments Ltd* (2008) 236 CLR 204 ('*Word Investments*').
[10] https://www.pc.gov.au/inquiries/completed/not-for-profit/report/not-for-profit-report.pdf.
[11] *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review Report and Recommendations* 2018, 89.

7,500 companies limited by guarantee and 131,000 incorporated associations that are 'non-charitable' not-for-profits.[12]

b. In 2018 the Sydney Anglican Diocese submission to the Review of the ACNC Legislation made an attempt to extrapolate the true number of religious affiliated charities in Australia from the proportion of faith-based charities identified within the charities with the highest turnover.[13] Their submission found that 51.1% of charities were religiously affiliated (comprised of 30.8% as 'advancing religion' and 20.3% being 'faith-based'). While it cannot be assumed that the proportion of faith-based entities within the charity sector will be as prevalent within the wider not-for-profit sector, if this trend within the charity sector can be extrapolated to the wider NFP sector, even with a more muted expression, this would lead to the conclusion that there is a very sizable grouping of NFPs that are religiously affiliated and which would be subject to the 'commercial activities' exclusion.

10. In light of this analysis, consideration should be given to removing not-for-profit bodies from the excluded category of bodies 'that engage solely or primarily in commercial activities'. The proposed regime risks preventing a sizeable proportion of the not-for-profit religious and faith-based sector from being able to ensure that their character remains identifiably religious, both through their employment decisions and in the actions that they are compelled to undertake.

Clause 5(1) - Clarifying that Public Benevolent Institutions Fall Within the Definition of a 'Religious Body'

11. Paragraph 85 of the EM clarifies that a 'public benevolent institution' (PBI) may be 'conducted in accordance with' religious beliefs. The recognition that a PBI may be conducted in accordance with religious beliefs is an important one. Courts have entertained the proposition that a body that has a primary benevolent purpose cannot be a religious body, on the basis that the body is undertaking an essentially secular activity (see for example *Walsh v St Vincent de Paul's Society (No 2)*[14] and *Spencer v World Vision, Inc*.[15] I have further outlined these authorities in 'Identifying Faith-Based Entities for the Purpose of Anti-Discrimination Law' in Neville G. Rochow and Brett G. Scharffs Paul T. Babie (eds), *Freedom of Religion or Belief: Creating the Constitutional Space for Fundamental Freedoms* (Edward Elgar Publishing Limited, 2020). The clarification provided in the EM will assist in removing the prospect that a court would read the reference to 'a registered charity' in the definition of 'religious body' to be limited to only 'advancing religion' charities, in a similar fashion to the approach adopted in the foregoing judgements. Appendix I further considers the international human rights law pertaining to faith-based charities (see particularly paragraph 78).

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[12] Anglican Church, Diocese of Sydney, *Submission to the Review from the Australian Charities and Not-for-profits Commission*, 2018 https://www.acnc.gov.au/sites/default/files/Download%20review%20submission%20%5B%20PDF%20240MB%5D.pdf, 17.

[13] Available at https://treasury.gov.au/consultation/c2017-t246103.

[14] *(2008)* QADT 32, [74]-[76], [98], [108].

[15] 633 F.3d 723 (9th Cir. 2011), per Circuit Judge Berson).

Clause 5(1) - Including Childcare and Early Learning Centres in the Definition of Educational Institution

12. The definition of educational institution at clause 5(1) of the Bill includes the following note: 'This includes child care centres and early learning centres at which education or training is provided.' The Explanatory Memorandum provides the following statement (at paragraph 82 (see also paragraph 293)):

> The term 'educational institution' is defined in subclause 5(1) to include schools, colleges and universities or any other institution at which education or training is provided. Childcare or early learning centres which provide education as part of their functions or services will therefore be educational institutions for the purposes of this Act. This definition is consistent with the definition of 'educational institution' in the *Sex Discrimination Act*.

13. However, contrary to this statement, child care services are included as a charitable purpose under the *Charities Act 2013* not under the head of 'advancing education', but instead under the head of 'advancing social or public welfare'. This is consistent with the recommendations of the *Charities Definition Inquiry* in 2001,[16] which after extensive consideration of the arguments in respect of whether child care centres extend educational or benevolent purposes, recommended against placing child care within the charitable head of 'advancing education'. This recommendation reflected the serious doubt as to whether childcare centres and early learning centres *in fact* provide education. Many private religious schools provide an affiliated child care centre, either as an independently incorporated entity or within their existing corporate structure. This is often effected as an exercise that is ancillary to their wider educational purposes (by assisting the attendance of sibling children of schooling age). Such schools seek to ensure consistency in their employment practices across the school and the associated child care centre. That such practices are protected under international human rights law was the conclusion of the European Court of Human Rights in judgement *Siebenhaar v Germany.*[17] The formulation adopted in the Bill raises the concern that many child care and early learning centres will not actually fall within the scope of the intended definition of educational institutions. To address the concern early learning and child care centres would need to be recognised as being able to be 'conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion' regardless of whether they are recognised as providing 'education' or not.

Clause 7 – Religious Freedom and Equality

14. In what will be a first for Australian law, clause 7 of the Bill declares the long-settled principle of international human rights law that the legitimate exercise of religious freedom 'is not discrimination'. Existing law that characterises religious freedom as an 'exemption' from a more fundamental standard of equality does not reflect this international law principle. The language of 'exemptions' contains some beguiling and at times untested philosophical presumptions. We do not say, for instance, that the right of the press to free speech is an 'exemption' from majoritarian imposed control. Similarly, we do not say the citizen's freedom to associate around common interests is an 'exemption' granted by the state from compelled forms of association. Such laden terminology characterises religious freedom as a secondary right. The Bill addresses these concerns.

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[16] I Sheppard, R Fitzgerald and D Gonski (Commonwealth of Australia), *Report of the Inquiry into the Definition of Charities and Related Organisations*, 28 June 2001).
[17] *Siebenhaar v Germany* [2011] no. 18136/02 Eur Court HR.

15. Equality is a fundamental right. However, while most of the attention given to religious freedom is directed to the permissible grounds for limitation of that freedom, the central focus for the right to equality is a threshold one, requiring attention to the conditions in which the right will be enlivened. This is because international law recognises that the protection to equality will not apply to all acts of 'differentiation'. Equality is thus not a right that can be assumed to immediately apply to all conditions. Indeed, there may be legitimate forms of distinction that will not give rise to a breach of the right to equality. It is, for example, not contentious that the equality right will not be relevant where a comparison is being made between matters that are not alike in substance. It is the nature of the criteria that are being compared that will determine whether questions of equality can arise. This principle applies to the right to equality on the basis of religious belief and activity, as it does to other protected attributes.

16. These notions are reflected in the applicable human rights law. The right to equality, or freedom from discrimination is contained at Article 26 of the ICCPR. The United Nations Human Rights Committee's General Comment 18 on Article 26 provides:

> The Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.[18]

This statement is not qualified by necessity (as is the right to religious freedom under Article 18(3)), nor does it require that the purported differentiation is the most appropriate means of achieving the purpose, rather the test is to achieve a legitimate purpose and be determined by reasonable and objective criteria. This test accords with common experience – individuals and organisations discriminate between differing substances through a multitude of means each day – the preference to purchase Thai over Vietnamese for dinner, the awarding of dux to the person who has earned it by merit, the awarding of first place to the person who completes the race before other competitors. These distinctions are reasonable and objective, and are not regarded as unlawful discrimination. Thus in *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v. Sri Lanka, Communication* the United Nations Human Rights Committee (UNHRC) observed:

> the notion of equality before the law requires similarly situated individuals to be afforded the same process before the courts, unless objective and reasonable grounds are supplied to justify the differentiation.[19]

17. The determination as to what comprises comparable substances will therefore be highly consequential in determining what is reasonably and objectively protected within the fold of the human right of equality. What it protects is defined by matters that are alike in the relevant criterion. Thus a degree of likeness must be established in order to assert that equality is required, or conversely to assert that inequality has arisen. These are not novel notions. In *The Politics* Aristotle writes:

[18] UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination,* 10 November 1989, available at: http://www refworld.org/docid/453883fa8 html.
[19] *No. 1249/2004, U.N. Doc. CCPR/C/85/D/1249/2004 (2005).*

> they admit that justice is a thing and has a relation to persons, and that equals ought to have equality. But there remains a question: equality or inequality of what?[20] …
> those who are equal in one thing ought not be to have an equal share in all, nor those who are unequal in one thing to have an unequal share in all.[21]

As noted by Finnis, Aristotle goes on to claim that 'it is a characteristic perversion of democracy to hold that because all persons are equal in some respects, all persons should be considered equal in all respects'.[22] He cites 'a key sentence in the page of Plato's Laws which anticipates much in Aristotle's and Hart's discussions of justice and equality: 'indiscriminate equality for all amounts to inequality [inequity], and both fill a state with quarrels between its citizens'.[23]

18. Professor Herbert Hart concludes his analysis of Plato and Aristotle and the tradition of thought about justice with this statement:

> the general principle latent in these diverse applications of the idea of justice is that individuals are entitled in respect of each other to a certain relative position of equality or inequality… Hence [the] leading precept [of justice] … is often formulated as 'Treat like cases alike'; though we need to add to the latter 'and treat different cases differently'… though … [this] is a central element in the idea of justice, it is by itself incomplete and, until supplemented, cannot afford any determinative guide to conduct. This is so because any set of human beings will resemble each other in some respects and differ from each other in others and, until it is established what resemblance and differences are relevant, 'Treat like cases alike' must remain an empty form. To fill it we must know when, for the purposes in hand, cases are to be regarded as alike and what differences are relevant. Without this further supplement we cannot proceed to criticize laws or other social arrangements as unjust.[24]

19. How are these principles relevant to the religious freedom protections provided to 'religious bodies' within the Bill? To adopt the phraseology of the United Nations Human Rights Committee, where a religious body acts in accordance with its religious precepts it is exercising a 'differentiation' that is 'reasonable and objective', where 'the aim is to achieve a purpose which is legitimate under the Covenant', being the manifestation of religious practices as protected by the Covenant, consistent with a democratic and plural society.[25] As such, clause 7 is correct when it states that a religious body 'does not discriminate' when it exercises rights as outlined therein. The United Nations Human Rights Committee has affirmed these principles in *William Eduardo Delgado Páez v Colombia,*[26] where it stated its view that the selection of teachers that conform with the teachings of the Catholic church by that church does not amount to discrimination, not disclosing a 'violation of article 26'. The comments of

[20] Aristotle, *The Politics*, III, 12.
[21] Ibid, III, 13.
[22] John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd ed, 2011), 461.
[23] Ibid.
[24] Herbert Hart, *The Concept of Law* (Oxford University Press, 2012), 159.
[25] UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination,* 10 November 1989, available at: http://www refworld.org/docid/453883fa8 html.
[26] *William Eduardo Delgado Páez v. Colombia* (n 2).

Sachs J in *Christian Education South Africa v Minister of Education* are particularly pertinent:

> To grant respect to sincerely held religious views of a community and make an exception from a general law to accommodate them, would not be unfair to anyone else who did not hold those views. ... [T]he essence of equality lies not in treating everyone in the same way, but in treating everyone with equal concern and respect.[27]

These principles disclose the alignment of Article 18 and Article 26. The same principles underpin the recognition of the 'the indivisibility and universality of human rights, and their equal status in international law' that is to be introduced into the objects of the various statutes pursuant to the *Human Rights Legislation Amendment Bill 2021*.

Clause 7 - Religious Schools

20. The Bill includes religious schools in clause 7. The right to establish private schools is protected by international human rights law that Australia has ratified, most directly the *International Covenant on Civil and Political Rights (ICCPR)*. The *United Nations Universal Declaration of Human Rights*, the *International Covenant on Economic, Social and Cultural Rights* and the *Convention on the Rights of the Child* also provide relevant protections to children and their parents. The Expert Panel on Religious Freedom noted the important contribution that faith-based schools provided to pluralism in the Australian education system.

21. The freedom to establish independent religious schools has been recognised by the United Nations Human Rights Committee in *William Eduardo Delgado Páez v Colombia*[28] and is grounded in the long-standing international human right of parents to 'ensure the religious and moral education of their children in conformity with their own convictions' found at Article 18(4) of the ICCPR.[29] Bodies exercising jurisdiction under the European Convention of Human Rights have recognised this right as being 'indispensable for pluralism in a democratic society',[30] as protecting the 'guaranteed … right to think freely',[31] the presence of which provides a bulwark against State education systems where students are 'led to think only in the directions that are decided by the political majority of the Parliament'.[32] The right to establish private religious schools is the human right that protects against the State imposed uniformity and guarantees pluralism in the provision of education as a means to ensure freedom of thought within a society. To ensure its equitable application, the Bill provides a safeguard by requiring that schools declare their requirements to potential employees and act in 'good faith'.

22. As religious discrimination legislation, the Bill does not alter existing law concerning LGBTIQ students within religious schools. The dissenting reports from Coalition

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[27] *Christian Education South Africa* [2000] 4 SA 757 (Constitutional Court) [42].
[28] *William Eduardo Delgado Páez v. Colombia* (n 2).
[29] In the European context the equivalent right is contained in Article 2 of the First Protocol to the European Convention on Human Rights (n 3).
[30] *Hasan and Chaush v Bulgaria (European Court of Human Rights, Grand Chamber, Application no. 30985/96, 26 October 2000)* ('*Hasan and Chaush v Bulgaria (European Court of Human Rights, Grand Chamber, Application no. 30985/96, 26 October 2000)*'). See also *Serif v. Greece* (ECtHR, App. No. 38178/97, 14 December 1999).
[31] *Ingrid Jordebo Foundation of Christian Schools v Sweden* (European Commission of Human Rights, Application No. 11533/85, 7 May 1985).
[32] Ibid.

Senators to two separate inquiries in the last Parliament highlighted the limitations the removal of section 38(3) of the *Sex Discrimination Act 1984* would place upon the ability of schools to teach their religious beliefs and maintain their ethos.[33] The analysis offered by those reports is highly informative. Those limitations arise because of the expansive scope of the technical legal notion of 'discrimination' that would apply in the absence of an 'exemption'. Unable to resolve these tensions at the time, this complex matter was rightly referred to the Australian Law Reform Commission for detailed consideration.

23. It is noted that clause 3 now includes a recognition of the internationally protected 'freedom to manifest this religion or belief either individually or in community with others'. Such is consistent with the recommendation of the Expert Panel that 'Commonwealth, State and Territory governments should consider the use of objects, purposes or other interpretive clauses in anti-discrimination legislation to reflect the equal status in international law of all human rights, including freedom of religion.' Private religious schools are a manifestation of individual human rights that operate 'in community with others'. The international human rights law pertaining to religious educational institutions is further set out at Appendix I to this submission.

Clauses 7, 9, 40 - Genuine Belief Test and Corporations Evidencing Belief

24. A further major improvement within the Bill is the introduction of provisions requiring judges to have regard to the *genuine* views of a religious believer. The protection to 'statement of beliefs' at clause 12 now has regard to the 'genuine' beliefs of the maker of the statement and the Explanatory Memorandum clarifies that 'The term religious belief is intended to capture genuine religious beliefs' (paragraph 39). The latter addition clarifies that the general protections to religious belief are intended to operate consistently with the settled position developed by the highest courts in Australia, England, Canada and the United States as a means to prevent judicial determination of doctrinal disputes.

25. Notwithstanding this very substantial improvement, various clauses have retained a test which requires a decision-maker to ascertain whether 'a person of the same religion as the religious body could reasonably consider [the conduct in question] to be in accordance with the doctrines, tenets, beliefs or teachings of that religion'. The test has been retained exclusively within those clauses that require the determination of the beliefs of a religious body, being:
    (a) Clause 7(2) – the general protection;
    (b) Clause 9(3) – concerning religious hospitals, religious aged care facilities, religious accommodation providers and religious disability service providers; and
    (c) Clause 40(2)(c) - religious camps and conference sites.

[33] Legislative and Constitutional Affair Committee Dissenting Report on *Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff* available here https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Schooldiscrimination/Report/d01; Legislative and Constitutional Affair Committee Dissenting Report on the *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018*, available here: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Sexdiscrimination

26. The ability of a religious body to act in a manner consistent with its religious beliefs should not turn on a court's assessment of the doctrinal correctness of the beliefs asserted by that institution, whether that assessment is made with regard to fellow adherents within that religion, or otherwise. Use of such means contemplate the possibility that a conviction that is sincerely and genuinely held by the founders or leaders of a religious institution will be defeated as a belief that is not religious simply because of a dispute as to doctrinal interpretation within the wider movement of which it is a part. That is not necessary, when the ultimate question is whether the manifestation accompanying the belief is to be accommodated in a plural society. Such a proposal has been directly criticised by the most senior courts within Australia, the United States, Canada and the United Kingdom. The full articulation of these concerns is found within 'Judicial Apprehension of Religious Belief under the Commonwealth Religious Discrimination Bill', in Michael Quinlan and A. Keith Thompson (eds) *Inclusion, Exclusion and Religious Freedom in Contemporary Australia*, (Shepherd Street Press, 2021).

27. In summary, that chapter asserts that the consensus among leading Anglophone courts on preferred models for judicial engagement with assertions of religious belief comprises:
    a. Regard to the 'genuineness' or 'sincerity' of an asserted belief as the evidentiary standard for identifying belief;
    b. As a subcategory of the foregoing, an avoidance of tests that assess the validity of a religious belief against the consensus interpretations of other adherents to that belief;
    c. That the foregoing conditions are necessary to:
        i. ensure that the task of identifying religious belief does not become the back-door means by which limitations are imposed, and
        ii. thus guarantee persons subjected to limitations (including where they manifest their religious belief in community with others) are given publicly available reasons determined according to objective limitation standards.

    International law prescribes a circumscribed number of strictly articulated grounds for limiting religious manifestation.[34] Whether a claimant's beliefs align with the beliefs of other members of their religion is irrelevant to that assessment.

28. As noted, the foregoing principles have been affirmed by leading courts across Anglophone democracies. In delivering the opinion of the U.S. Supreme Court in *Thomas v. Review Board of the Indiana Employment Security Division*,[35] Burger CJ stated:

> . . . the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, *it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their*

[34] For Australia, the relevant obligation is found in Article 18(3) of the *International Covenant on Civil and Political Rights 1966*, Article 18(3), as applied in the jurisprudence of the United Nation Human Rights Committee. See further, paragraphs 40 to 43, 50 to 52 and Appendix I generally.
[35] 450 U.S.707 (1981).

> *common faith. Courts are not arbiters of scriptural interpretation*.[36] (emphasis added)

29. Similarly, in *Syndicat Northcrest v Amselem* Iacobucci J held:

> *claimants seeking to invoke freedom of religion should not need to prove the objective validity of their beliefs in that their beliefs are objectively recognized as valid by other members of the same religion, nor is such an inquiry appropriate for courts to make;…* In fact, this Court has indicated on several occasions that, if anything, a person must show "[s]incerity of belief" and not that a particular belief is "valid"… "it is not the role of this Court to decide what any particular religion believes".[37] (emphasis added, citations omitted)

Justice Iacobucci's admonition against judges interpreting doctrine applies to efforts to locate the true interpretation of a doctrine within a particular denomination, or religious sub-grouping. Such attempts breach a necessary component of separation between church and state:

> This approach to freedom of religion effectively avoids the invidious interference of the State and its courts with religious belief. The alternative would undoubtedly result in unwarranted intrusions into the religious affairs of the synagogues, churches, mosques, temples and religious facilities of the nation with value-judgment indictments of those beliefs that may be unconventional or not mainstream … "an intrusive government inquiry into the nature of a claimant's beliefs would in itself threaten the values of religious liberty".[38]

For substantively the same reasons, Iacobucci J also cautioned against reliance on the testimony of 'experts':

> The emphasis then is on personal choice of religious beliefs. In my opinion, these decisions and commentary should not be construed to imply that freedom of religion protects only those aspects of religious belief or conduct that are objectively recognized by religious experts as being obligatory tenets or precepts of a particular religion …
>
> A claimant may choose to adduce expert evidence to demonstrate that his or her belief is consistent with the practices and beliefs of other adherents of the faith. While such evidence may be relevant to a demonstration of sincerity, it is not necessary. *Since the focus of the inquiry is not on what others view the claimant's religious obligations as being, but rather what the claimant views these personal religious "obligations" to be, it is inappropriate to require expert opinions to show sincerity of belief.*
>
> An "expert" or an authority on religious law is not the surrogate for an individual's affirmation of what his or her religious beliefs are. Religious belief is intensely personal and can easily vary from one individual to another. Requiring proof of the established practices of a religion to gauge the sincerity of belief diminishes the very freedom we seek to protect.[39]

[36] Ibid 715-16.
[37] (2004) 2 SCR 551 at [43].
[38] Ibid [55].
[39] Ibid [54].

30. This same approach has been adopted in the United Kingdom. As Lord Nicholls, with whom the Court agreed, set out in *R (on the application of Williamson) v Secretary of State for Education and Employment*:[40]

> emphatically, it is not for the court to embark on an inquiry into the asserted belief and judge its "validity" by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question *or the extent to which the claimant's belief conforms to or differ from the views of others professing the same religion*. Freedom of religion protects the subjective belief of an individual. As Iaccobucci J also notes religious belief is intensely personal and can easily vary from one individual to another. Each individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may seem to some, however surprising.[41] (emphasis added, citations omitted)

This is not to say that a claimant may not, of their own volition, lead evidence in support of their claim. However, as Ahdar and Leigh assert: 'It is wrong to *insist* that expert evidence from religious authorities support the claimant's case'[42]

31. In light of these authorities it must be asked why has the Bill retained such a 'reasonable believer' test? It appears that the test that 'a person of the same religion as the religious body could reasonably consider [the conduct in question] to be in accordance with the doctrines, tenets, beliefs or teachings of that religion' has been retained due to a concern as to how a religious institution may be said to hold a 'genuine' or 'sincere' belief. However, this difficulty may be addressed by a simple rule of attribution, rather than a test that requires courts to determine doctrinal matters. That such a provision could be utilised is affirmed by the reasoning of Maxwell P and Neave JA in *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (*Cobaw*). Therein Maxwell P said:

> Finally, for a body corporate to avail itself of the protection under s 77, it would have to demonstrate that it had 'genuine religious beliefs or principles' and that the relevant conduct was 'necessary ... to comply with' those beliefs or principles. A corporation, of course, has 'neither soul nor body'. The state of mind of a corporation being a legal fiction, it would be necessary — for the provision to operate intelligibly — for the Court to identify a rule of attribution for the purposes of s 77. This would only be justified if the express provisions of the statutory scheme required for their effective operation the attribution to a corporation of a particular state of mind — in this case, the holding of genuine religious beliefs or principles.
>
> As senior counsel for the applicants pointed out, where the legislature wishes to attribute a belief to a corporation, it typically does so by enacting a special rule of attribution appropriate to the purpose. In such a case, the statute itself identifies the officers or employees of the corporation whose beliefs are to be attributed to the corporation for this purpose. The EO Act contains no such provision.[43]

Similarly, in *Cobaw* Neave JA said:

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[40] (2005) UKHL 15.
[41] Ibid 258.
[42] Ahdar, Rex and Ian Leigh, *Religious Freedom in the Liberal State* (OUP Oxford, 2nd ed, 2013), 196.
[43] Ibid [317]-[318].

> Because a corporation is not a natural person and has 'neither soul nor body', it cannot have a conscious state of mind amounting to a religious belief or principle. It follows that applying the s 77 exception to a corporation would require the adoption of a legal fiction which attributes the beliefs of a person or persons to the corporation.[44]

32. As Rajanayagam and Evans have noted, one way to do this is by the 'legislature expressly stipulating a rule by which the beliefs of the shareholders may be attributed to the corporation', or in the case of a charitable organisation under clause 7, the members or directors of the body.[45] Such attribution provisions are common in anti-discrimination law. Justice Redlich offered an alternative means in *Cobaw*:

> If the body corporate may have a religious belief, then having regard to the Constitution and Memorandum and arts of Association that belief will be that of the persons who are the 'embodiment of the company' or its 'directing mind and will'. They will ordinarily include the board of directors.[46]

33. The adoption of a rule of attribution that operates as a legal fiction is not a novel concept within the law and could be readily stated within the Bill. This solution is consistent with the existing common law enshrining the sincerity test. In *Syndicat Northcrest v Amselem* Iacobucci J provided the following practical evidentiary principles to guide the application of the sincerity test:

> Assessment of sincerity is a question of fact that can be based on several non-exhaustive criteria, including the credibility of a claimant's testimony, as well as an analysis of whether the alleged belief is consistent with his or her other current religious practices.[47]

Each of the markers asserted by Iacobucci J might also readily be applied to a religious body claimant/respondent by a statutorily articulated rule of attribution that requires regard to any relevant documented statements of beliefs, the credibility of the testimony of the relevant leaders of the institution, as well as consideration of whether the asserted belief is consistent with the prior conduct of the entity. This is not to state that a corporate body itself 'sincerely' believes a matter, but instead adopts a legal fiction which provides a number of factors by which a court may attribute satisfaction of the 'sincerity test' to religious assertions made by a corporate body.

34. In substance, this would reflect the approach to the evidencing of religious belief by religious institutions adopted by the New South Wales Court of Appeal in *OV & OW v Members of the Board of the Wesley Mission Council*. Therein the Court of Appeal had regard to the affidavit testimony of the Superintendent and Chief Executive Officer of the Wesley Mission and whether the actions of the body were consistent with its asserted beliefs.[48] In adopting this approach the Court of Appeal exhibited the hallmarks of the sincerity approach when emphasising the importance of regarding the beliefs to

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[44] Ibid [316].
[45] Shawn and Carolyn Evans Rajanayagam, 'Corporations and Freedom of Religion: Australia and the United States Compared' (2015) 37 *Sydney Law Review* 329, 330.
[46] *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* [2014] VSCA 75, [573] (Redlich J) ('*Cobaw*').
[47] *Syndicat Northcrest v Amselem* (2004) 2 SCR 551 [53], see also [56].
[48] *OV & OW v Members of the Board of the Wesley Mission Council* (2010) NSWCA 155 ('*Wesley Mission*').

be attributed to the institution in question, contra the wider denomination in which it was located:

> there is no basis in s 56 to infer that Parliament intended to exempt from the operation of the Anti-Discrimination Act only those acts or practices which formed part (relevantly for present purposes) of the religion common to all Christian churches, or all branches of a particular Christian church (in the sense of denomination), to the exclusion of variants adopted by some elements within a particular Church, but not by others.[49]

The exemption 'section encompassed any body established to propagate a system of beliefs, qualifying as a religion'[50] and required regard to be had to the beliefs of the respondent organisation in question, not any other body.

35. The United States Supreme Court decision in *Burwell v Hobby Lobby Stores, Inc.* (*Hobby Lobby* case) is also pertinent to the question of how religious belief may be meaningfully attributed to a corporate body.[51] It concerned a private company which wanted a religious exemption under the US *Religious Freedom Restoration Act* ('RFRA'); the desired exemption was from obligations under the healthcare mandate because they did not want to be morally complicit in abortions by funding reproductive healthcare insurance for their employees.[52] The Supreme Court held 5:4 that this exemption should be granted because a private company can exercise the right to religious freedom and belief.[53] As the Supreme Court noted, the corporation is a legal person who can raise religious freedom claims under the RFRA.[54] The corporations may pay the penalty, but 'the humans who own and control these companies' are subject to the burden on religion.[55] Under RFRA there is a requirement to prove a substantial burden on religious exercise for an exemption to be granted, and a major issue in *Hobby Lobby* is how a corporation proves substantial burden. As Hardee explores, there are difficulties with determining the religious sincerity of a corporation when the members or shareholders of that corporation may have diverse religious convictions. She recommends a dual inquiry into the veracity of the shareholders' religious beliefs and an attribution inquiry into whose religious beliefs should be considered in determining the sincerity of the corporation.[56]

36. In *Hobby Lobby* the Supreme Court indicated that they would be 'deferential to a religious institution's claim of a burden on free exercise'; the Court's 'narrow function... is to determine whether the plaintiffs' asserted religious belief reflects an honest conviction'.[57] The Court rejected the argument that the complicity was too attenuated to be cognizable on the basis that it could not engage in a theological analysis of whether the burden was true and substantial; 'a sincerely held belief that results in

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[49] Ibid [41].
[50] Ibid [50].
[51] I acknowledge Alex Deagon as an equal co-contributor to this section of material.
[52] *Burwell v Hobby Lobby Stores, Inc.* 134 S. Ct. 2751 (2014) ('Hobby Lobby').
[53] For a detailed analysis, see Micah Schwartzman, Chad Flanders and Zoe Robinson (eds), *The Rise of Corporate Religious Liberty* (Oxford University Press, 2016).
[54] *Hobby Lobby* (n 52) 2768-70.
[55] Ibid 2768.
[56] Catherine Hardee, 'Schrodinger's Corporation: The Paradox of Religious Sincerity in Heterogenous Corporations' (2020) 61(5) *Boston College Law Review* 1764, 1764-1765.
[57] Helen Alvare, 'Beyond Moralism: A Critique and a Proposal for Catholic Institutional Religious Freedom' (2019) 19(1) *Connecticut Public Interest Law Journal* 149, 158.

severe penalties is sufficient to establish a substantial burden under RFRA'.[58] Hence, an appropriate solution for evidencing the religious belief of a corporation is to accept the testimony of the religious corporation as to their sincerity, and the content and nature of their belief, as expressed by those within the corporation who possess the recognised authority to speak on behalf of the corporation.[59] A provision should therefore be inserted into the RDB which defers to the religious corporation's articulation of its relevant religious beliefs and/or activities, including an evidential inquiry into the locus of authoritative expression of those beliefs for the corporation. The articulation of beliefs and/or activities itself must also provide supporting evidence of the sincerity (though not of the truth) of those beliefs.

37. In this respect it is to be noted that the Explanatory Memorandum clarify that (see paras 98, 125, 448):

> A court may still have regard to any foundational documents that a religious body considers supports the conduct under consideration, where those documents are used to demonstrate that particular religion's doctrines, tenets, beliefs or teachings.

This particular allowance, in requiring that beliefs be asserted in 'foundational documents' is problematic. It will require religious institutions, schools and faith-based charities to amend their constituting documents (being Constitutions, Trust Deeds etc). This is an unnecessary burden, as in many cases these documents may be dated, or require onerous and lengthy processes for amendment. Further, the artificial effect that such a requirement imposes on the ability to evidence religious beliefs was ably illustrated by the decision of the Victorian Court of Appeal in *Cobaw*.[60] Therein a majority held that the absence of any express mention of sexuality within the 1921 Trust Deed of the respondent meant that the institution's asserted beliefs did not comprise a doctrine. President Maxwell upheld the following conclusion by the judge at first instance, Hampel J:

> I accept Dr Black's evidence that although scripture is the source of doctrine, not all that is said in scripture is doctrine. I accept his evidence about the content of the fundamental doctrines of Christian religions, and the consistency of doctrines in the creeds and the statement of fundamental beliefs and doctrines in the 1921 Trust Deed. I consider compelling his conclusion that the absence of any reference to marriage, sexual relationships or homosexuality in the creeds or declarations of faith which Christians including the Christian Brethren are asked to affirm as a fundamental article of their faith demonstrates the Christian Brethren beliefs about marriage, sexual relationships or homosexuality are not fundamental doctrines of the religion.[61]

The trust deed for CYC, which on the evidence was held to contain the core doctrines, listed only plenary inspiration, and contained no teachings 'that homosexuality was contrary to God's will.' As a result, the claim that the conduct conformed with the doctrines of the institution failed. The Bill risks imposing a similarly artificial

[58] Angela Carmella, 'Progressive Religion and Free Exercise Exemptions' (2020) 68 *Kansas Law Review* 535, 581, 581-582.
[59] See Alex Deagon, 'The "Religious Questions" Doctrine: Addressing (Secular) Judicial Incompetence' (2021) 47(1) *Monash University Law Review* (forthcoming); Neil Foster, 'Respecting the Dignity of Religious Organisations: When Is It Appropriate for Courts to Decide Religious Doctrine?' (2020) 47(1) *University of Western Australia Law Review* 175.
[60] *Cobaw* (n 46).
[61] Ibid [275].

restriction by requiring that reference be had to 'foundational documents' of an institution.

Clauses 7, 9, 40 - Future Ability of a Minister to Limit the Scope of the Religious Body Exclusions

38. The provisions concerning schools, religious hospitals, aged care, accommodation providers, disability service providers, religious camps and conference sites are all subject to the requirement that a subsequent Minister may promulgate Regulations imposing 'requirements' in respect of a written policy (see clauses 7(7), 9(3)&(7), 40(3), EM para 129). The basic formulation imposing the limitation is demonstrated by subclauses 7(6) and (7):

> (6) If a religious body that is an educational institution engages in conduct mentioned in subsection (2) or (4) in relation to the matters described in section 19 (about employment):
>
> (a) the conduct must be in accordance with a publicly available policy; and
>
> (b) if the Minister determines requirements under subsection (7)—the policy, including in relation to its availability, must comply with the requirements.
>
> (7) The Minister may, by legislative instrument, determine requirements for the purposes of paragraph (6)(b).

39. There is no limit on the matters that may be addressed by the Minister in the Regulation. Requirements could potentially encroach upon or frustrate the operation of the exclusion as applied to a religious institution. There is no equivalent power granted to any Government Minister under any State or Territory law concerning the ability of religious institutions to act in accordance with their religious beliefs. Some comment attempting to limit the kinds of matters that may be imposed by a future Regulation is made at para 129 of the EM, but this is non-binding. By contrast, clause 11 does not contain a provision permitting the Minister to set policy requirements by legislation. The ability to determine requirements for a policy should be removed as it delegates a significant discretionary power to a future Minister, which power may conceivably encompass limitations that would frustrate the effective operation of the applicable provision.

Clause 11 – Overriding Certain State and Territory Laws

40. Clause 11 proposes a mechanism that would override State or Territory law. The Victorian *Equal Opportunity Amendment Religious Exceptions Bill 2021* is named as a potential subject of this override in the *Religious Discrimination (Consequential Amendments) Bill 2021*. The Victorian legislation contains two main contentious proposals. The first is the variously imposed requirement that a religious body's or schools actions must be 'reasonable and proportionate in the circumstances'. A 'reasonableness' test does not align with the strict 'necessity' test for the imposition of restrictions under international law.

41. Article 18(3) of the ICCPR, which contains the relevant standard of limitation that Australia has ratified, permits that only 'necessary' limitations may be imposed on the manifestation of religion or belief (see further Appendix I). This includes the freedom to associate with fellow believers (see further Appendix I). Human rights law

recognises that a standard that permit 'reasonable' limitations imposes a lesser standard than one of 'necessity'. For example, the European Court of Human Rights has recognised that the term 'necessary' imposes upon the relevant party a high threshold:

> ['Necessary'] is not synonymous with 'indispensable' … neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable'. … [I]t is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context.[62]

This principle has also received recognition in domestic law. In a passage later approved by the High Court, in *Secretary, Department of Foreign Affairs & Trade v Styles* Wilcox J stated that 'The test of reasonableness is less demanding than one of necessity, but more demanding than a test of convenience.'[63] Similarly in *Mahommed v State of Queensland* Dalton P stated:

> The test of reasonableness (of the term) is an objective one, less demanding than a test of necessity, but more demanding than a test of convenience. I am required to weigh "the nature and extent of the discriminatory effect, on the one hand, against the reasons advanced in favour of the term on the other and all other circumstances, including those specified in section 11(2)"[64]

Although these statements are made in relation to domestic Australian law, they are illustrative of the differentiation between the requirements of a standard of 'reasonableness' and that of a standard of 'necessity', as applied within anti-discrimination law.

42. The second contentious issue contained in the Victorian legislation is the limitation of the exemption for religious institutions and schools to an 'inherent requirements' test (substantively akin to genuine occupational requirements tests) for certain roles. An analysis of the applicable jurisprudence under the ICCPR and as promulgated within the European Court is further set out at Appendix I. As Aroney and Taylor note in their summary of European Court of Human Rights judgements on religious institutional autonomy:

> In its determinations in a number of cases the ECtHR has found there to have been no violation of the rights of the employee, without applying narrow occupational requirements, even when the ethos requirements of the employer organisation impinge on the employee's fundamental human rights.[65]

Serious consideration is required as to whether the 'inherent requirements' test sufficiently acquits the obligations Australia has accepted under international human rights law.

43. Australia has ratified the ICCPR and is also bound by the First Optional Protocol to the ICCPR. This means that individuals may make complaints to the United Nations Human Rights Committee that Australian legislation (including legislation of

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[62] *Handyside v United Kingdom* (1976) 1 EHRR 737 [48].

[63] *Secretary, Department of Foreign Affairs & Trade v Styles* (1989) 23 FCR 251, 263. This passage was also approved by the High Court in *Waters v Public Transport Corporation* (1991) 173 CLR 349, 395-396 (Dawson and Toohey JJ, with whom Mason CJ and Gaudron J agreed, 365), 387 (Brennan J) 383 (Deane J); applied in *Australian Medical Council v Wilson* (1996) 68 FCR 46, 60 (Heerey J, with whom Black CJ, 47, and Sackville J, 79, agreed), see also Law Council of Australia, *Submission 415*, 32.

[64] (2006) QADT 21, 37, referring to *HM v QFG & KG* (1998) QCA 228.

[65] Nicholas Aroney and Paul Taylor, 'The Politics of Freedom of Religion in Australia' (2020) 47(1) *University of Western Australia Law Review* 42, 58.

individual States and Territories pursuant to Article 50 of the ICCPR) does not align with the protections offered by the ICCPR. Under the ICCPR, the Commonwealth is held to account for the actions of the States in failing to protect human rights. The concern is accentuated by the fact that the violation of an ICCPR right by removal could be grounds for a complaint to the UN Human Rights Committee. As pointed out by Associate Professor Julie Debaljak (in respect of the Victorian *Charter of Human Rights and Responsibilities 2006*), 'where the Victorian Charter obligations are less rigorous than the minimum protections guaranteed under international human rights law, the Commonwealth may still be held to account internationally for any violations of Australia's international human rights obligations.'[66] Importantly 50 the ICCPR applies in all parts of a federation 'without any limitations or exceptions'. The foregoing analysis would support the argument that the Commonwealth has legitimate bases on which to enact clause 11.

Clause 12 - Statements of Belief

Statements Protected by the Provision

44. The primary allegation against the protection contained at clause 12 is that it will license dreadful personal attacks. Such criticism has been apparently anticipated by the gauntlet of judicial tests built into the protection. To pass muster any statement must not harass, threaten, intimidate or vilify; or amount to the urging of a serious criminal offence, all determined according to whether a 'reasonable person would consider' that these standards had been breached. It must also be made in good faith and be not malicious. Drawing on existing understandings of equivalent provisions these are very significant hurdles to overcome.

45. The drafting appears as an attempt to protect the valued contribution of religious believers to civil discourse in this country. This would accord with the broad support for free speech within our community, with a recent McCrindle survey finding that 90% of Australians believe that people should have the freedom to share their religious beliefs in a peaceful way.[67]

46. The critique that the provision would give greater protection to religious people appears also to have been anticipated by the drafters, with the protection extending equally to statements by atheists or agnostics that relate to religious matters. The definition of 'statement of belief' provides that, for a statement 'of a belief held by a person who does not hold a religious belief' to receive protection it must be 'of a belief that the person genuinely considers to relate to the fact of not holding a belief.' This proposes a very wide scope of protection for agnostics or atheists. Take for example the atheist who genuinely proclaims their belief that 'secular ethics provides a sufficient basis to ground a pacifist morality, and that, accordingly, religion may be a sufficient condition for pacificism, but it is certainly not a necessary condition.'[68] The statement of that belief will be protected. If this hypothetical atheist were to go further and state that 'secular ethics provides a sufficient basis to ground a pacificist morality, whereas religion is at its heart an agent of violence, contrary to the principles of any true form of pacificism or morality'. Provided the latter statement is not malicious threatening, harassing, intimidating, vilifying and made in good faith within the context in which it

[66] Julie Debeljak 'Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian Charter of Human Rights and Responsibilities Act 2006' (2008) *Melbourne University Law Review* 32(2).
[67] https://cityinfield.com/#report.
[68] Anne Sanders, 'The Mystery of Public Benefit' (2007) 10(2) *Charity Law & Practice Review* 33.

is said, even though that statement may well be offensive or insulting to a religious believer, it would most likely receive protection under clause 12. This is because the latter statement remains a statement 'of a belief that the person genuinely considers to relate to the fact of not holding a belief.' This analysis is consistent with the example provided in the Explanatory Memorandum at paragraph 194:

> Terrance is an atheist. One day, his colleagues are discussing end of year plans and Terrance mentions that he does not celebrate Christmas. When asked about his beliefs, Terrance says that as an atheist, he thinks that prayer and belief in god is 'illogical'. Terrance does not realise that his colleague, Meaghan, is religious and is offended by Terrance's comments. In this example, Terrance's statement is a statement of belief and therefore not discrimination. However, if Terrance were to make repeated comments of this nature directed at Meaghan, knowing that she is religious, it may be possible to demonstrate that these comments are not being made in good faith.

47. Clause 12 does not protect conscientiously held views in respect of matters that are not relevant to religion. This is consistent with all existing Australian anti-discrimination law that protects religious belief or activity. These laws do not extend to conscientiously held beliefs. Such a proposal is not inconsistent with international human rights law. Article 18 of the ICCPR recognises a distinction between conscientiously held views and religious views. While the freedoms to adopt a religion or a conscientious worldview are absolute and cannot be subject to limitation (under Article 18(1)), it is only religious manifestation (which is inclusive of religious speech) as opposed to conscientious manifestation that receives dedicated protection against State imposed limitations (under Article 18(3)). This distinction in international law would not however prevent the protection of conscientiously held views in conjunction with a protection to religious views. Appendix II considers the wider interaction of clause 12 with the internationally protected right of freedom of expression and with protections to religious speech.

Operational and Procedural Considerations

48. Clause 12 has demonstrable work to do. Australian courts have recognised that in certain contexts comments can amount to discrimination, a statutory concept that is distinct from *vilification* (see for example *Nationwide News Pty Ltd v Naidu*;[69] *Qantas Airways v Gama*[70] and *Singh v Shafston Training One Pty Ltd and Anor*[71]).

49. Where a respondent relies on clause 12 in a State or Territory tribunal, as these bodies are not Chapter III Courts, within the meaning of the Australian Constitution, consideration will need to be given to whether the matter would need to be transferred to a federal court or a State court vested with Commonwealth jurisdiction. Several considerations are apposite:
    a. It is not necessarily the case that a Federal or State Court vested with Federal jurisdiction would need to hear the claim. If the assertion relying on section 12 is incidental to the determination of another claim, then a State tribunal may have power to determine the matter (see the rule in *Fencott v Muller*).[72]

[69] *Nationwide News Pty Ltd v Naidu; ISS Security Pty Ltd v Naidu* [2007] NSWCA 377 [378] Basten J.
[70] (2008) 157 FCR 537, [78].
[71] [2013] QCAT 008 (ADL051-11) Michelle Howard, Member 8 January 2013.
[72] (1983) 152 CLR 570 at 606-8 per Mason, Murphy, Brennan and Deane JJ.

b. The need to refer the complaint to a determination on the question of the override imposed by clause 12 would diminish rapidly over time as a body of law develops concerning the interpretation of clause 12. Once that body is developed, State Tribunals will perform their role of applying the law as stated by the relevant Courts.
c. There are many instances where matters are referred from a Tribunal to the Local or District Court for a specific determination. Costs in those matters then are determined according to the costs regimes implemented in those Courts. If a concern is held over the costs consequences in respect of the initial claims that will be referred until such time as a body of law develops around clause 12, specific provisions could be inserted into the relevant Commonwealth law to preserve the regime for costs in the respective jurisdiction from which the matter is referred (to the extent that the referral is made to a Federal court).

Clause 14 – Indirect Discrimination

Alignment with International Law

50. Clauses 14(1) and (2) retain the orthodoxy of the reasonableness exception to indirect discrimination. However under the Bill decision-makers are not provided with direction to align the test of 'reasonableness' to the international standard for permissible limitations stated at Article 18(3) of the ICCPR (being only on 'necessary' grounds). Such an alignment may be performed in the context of religious discrimination because Article 18(3)'s standard is uniquely imposed in respect of limitations on the manifestation of religious belief (which is essentially what the indirect discrimination reasonableness test does) in a way that is not the case for the other protected attributes.

51. The overlap between the prohibition on discrimination under Article 26 and the protection for religious freedom under Article 18 may be stated as follows: where a domestic court denies a person's religious discrimination claim, it imposes an effective limitation on that person's religious manifestation, and the future manifestation of similar conduct in comparable circumstances. Under the indirect discrimination test a limitation may be imposed where it is 'reasonable' to do so. All limitations on the forms of religious belief and activity that are protected by the Covenant are however to comply with the relevant international standard for the imposition of limitations stated under Article 18(3), being 'necessary' limitations only (see discussion further above at paragraphs 40 to 43). The overlap indicates that domestic religious discrimination protections can operate in a manner that fails to acquit the obligations imposed by Article 18(3). The importance of aligning permissible restrictions under domestic legislation with those proposed under international law has been emphasised by the Special Rapporteur in the following terms:

> The Special Rapporteur has gained the impression that restrictions imposed on religious manifestations at the workplace frequently fail to satisfy the criteria set out in relevant international human rights instruments. This critical assessment covers both public employers and the private sector. Limitations are often overly broad; it remains unclear which precise purpose they are supposed to serve and whether the purpose is important enough to justify infringements on an employee's right to freedom of religion or belief. The requirement always to minimize interferences to what is clearly "necessary" in order to achieve a legitimate purpose, as implied in the proportionality test, is frequently ignored. Moreover, restrictions are sometimes applied in a discriminatory manner.

> Indeed, many employers appear to lack awareness that they may incur serious human rights problems as a result of restricting manifestations of freedom of religion or belief by their staff. Under international human rights law, States — in cooperation with other stakeholders —have a joint responsibility to rectify this state of affairs.[73]

52. The EM contains the following statement at paragraph 15: 'In accordance with the ICCPR and Siracusa Principles, this Bill only limits the right to freedom of religion and other rights in circumstances where it is necessary to do so.' While a welcome clarification, this does not amount to a direction to align the reasonableness test to the standard for permissible limitations under Article 18(3). Rather, it appears as a statement that the indirect discrimination test already aligns with international law. To avoid a disjunct between the Bill and international law in this respect, clause 14(2) concerning factors to be fulfilled in satisfying the reasonableness test should require reference to the 'necessary' standard imposed under Article 18(3).

Burden of Proof

53. The Second Exposure Draft of the Religious Discrimination Bill clarified that the burden of proof lay with the person seeking to establish that the condition requirement or practice is reasonable. This is consistent with existing Commonwealth anti-discrimination law.[74] In addition, the Second Exposure Draft contained a provision clarifying that a qualifying body carried the burden of proving that a requirement imposed was 'essential'. These requirements were contained in the following provision:

> *Burden of proof*
>
> (8) For the purposes of subsection (1), the person who imposes, or proposes to impose, the condition, requirement or practice has the burden of proving that the condition, requirement or practice is reasonable.
>
> Note: As a result of this subsection, the person who imposes, or proposes to impose, the condition, requirement or practice also has the burden of proving that compliance with the rule is:
>
> (a) necessary as referred to in subsection (3) or (7); or
>
> (b) an essential requirement as referred to in subsection (4).

54. These requirements should be reinstated. The rationale for maintaining the existing position under other Commonwealth anti-discrimination law was adequately stated in the EM to the Second Exposure Draft:

> Placing the burden of proof on the person imposing or proposing to impose the condition, requirement or practice is appropriate as that person would be in the best position to explain or justify the reasons for the condition in all the circumstances, and would be more likely to have access to the information needed to prove that such a condition is reasonable. Conversely, requiring a complainant to prove that conduct is unreasonable is a significant barrier to successfully proving a complaint of indirect discrimination, particularly as the

[73] Interim report of the United Nations Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt, *Elimination of all forms of religious intolerance*, A/69/261, 5 August 2014 https://www.ohchr.org/documents/issues/religion/a.69.261.pdf [40].
[74] See for example *Sex Discrimination Act 1984*, s 7C.

complainant is unlikely to have access to the information required to prove that an action is unreasonable.

For example, an employer who imposes uniform standards for food safety purposes is best placed to show why those standards are required and why they are reasonable. An employee or prospective employee is less likely to have access to all the information about food safety requirements for that particular business and any alternatives that may be available to the employer in complying with those standards or imposing that condition.

Reasonable Adjustments

55. The Report of the Former United Nations Special Rapporteur of Freedom of Religion or Belief titled *Elimination of all forms of religious intolerance* provided to the sixty-ninth session of the General Assembly recommended the use of 'reasonable accommodation' provisions as a means to combat religious discrimination.[75] The Report would support the inclusion of a reasonable adjustments requirement within the Bill. The relevant part of the Special Rapporteur's analysis is provided at paragraphs 49 to 66, with a summary of conclusions at paragraphs 70-72 and 77-78. The Special Rapporteur concludes that 'there can be no reasonable doubt that the right to freedom of thought, conscience, religion or belief also applies in the workplace' [31] and that 'eliminating indirect discrimination may require measures of "reasonable accommodation"' [70]. A 'reasonable adjustments' clause similar to that contained in the *Disability Discrimination Act 1992* included within the tests for direct and indirect discrimination would provide a means to deal with the 'comparator test' issue highlighted by *Purvis* judgement.[76] That issue is that an alleged discriminator can avoid a finding of discrimination where they are able to assert that they would have treated any person who acted in the same way absent religious reasons in the same way. A reasonable adjustments provision reflects the approach adopted in amendments to the *Disability Discrimination Act 1992* in 2008/09 adopted in response to the problems with the comparator test highlighted by the High Court decision in *Purvis v New South Wales (Department of Education and Training)*[77] (*Purvis*).

56. Another way to deal with the *Purvis* issue is through clause 6 concerning characteristics attributed or imputed to religious believers. The Bill already provides certain examples. These could be further expanded to clarify the kinds of attributes that would ordinarily be attributed or imputed to religious believers. There is precedent for clarifying what characteristics attach to a protected attribute in Commonwealth anti-discrimination law. For example, s 5(1A) of the SDA states 'to avoid doubt, breastfeeding (including the act of expressing milk) is a characteristic that appertains generally to women.'

Clause 16 - Protecting Corporate Bodies from Discrimination

57. The Bill offers protection to religious institutions through an 'associates clause' at clause 16. There are sound policy reasons why religious corporations should be clearly protected under the Bill: religious belief is most often expressed in associational form.

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[75] Interim report of the United Nations Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt, *Elimination of all forms of religious intolerance*, A/69/261, 5 August 2014 https://www.ohchr.org/documents/issues/religion/a.69.261.pdf

[76] *Disability Discrimination Act 1992* (Cth), ss 5(2), 6(2).

[77] (2003) 217 CLR 92.

To allow that a sole trader could take the benefit of religious discrimination protections, but not where they subsequently incorporated the business would be arbitrary, as Redlich JA said in *Cobaw*: 'That interpretation would produce the unintended result that individuals who operate a business would have different levels of religious freedom, depending upon whether the business was incorporated or not. It would force individuals of faith to choose between forfeiting the benefits of incorporation or abandoning the precepts of their religion'.[78] Similarly, as Rajanayagam and Evans note, the United States Supreme Court has recognised that:

> to deny corporations recourse to freedom of religion would require an untenable bright line to be drawn between corporations and other legal entities (partnerships, sole traders, incorporated and unincorporated associations, and so on) … It was suggested by Redlich JA in *Cobaw* and the majority in *Hobby Lobby* that this bright line rule, were it adopted, would operate unfairly and arbitrarily by making the availability of religious freedom protections contingent upon the happenstance of what form a business chooses to take. So, in effect, a business would be penalised for running its activities through a corporation, rather than as a sole trader or a partnership.[79]

58. Most Australian discrimination law provides that a 'person' may initiate a complaint, and the default position is that this would include corporate 'persons'. This was the view taken by Mason J in applying the *Racial Discrimination Act 1975* (RDA) in *Koowarta v Bjelke-Petersen*:[80]

> It is submitted that because, generally speaking, human rights are accorded to individuals, not to corporations, "person" should be confined to individuals. But, the object of the Convention being to eliminate all forms of racial discrimination and the purpose of s. 12 being to prohibit acts involving racial discrimination, there is a strong reason for giving the word its statutory sense so that the section applies to discrimination against a corporation by reason of the race, colour or national or ethnic origin of any associate of that corporation. It is also submitted that the reference in the concluding words to "any relative or associate of that second person" is inappropriate to a corporation. Certainly that is so of "relative", but a corporation may have an "associate". The concluding words are therefore quite consistent with the "second person" denoting a corporation as well as an individual.[81]

The 'second person' referred to in the relevant provisions is the 'person' who is the subject of a discriminatory act, whether corporation or individual. Justice Mason thus clearly contemplates that corporate bodies may receive protection where they experience discrimination 'by reason of the race, colour or national or ethnic origin of any associate of that corporation'.[82]

59. The Human Rights and Equal Opportunity Commissioner (the forerunner to the Australian Human Rights Commission) applied this reasoning to conclude that an Aboriginal community organisation was a 'person aggrieved' for the purposes of the

[78] *Cobaw* (n 46).
[79] Shawn Rajanayagam and Carolyn Evans 'Corporations and Freedom of Religion: Australia and the United States Compared' (2015) 37 *Sydney Law Review*, 329.
[80] (1982) 153 CLR 168, 236.
[81] (1982) 153 CLR 168, 236.
[82] Ibid.

complaint provisions which then existed under the RDA. The HREOC found that the respondents' conduct had prejudicially affected the interests of the organisation in that it had hindered it from carrying out its objects.[83]

60. Clause 16 of the Bill requires that an associated religious institution be dealt with 'in the same way' as the associated religious believer. Interpreting equivalent provisions in 2018, Federal Court Judge Moshinsky said they are 'not free from doubt' and suggested alternative drafting that would remove this uncertainty.[84] At paragraph 247 the EM now clarifies that:

> Moshinsky J in *Eisele v Commonwealth* [2018] FCA 15 set out useful commentary on the interpretation of the associates clause in the Disability Discrimination Act, with which this associates clause is consistent. This commentary stepped out the understanding of the provision in plain terms, which may provide clarity when applying an associates provision to particular facts.

Given the centrality of the associate provision to the protection of religious institutions, and the fact that such provisions are largely untested in anti-discrimination law, this clarification is a welcome addition.

61. The analysis of international law provided at Appendix III demonstrates that there is strong support for the protection of groups against religious discrimination that is encountered because of their association with an individual who holds a religious belief or engages in a religious activity. Indeed, as Appendix III shows, that support may also extend to the protection of corporations as litigants in their own right, as a necessary means to give adequate protection to the rights of individuals. Both clause 16 and a direct right of corporations to allege discrimination in their own capacity would give effect to Article 18(1) of the *International Covenant on Civil and Political Rights* and other connected provisions and international law instruments, which protect individuals manifesting their beliefs in community with others (including through incorporated and unincorporated communities).[85] This is so because the external affairs power authorises a potentially broad range of Commonwealth laws on any subject matter which is the subject of rights and obligations arising out of an international treaty.[86] The Constitutional scope of the external affairs power is further outlined at Appendix III.

62. The importance of giving detailed consideration to the sufficiency of clause 16's ability to provide protection to the community aspect of religious belief under Article 18 is further accentuated when the limitations on the ability to make complaints through the representative complainant provisions is considered. While representative complainant provisions are available under the RDB, in conjunction with the *Australian Human Rights Commission Act 1986* (Cth) (ARCHA), they will not serve the end of protecting corporations that *themselves* are the subject of discrimination through denials of services, funding, contracts and the like. There are four main reasons for this:
    a. First, as outlined by Dawson and Gaudron JJ in *IW v City of Perth*, in the specific context of a denial of services, the person denied the supply is the person who

[83] [1993] HREOCA 24 (extract at (1994) EOC 92-653).
[84] *Eisele v Commonwealth* [2018] FCA 15.
[85] I acknowledge Alex Deagon as an equal co-contributor to this section of material and to Appendix III.
[86] As held by the majority in *Commonwealth v Tasmania* (1983) 158 CLR 1, 125 (Mason J) ('Tasmanian Dams').

must make the complaint.[87] Statutory provisions enabling representative complainant proceedings are thus inapplicable where the corporate body is the body that has been denied services.

b. Second, section 46PB(1)(a) of the AHRCA provides that a representative complaint may only be lodged where the class of members are themselves each able to lodge a complaint. The separate means to lodge a complaint 'on behalf' of a person contained at sections 46P(2)(a)(ii) and 46P(2)(c) are only available where the person on whose behalf the complaints are lodged is an 'aggrieved person'. The contention that these provisions would be available to a corporate body in the absence of a provision clarifying that corporate bodies may make a complaint is incorrect. Conceptually, representative complainant provisions have been considered to enable parents to make complaints on behalf of minors, or for a person to make complaints on behalf of another person suffering a disability, where those latter persons have suffered discrimination. They will not enable a person to lodge a complaint on behalf of a corporate body if the corporate body is not able to itself make the complaint.

c. Third, the representative complainant provisions in the AHRCA are styled to enable representation in a class-action type of proceedings, not the denial of a specific approval or of funding to a corporate body. As Maxwell J outlined with reference to the Victorian *Equal Opportunity Act 1995* provisions:

> There are several conditions to be satisfied before a complaint may be made by a representative body on behalf of named persons. In particular, each named person must have been entitled, as an individual, to make a complaint of discrimination in his or her own right.[88]

Where the discriminatory act is against a corporate business, these conditions will often not exist.

d. Finally, as Rees, Rice and Allen admit representative complainant provisions are rarely utilised:

> The legislative provisions governing representative complaints have rarely been used but it is difficult to determine the precise reason for this. Some of the possible reasons include: the provisions are complex; and the remedies available in a representative complaint are usually more limited than those available in an individual complaint.[89]

The scope of the protections enabled by such provisions thus entails a degree of uncertainty.

These reasons support the inclusion of clause 16, and the provision of further attention to the ability of groups to take the benefits of the protections against religious discrimination in their own capacity.

Partnerships – Clause 20

63. It is also noted that to be consistent with existing Commonwealth law, the prohibition on discrimination within partnerships should only operate in respect of partnerships of 6 or more persons (the current drafting limits the exception to partnerships of three or less persons).

[87] *IW v City of Perth* (1997) 191 CLR 1, 25 (Dawson and Gaudron JJ).
[88] *Cobaw* (n 46) [32] (Maxwell J).
[89] Neil Rees, Simon Rice and Dominque Allen, *Australian anti-discrimination and equal opportunity law* (Federation Press, 2018) [15.2.22].

Charities

64. The legislative package protects institutions that hold a traditional view of marriage from loss of their charity status, as has occurred abroad (*Human Rights Legislation Amendment Bill 2021* clause 3). The amendment addresses both the requirement that charities conform with 'public policy'[90] and also that they exist for the public benefit. The rationale for addressing both requirements is stated in the enclosed article Mark Fowler, 'Attaining to Certainty: Does the Expert Panel's Proposal for Reform of the Charities Act Sufficiently Protect Religious Charities?' (2020) 2 *Third Sector Review* 87.

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[90] *Charities Act 2013* (Cth), s 11.

Appendix I - The International Human Rights of Religious Educational Institutions

65. All Australian jurisdictions provide exemptions to religious educational institutions in both the areas of employment[91] and in respect of the supply of services to students.[92] As set out in the first section, these provisions give effect to the internationally recognised human rights of religious freedom and associational freedom. The framework of those rights has been primarily considered within matters that concern the ability of a private school to define its religious ethos through its employment policies.

United Nations Jurisprudence

66. The right to establish and maintain private religious schools is protected under various United Nations instruments. Article 13(3) of the *International Covenant on Economic, Social and Cultural Rights* states:

> The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

Article 13(4) provides a guarantee that individuals and bodies may establish private educational institutions:

> No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

The *United Nations Universal Declaration of Human Rights* (UDHR) simply protects the prior right of parents to choose the kind of education that shall be given to their children.

67. Article 18(4) of the *International Covenant on Civil and Political Rights* (ICCPR), which has been ratified by Australia provides:

> The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

This right also protects the right to establish private religious schools. In his commentary on the ICCPR Nowak concludes that '[w]ith respect to the express rule in Art.13(3) of the *International Covenant on Economic, Social and Cultural Rights* and the various references to this provision by the delegates in the 3d Committee of the General Assembly during the drafting of Article 18(4), it may be assumed that the

[91] *Discrimination Act 1991* (ACT) ss 33(1), 44(a); *Anti-Discrimination Act 1977* (NSW) ss 25(3)(c), 38C(3)(c), 40(3)(c), 49ZH(3)(c); *Equal Opportunity Act 2010* (Vic) s 83; *Anti-Discrimination Act 1998* (Tas) s 51; *Equal Opportunity Act 1984* (SA) s 34(3); *Equal Opportunity Act 1984* (WA) ss 66(1)(a), 73(1); *Anti-Discrimination Act 1991* (Qld) s 25.

[92] *Discrimination Act 1991* (ACT) ss 33(2), 46; *Anti-Discrimination Act 1977* (NSW) ss 38K, 46A, 49ZO; *Equal Opportunity Act 2010* (Vic) ss 39(a), 61(a), 83; *Anti-Discrimination Act 1998* (Tas) s 51A; *Equal Opportunity Act 1984* (SA) s 35(2b); *Equal Opportunity Act 1984* (WA) ss 66(1)(a), 73(3); *Anti-Discrimination Act 1991* (Qld) s 41(a).

parental right covers the freedom to establish private schools.'[93] As further discussed below, the jurisprudence of the European Court of Human Rights (ECHR), has confirmed that the right under Article 2 of the First Protocol to the *European Convention on Human Rights* (which is closely aligned to Article 18(4) establishes a human right to found and maintain private schools.

68. In *Delgado Páez v Colombia* the UNHRC considered a complaint by a teacher within the Colombian Catholic schools system who had received differential treatment due to his advocacy of 'liberation theology'. The UNHRC stated:

69. With respect to Article 18, the Committee is of the view that the author's right to profess or to manifest his religion has not been violated. The Committee finds, moreover, that Colombia may, without violating this provision of the Covenant, allow the Church authorities to decide who may teach religion and in what manner it should be taught.[94]

    Similarly, the UNHRC found no breach of Article 19. The Committee's view would support the assertion that religious institutional autonomy under Article 18 permits the exercise of discretion over staff and teaching by religious bodies in the context of education.

70. The *Convention on the Rights of the Child*, also ratified by Australia, requires State Parties to 'undertake to ensure the child such protection and care as is necessary for his or her wellbeing, taking into account the rights and duties of his or her parents …'.[95] The right of the child to 'freedom of thought, conscience and religion' is explicitly protected in Article 14 of the Convention.[96] Further, it requires States to respect the 'rights and duties of parents … to provide direction to the child in the exercise of his or her right.'[97] This also includes in the substantive content of education the development of respect for the child's parents, and the child's own cultural identity, language, and values.[98]

71. It is therefore clear that international human rights law protects freedom of religion for both adults and children. The right to establish private schools is also protected by international human rights law that Australia has ratified. To deny the discretion of a private faith-based school to ensure that those persons appointed to its leadership, staff and volunteer roles also share its faith is to remove the ability to maintain the unique religious identity of that school. Such a proposal is thus a breach of the right to establish private religious schools.

72. Furthermore, in the context of faith-based schools, it is also relevant to note that the United Nations *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* provides that the right to freedom of thought, conscience, religion or belief under Article 18 of the ICCPR includes the freedom, 'to establish and maintain appropriate charitable or humanitarian

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[93] Manfred Nowak, *CCPR Commentary, 2nd revised edition* (Kehl: N P Engel, 2006), 443.
[94] *Delgado Páez v Colombia* (n 2) [5.7].
[95] *Convention on the Rights of the Child* (1989), opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3(2) ('CRC').
[96] Ibid art 14(1).
[97] Ibid art 14(2). See also art 5, which contains a general requirement for State Parties to 'respect the responsibilities, rights and duties of parents … to provide … appropriate direction and guidance in the exercise by the child of the rights contained in the Covenant.'
[98] Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford University Press, 2010) 243.

institutions'.[99] The establishment and maintenance of such faith-based schools in accordance with their religious freedom rights necessitates their ability to exercise discretion over their leadership, their staff and their volunteers. This instrument was declared "an international instrument relating to human rights and freedoms for the purposes of the *Human Rights and Equal Opportunity Commission Act 1986*" by Michael John Duffy as Commonwealth Attorney-General on February 8, 1993, thus enabling the making of a complaint alleging a breach of these principles to the Australian Human Rights Commission.

73. Former United Nations Special Rapporteur on freedom of religion or belief Heiner Bielefeldt has offered the following comments in relation to the community aspect of religious freedom and the right to determine appointments to critical roles:

> 57. Freedom of religion or belief also covers the right of persons and groups of persons to establish religious institutions that function in conformity with their religious self-understanding. This is not just an external aspect of marginal significance. Religious communities, in particular minority communities, need an appropriate institutional infrastructure, without which their long-term survival options as a community might be in serious peril, a situation which at the same time would amount to a violation of freedom of religion or belief of individual members (see A/HRC/22/51, para. 25). Moreover, for many (not all) religious or belief communities, institutional questions, such as the appointment of religious leaders or the rules governing monastic life, directly or indirectly derive from the tenets of their faith. Hence, questions of how to institutionalize religious community life can have a significance that goes far beyond mere organizational or managerial aspects. Freedom of religion or belief therefore entails respect for the autonomy of religious institutions.[100]

74. The Special Rapporteur has emphasised that these principles also apply to religious schools, noting that limitations on the ability to incorporate private religious schools:

75. may have negative repercussions for the rights of parents or legal guardians to ensure that their children receive religious and moral education in conformity with their own convictions – a right explicitly enshrined in international human rights law as an integral part of freedom of religion or belief.[101]

Religious Institutional Autonomy

76. At a broad conceptual level, the European Court of Human Rights summarised its view of the correlation between religious institutional autonomy and plural democratic society in *Hasan v Bulgaria*:

> the believer's right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully free from arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the

[99] UN General Assembly, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, 25 November 1981, A/RES/36/55, Article 6.
[100] UN General Assembly, *Elimination of all Forms of Religious Intolerance*, 7 August 2013, A/68/290, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N13/421/91/PDF/N1342191.pdf?OpenElement
[101] UN General Assembly, Report of the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt, 22 December 2011, A/HRC/19/60 [47].

> very heart of the protection which article 9 affords. It directly concerns not only the organisation of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members. Were the organisational life of the community not protected by article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable.[102]

77. In respect of members' rights, in *Sindicatul "Păstorul Cel Bun" v Romania*,[103] the Grand Chamber of the ECHR considered that:

> In accordance with the principle of autonomy, the State is prohibited from obliging a religious community to admit new members or to exclude existing ones.… in the event of a disagreement over matters of doctrine or organisation between a religious community and one of its members, the individual's freedom of religion is exercised through his freedom to leave the community.[104]

78. In its developed consideration of religious institutional autonomy the Court has applied these principles to a range of faith-based institutions, including in the case of religious educational institutions. In doing so it has not seen fit to drive a wedge between religious bodies and their other charitable emanations. In *Rommelfanger v Germany*[105] a faith-based hospital was permitted to sanction staff that made public statements on abortion contrary to its beliefs. In *Siebenhaar v Germany*[106] a day-care centre run by the German Protestant church could act lawfully in dismissing a member of a differing religious body in order to maintain the credibility of the church in the eyes of the general public and parents and to avoid the risk that children would be influenced. The decision discloses particular regard to the ethos of the organisation, and its engagement with the wide public, as opposed to any imposition of an inherent requirements style test that would have regard to the particular requirements of any given role. In *Obst v Germany* (2010) the dismissal of the European Director of Public Relations of the Church of Latter Day Saints for entering into an extramarital relationship was upheld as a legitimate expression of religious institutional autonomy in light of the public position assumed by the role. In *Martinez v Spain* (2014) the Court held that a Catholic scripture teacher in public schools can be required to live a life consistent with the teachings of the Church, demonstrating a sufficiently close proximity between the role and the requirements of the faith.[107] The availability of an unemployment benefit was also a relevant determinant.

79. Extending similar principles, in *Syndicatul "Păstorul cel Bun" v Romania* (2013) the formation of a Romanian Orthodox priest's trade union without the consent of the Bishop was held to not breach Article 11 (right to freedom of association and to form unions), as it was not role of the State to interfere in internal governance of dissidents of religious institutions:

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[102] *Hasan and Chaush v Bulgaria (European Court of Human Rights, Grand Chamber, Application no. 30985/96, 26 October 2000)* ('*Hasan and Chaush v Bulgaria (European Court of Human Rights, Grand Chamber, Application no. 30985/96, 26 October 2000)*'). See also *Serif v. Greece* (ECtHR, App. No. 38178/97, 14 December 1999).

[103] (2014) 58 EHRR 284, 319 [137] (citations omitted).

[104] *Ibid* 324 [165].

[105] *Rommelfanger v Federal Republic of Germany* (1989) ECHR 27 ('*Rommelfanger v Federal Republic of Germany*'); ibid.

[106] *Siebenhaar v Germany* (2011) ECtHR, App. No. 18136/02 ('*Siebenhaar v Germany*').

[107] *Fernández Martínez v. Spain* [GC], no. 56030/07, ECHR 2014.

> it is the domestic courts' task to ensure that both freedom of association and the autonomy of religious communities can be observed within such communities in accordance with the applicable law, including the Convention. Where interferences with the right to freedom of association are concerned, it follows from Article 9 of the Convention that religious communities are entitled to their own opinion on any collective activities of their members that might undermine their autonomy and that this opinion must in principle be respected by the national authorities. However, a mere allegation by a religious community that there is an actual or potential threat to its autonomy is not sufficient to render any interference with its members' trade-union rights compatible with the requirements of Article 11 of the Convention. It must also show, in the light of the circumstances of the individual case, that the risk alleged is real and substantial and that the impugned interference with freedom of association does not go beyond what is necessary to eliminate that risk and does not serve any other purpose unrelated to the exercise of the religious community's autonomy. The national courts must ensure that these conditions are satisfied, by conducting an in-depth examination of the circumstances of the case and a thorough balancing exercise between the competing interests at stake.[108]

80. As Aroney and Taylor note in their summary of European Court of Human Rights judgements on religious institutional autonomy:

> In its determinations in a number of cases the ECtHR has found there to have been no violation of the rights of the employee, without applying narrow occupational requirements, even when the ethos requirements of the employer organisation impinge on the employee's fundamental human rights.[109]

81. In eschewing the distinction between secular and religious roles when determining whether an employee may be subject to a heightened degree of loyalty,[110] the Court has on occasion conducted a proportionality analysis that looks to the specific roles assigned to an employee, and the proximity between the applicant's activity and the proclamatory mission of the religious body.[111] The few occasions in which the Court has not upheld institutional autonomy include a church organist who was not able to locate employment elsewhere[112] and where there had been a failure of fundamental natural justice.[113] The proximity test is not a relevant consideration under Commonwealth law and has not been adopted within the United Nations jurisprudence.

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[108] *Sindicatul "Păstorul cel Bun" v. Romania* [GC], no. 2330/09, ECHR 2013.
[109] Aroney and Taylor (n 65).
[110] *Case of Fernández Martínez v Spain* (2014) ECHR 615 ('*Case of Fernández Martínez v Spain*'); ibid.
[111] *Schuth v Germany (European Court of Human Rights, Grand Chamber, Application no. 1620/03, 23 September 2010)* ('*Schuth v Germany (European Court of Human Rights, Grand Chamber, Application no. 1620/03, 23 September 2010)*'). *Obst v Germany* (2010) ECtHR, App. No. 425/03 ('*Obst v Germany*').
[112] *Schuth v Germany (European Court of Human Rights, Grand Chamber, Application no. 1620/03, 23 September 2010)* (n 111). That case involved a Catholic organist dismissed for entering an extra marital relationship. The Court upheld the applicant's complaint on the basis that the German court failed to adequately consider the nature of the post, and provided only limited judicial scrutiny. The Court have therefore have reached a differing outcome if sufficient consideration had been given by the domestic courts. *Case of Fernández Martínez v Spain* (n 110); *Obst v Germany* (ECtHR, App. No. 425/03, §§ 12-19, 23 September 2010).
[113] *Lombardi Vallauri v. Italy*, no. 39128/05, 20 October 2009. This matter concerned the dismissal of an academic in the absence of any explanation as to the grounds for dismissal, or an ability to respond to the proposed dismissal.

Similarly, the United Nations Human Rights Committee has refused to apply the European Court's margin of appreciation doctrine.

Right to Establish Private Religious Institutions

82. The right corresponding to Article 18(4) of the ICCPR is contained within Article 2 of the First Protocol to the European Convention on Human Rights. It states that:

> No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

83. The European Court of Human Rights judgement in *Kjeldsen, Busk Madsen and Pedersen v Denmark (Kjeldsen)*[114] concerned the right of parents to remove children from sex education. Therein the European Court of Human Rights held that Article 2 aims at securing pluralism across the education sector:

> The second sentence of Article 2 (P1-2) aims in short at safeguarding the possibility of pluralism in education which possibility is essential for the preservation of the "democratic society" as conceived by the Convention. In view of the power of the modern State, it is above all through State teaching that this aim must be realised.[115]

As noted by Rivers '[t]he two sentences of the article are connected, in that parents have the prior duty to ensure that children receive an education, and the right to determine what that education shall be. State provision is only legitimate if it respects this prior parental responsibility.'[116] The Court held:

> The right set out in the second sentence of Article 2 (P1-2) is an adjunct of this fundamental right to education …. It is in the discharge of a natural duty towards their children - parents being primarily responsible for the "education and teaching" of their children - that parents may require the State to respect their religious and philosophical convictions. Their right thus corresponds to a responsibility closely linked to the enjoyment and the exercise of the right to education.[117]

84. The Court also noted the important role private schools play in offering an opportunity for parents to excuse their children from sex education that does not align with their religious or philosophical convictions:

> the Danish State preserves an important expedient for parents who, in the name of their creed or opinions, wish to dissociate their children from integrated sex education; it allows parents either to entrust their children to private schools, which are bound by less strict obligations and moreover heavily subsidised by the State (paragraphs 15, 18 and 34 above), or to educate them or have them educated at home, subject to suffering the undeniable sacrifices and inconveniences caused by recourse to one of those alternative solutions.[118]

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[114] (1979-80) 1 EHRR 711.
[115] At 21. Also affirmed in *Case of Folgero and Others v Norway* (European Court of Human Rights, Grand Chamber, Application No. 15472/02 29, 29 June 2007) at para 84(b).
[116] Rivers (n 98) 245, commenting upon the decision of *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1979-80) 1 EHRR 711.
[117] *Kjeldsen, Busk Madsen and Pedersen v Denmark* (n 116) [22].
[118] *Kjeldsen, Busk Madsen and Pedersen v Denmark* (n 116) [24].

85. Thus, Article 2 will be breached where a state's education system fails to make reasonable provision for parental convictions across the entire education system. The presence of alternative private religious schools was held to be a critical component of a state's ability to satisfy this requirement.

86. Importantly in the context of the current Inquiry, in *Ingrid Jordebo Foundation of Christian Schools v Sweden*[119] the European Commission on Human Rights applied the principles set out in *Kjeldsen* to the context of independent schools. In *Jordebo v Sweden* the Commission considered that Article 2 of the First Protocol guarantees the right to start and run religious educational institutions as a 'corner-stone' protection to individual freedom.[120] The Commission acknowledged that the *travaux preparatories* [the records of the deliberations of State Parties that led to the European Convention on Human Rights] recognise:

> that the principle of the freedom of individuals, forming one of the corner-stones of the Swedish society, requires the existence of a possibility to run and to attend private schools … In particular, it was pointed out that it should be possible at a private school to give certain topics a more, and others a less, prominent position than that given in public schools and that the activity in a private school should be allowed "within very wide ranges to bear the stamp of different views and values".[121]

87. The Commission criticised the Swedish Government, which:

> seem[ed] to regard the right to keep a school as something entirely within "le fait du Prince" [permissible acts of government]. But this is clearly different from the mainstream in the countries of the High Contracting Parties, necessitating an autonomous way of judgment… The Government seem to look at schooling the same way as at military service, where of course no competing "private regiments" could be tolerated.[122]

88. Legislative proposals that fail to afford religious education associations the ability to maintain their ethos could be said to be subject to similar concerns.

89. In linking a diversity in private schooling to a flourishing democratic State the Commission was critical of the unitary nature of Swedish schooling system in the following terms:

> The applicants' school was founded with the aim of preserving the tradition of the Christian school in Sweden before the secularisation of the municipal schools. There is thus nothing odd or strange in these general ideas, although this kind of school no longer fits in the general system of a secularised school and State. Thus, in the applicants' school, the teaching of religion, although ecumenical and not pertaining to any particular Christian sect or movement, is confessional and founded on Christian belief. There are morning prayers and prayers before and after meals, such as was common in all schools 30 years ago…

[119] *Ingrid Jordebo Foundation of Christian Schools v Sweden* (n 31).
[120] Klaus Beiter *The Protection of the Right to Education in International Law* (Martinus Nijhoff, 2006).
[121] *Ingrid Jordebo Foundation of Christian Schools v Sweden* (n 31).
[122] Ibid.

> The State has the right to have the applicants' school inspected, but the judgment over the school and its quality should be made in an independent way, avoiding all harassment, by inspectors free of bias. The school has not been treated in such a way, and Mrs Jordebo's right, as a parent, has thereby been violated, as also by decisions of the instances which are bound to be biased by their coupling to the State and the municipal school system…
> Finally, as general information the following is mentioned. Sweden is nearly unique among countries belonging to the Council of Europe as far as the school policy is concerned. In Sweden it is a basic political idea, which has governed the political leaders for a long time, that the State and the local municipal authorities must control the education: what the children have to learn and in which ways they have to receive the education must in every instance be decided by the political majority of the country. For this reason private schools, although formally allowed, are in practice stopped with all means. The children should be kept within the State-municipal public schools in order to prevent any other influence on the education than such as has been accepted by the political majority. A formal decision has been made that not more than 0.3 % of the children of compulsory school age may be allowed to visit private schools, three out of 1000 children. The whole Swedish school system is very close to violating Article 9 of the Convention [freedom of religion or belief] when it says that everyone is guaranteed the right to think freely. The idea is that the Swedish school children are in principle led to think only in the directions that are decided by the political majority of the Parliament. When this majority has decided that the public education should be non-confessional, it means that this majority can allow only three children out of 1000 to have a confessional education. To maintain a democratic outlook, private schools cannot be totally forbidden but instead economic rules have been adopted to stop private schools in Sweden in reality. These measures are very efficient. The Anna school has, in spite of all these difficulties of a financial kind, been successful and created an alternative in Jönköping. Then other ways have been used in order to stop its development. In this respect it is easy to say that the education offered at the Anna school is not good enough. In the applicants' opinion the education offered to the children was good enough for reasons which it is not necessary to explain here.[123]

90. Again, a failure to afford religious education associations the ability to maintain their ethos gives rise to similar concerns. Legislative restrictions on the freedom of religious educational institutions to maintain their ethos give rise to the need for careful consideration as to whether they evince a movement towards a society in which children are 'led to think only in the directions that are decided by the political majority of the Parliament'.[124]

91. Having emphasised the need for a non-biased approach to religious schooling and the importance of private schooling in ensuring civil society freedoms, the Commission concluded:

> The question which arises is whether Article 2 of Protocol No. 1 (P1-2) could be interpreted as granting a right to start and run a private school, and whether, when a private school is as such approved, the school should have a right to run

[123] Ibid.
[124] Ibid.

> classes at all stages of the compulsory school … The Commission considers that it follows from the judgment of the European Court of Human Rights in the Case of Kjeldsen, Busk Madsen and Pedersen (judgment of 7 December 1976, Series A no. 23, pp. 24-25, para. 50) that Article 2 of Protocol No. 1 (P1-2) guarantees the right to start and run a private school.[125]

92. The 'free-standing right, regardless of State provision, to establish and run private schools, including faith-based schools, subject to State oversight and conformity to minimum standards' was affirmed by the Commission in *Verein Gemeinsam Lernen v Austria*.[126] It is also worth noting that in that decision the Commission also confirmed that private schools have a right based on article 14 in the context of article 2 First Protocol to non-discriminatory conditions of existence, including equal access to State funding for schools of their type.[127] Similarly, in *Waldman v Canada*,[128] the United Nations Human Rights Committee held that the differential treatment granted by Ontario to Roman Catholic religious schools, which were publicly funded, as opposed to schools of other religions, which were not, amounted to discrimination. The distinction drawn by the State could not be considered to be reasonable and objective, and thus violated Article 26.

93. In applying these principles, the ECHR has held that the obligation to 'respect' religious conviction sets a high standard on the State in the education of children:

> That duty is broad in its extent as it applies not only to the content of education and the manner of its provision but also to the performance of all the "functions" assumed by the State. The verb "respect" means more than "acknowledge" or "take into account". In addition to a primarily negative undertaking, it implies some positive obligation on the part of the State. [129]

94. In addition, the ECHR has recognised the unique nature of religious conviction as a ground for its separate protection under the Protocol:

> The term "conviction", taken on its own, is not synonymous with the words "opinions" and "ideas". It denotes views that attain a certain level of cogency, seriousness, cohesion and importance.[130]

95. In summary, the above rulings are inconsistent with any proposal to remove the distinct exemptions for faith-based schools that concern employment in Commonwealth law. The Bill affords strong protection in this regard, providing strong support for the contention that it aligns with the requirements of international law. Failure to do so may jeopardise the ability of religious schools to control their leadership, staff and volunteers, and thus the ability of religious schools to offer students a holistic religious education in accordance with their religious convictions. The Bill preserves the right to establish independent schools, protected in human rights law as a fundamental right central to the preservation of pluralistic democracy. To that extent, the Bill also

[125] Ibid. Having set out these this general statement of rights, the Commission held that on the particular facts that the education provided did not meet the quality control requirements legitimately imposed by the Government.
[126] (1995) 20 EHRR CD 78.
[127] Rivers (n 98) 248.
[128] *Waldman v Canada* No. 694/1996 [10.5] – [10.6].
[129] *Case of Folgero and Others v Norway* (European Court of Human Rights, Grand Chamber, Application No. 15472/02 29, 29 June 2007) [84(c)].
[130] Ibid.

preserves the legitimate expression of the rights of children and their parents to ensure the religious and moral education of their children. The Bill thus preserves the ability of parents to choose a school consistent with the ethical and religious values of themselves and their children. It should also be noted that failure to recognise the ability of religious educational bodies to employ persons consistent with their religious values would also limit their right to freedom of association.

96. A failure to allow proper recognition to the discretion of religious schools over leadership and staff could jeopardise their unique identity. Such would be a proposal to breach what the European Commission on Human Rights has termed the 'guaranteed … right to think freely'; the human right that protects against the State imposed uniformity and guarantees pluralism in the provision of education as a means to ensure freedom of thought within a society.

The Expert Panel Recommendations on Staff

97. In its analysis of international law, the Expert Panel on Religious Freedom considered the question of the religious ethos of faith-based schools in considerable detail, having had the benefit of a wide consultation with academics, peak bodies and community groups and having received 15,620 submissions. The Expert Panel's report states:

> In the absence of any specific and comprehensive law dealing with freedom of religion, the Panel noted the pivotal role of exceptions to discrimination laws in the protection of freedom of religion.[131]

98. The Expert Panel also noted the contribution of such faith-based schools to diversity within Australia in the following terms:

> The Panel noted the wide variety of faith-based schools in Australia and the communities in which they operate. The Panel considered there is value in this variety, as it supports parental rights to select the best education for their individual child. While many faith-based schools choose not to rely on the existing exceptions in legislation to discriminate against staff on the basis of protected attributes, others consider that the freedom to select, and to discipline staff who act in a manner contrary to the religious teachings of the school, is essential to their ability to foster an ethos that is consistent with their religious beliefs.[132]

99. The Panel linked the ongoing presence of this diversity to the ability of faith-based schools to exercise discretion in their hiring practices. [133]

[131] *Religious Freedom Review, Report of the Expert Panel* (May 2018) https://www.pmc.gov.au/domestic-policy/religious-freedom-review, [1.418].
[132] *Ibid* [1.245].
[133] *Ibid* [1.246].

Appendix II - The Interaction of Clause 12 with the Internationally Protected Right of Freedom of Expression

100. Various critiques of clause 12 focus on the offensive statements that are asserted to be enabled by the clause. Some of these examples have been offered without any evidence as to any actual current mischief, or without any rational correlation to the doctrines of mainstream religions within Australia. The presumption behind these critiques is that the law should be enforceable by private citizens so as to prevent the giving of offence. If given effect, this would entail an extraordinary expansion of the power of the State as between private citizens. Further, as demonstrated by the following analysis, these critiques are not formulated with any apparent regard to international law. This is because international human rights law recognises the importance of free speech within an open and democratic polity.

101. The rights governing the permissible curtailment of expression are contained in the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD) and the *International Covenant on Civil and Political Rights* (ICCPR), both of which instruments Australia has ratified. The latter treaty is of direct relevance to the Bill, whereas the former is relevant in this context to the extent that it is illustrative of the scope of the protections afforded to speech within international human rights law. As will be seen, this scope has been particularly illustrated by judicial and academic consideration of section 18C of the *Racial Discrimination Act 1975*.

102. Article 4(a) of the CERD provides the international requirement to prevent racial hatred:

> Article 4
> States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:
>
> (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
>
> (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
>
> (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

38. Article 20 of the ICCPR similarly provides:

> 1. Any propaganda for war shall be prohibited by law.
>
> 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 19 of the ICCPR provides the relevant rights to freedom of speech:

> 1. Everyone shall have the right to hold opinions without interference.
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

103. In elaborating on the requirements of this right the United National Human Rights Council (UNHRC) has stated:

> The exercise of the right of freedom of opinion and expression is one of the essential foundations of a democratic society, is enabled by a democratic environment, which offers, inter alia, guarantees for its protection, is essential to full and effective participation in a free and democratic society, and is instrumental to the development and strengthening of effective democratic systems.[134]

104. Article 20 clause is also consistent with Article 19. Article 19(2) protects freedom of expression. Article 19(3) places limitations on the exercise of this right, recognising that freedom of expression carries 'special duties and responsibilities', and is subject to restrictions as 'provided by law' and necessary for 'respect of the rights or reputations of others' or 'for the protection of national security, or of public order, or of public health or morals'. The tests that must be satisfied under clause 12 arguably give effect to these standards of limitation. The UNHCR has also clarified that Article 20's 'required prohibitions are fully compatible with the right of freedom of expression as contained in article 19, the exercise of which carries with it special duties and responsibilities'.[135]

105. In the terms of Article 4 of the CERD, the requirement extends to 'ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence'. In the terms of Article 20 of the ICCPR, as Taylor notes 'The threshold in Article 20(2) is extremely high'.[136] This is because Article 20(2)'s reference to 'incitement to discrimination, hostility or violence' is confined to circumstances where such incitement flows from 'Any advocacy of national, racial or religious hatred'. In these ways the ICCPR places a high value on freedom of speech, tightly curtailing permissible limitations thereupon. Therefore, as noted by the ALRC in its 2016 *Freedoms Inquiry Report*, there is an important distinction to be drawn between

[134] UN Human Rights Council, Resolution 12/16, preamble.
[135] UN Human Rights Committee, General Comment No. 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20), 29/07/1983.
[136] Paul Taylor, *A Commentary on the International Covenant on Civil and Political Rights* (Cambridge University Press, 2020).581

'vilification' as understood within international law and domestic laws which render 'offensive' conduct unlawful (when commenting on section 18C of the *Racial Discrimination Act 1975*):

> Racial vilification, in this context, generally refers to public acts that encourage or incite others to hate people because of their race, nationality, country of origin, colour or ethnic origin. Vilification carries with it a sense of extreme abuse or hatred of its object, and can provoke hostile and even violent responses. Arguably, the words of s 18C do not convey this meaning.[137]

106. In order for the Commonwealth to implement international law under the external affairs power, certain tests must be adhered to, including that the law 'conforms' to the requirements of international law. The High Court has held that, in order to validly implement a treaty, a law must pass a four-stage test:

> 1. The treaty is a bona fide treaty.
> 2. The subject of the treaty is a matter of international concern.
> 3. The treaty specifically obliges the Commonwealth of Australia to take legislative action (known as the 'specificity requirement').
> 4. The law conforms to the relevant treaty (known as the 'conformity requirement'). The test for the conformity requirement is whether the law is reasonably capable of being considered appropriate and adapted to implementing the treaty.[138]

In short, the relevant international norms do not provide constitutional force, on the basis of the external affairs power, to a prohibition on speech that offends, humiliates, intimidates or insults.

107. The inconsistency of legislated prohibitions on offensive or insulting speech with international law has received domestic judicial affirmation. *Coleman v Power* concerned Queensland legislation prohibiting 'threatening, abusive or insulting words' in a public place. Therein Kirby J observed that the widest possible meaning of the term 'insulting'—would go beyond the permissible limitations on freedom of speech set out in Article 19.3 of the ICCPR.[139]

108. That international law does not encompass the provisions of section 18C was also noted by the Parliamentary Research Service in the *Bills Digest* that accompanied the Bill originally inserting section 18C into the RDA:

> There is no requirement in proposed s. 18C that the act include ideas based on racial superiority or hatred, or incite racial discrimination or violence, nor is there a requirement that it involve the advocacy or racial hatred or incite hostility. There appears to be quite a wide chasm between racial hatred and

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[137] Australian Law Reform Commission *Freedoms Inquiry Report* 2016 [4.178]

[138] *Victoria v Commonwealth of Australia* [1996] HCA 56; (1996) 187 CLR 416, 487 (Brennan CJ, Toohey, Gaudron, McHugh & Gummow JJ). Joshua Forrester, Augusto Zimmerman and Lorraine Finlay submission to PJCHR Freedom of Speech in Australia, available at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights_inquiries/FreedomspeechAustralia/Submissions.

[139] *Coleman v Power* (2004) 220 CLR 1, [242].

> 'offending' a person by an act, where one of the reasons for the act was the race of a person[140]

109. It should also be noted that, prior to the enacting of section 18C, the Australian Human Rights Commission (at the time that was known as the 'Human Rights and Equal Opportunity Commission') in its 1991 *National Inquiry into Racist Violence* recommended a protection against racial hatred, but warned against a broader standard:

> The threshold for prohibited conduct needs to be higher than expressions of mere ill will to prevent the situation in New Zealand, where legislation produced a host of trivial complaints… The Inquiry is of the opinion that the term "incitement to racial hostility" conveys the level and degree of conduct with which the legislation would be concerned.[141]

110. In 2016 the ALRC concluded that section 18C 'may be vulnerable to constitutional challenge on two fronts'. The first of those fronts was the concern that section 18C fails to acquit Australia's international obligations:

> [4.203] The first is the question of whether s 18C is validly supported by the external affairs power under s 51(xxix) of the Constitution. This would arise if the provision extends beyond Australia's international obligations under the ICCPR and CERD, which may be said to 'focus on protecting against racial vilification and hatred rather than prohibiting offence or insult'.[142]

The second related to the scope of the Constitutional implied freedom of political communication, of less direct relevance to clause 12 of the Bill. While a prohibition equivalent to section 18C is not proposed by the Bill, the foregoing discussion is relevant to the extent that arguments are made against clause 12 on the basis that it will permit offensive statements. The point of the foregoing discussion is that international human rights law places a high value on freedom of speech, and thus resiles from the placing of limitations on speech that would see domestic courts determining disputes between private citizens where the purportedly unlawful conduct is the giving of offence.

111. Turning to the particular question of the protections to religious speech recognised in international law, the United Nations *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (the Religious Declaration) provides that the right to freedom of thought, conscience, religion or belief under Article 18 of the ICCPR includes the 'freedom … To establish and maintain communications with individuals and communities in matters of religion or belief at the national and international levels.'[143] Importantly, the UNHCR has relied

[140] Parliamentary Research Service (Department of the Parliamentary Library), *Bills Digest: Racial Hatred Bill 1994*, 14 November 1994, 12.
[141] Australian Human Rights and Equal Opportunity Commission *National Inquiry into Racist Violence* 1991 [300].
[142] Lorraine Finlay, 'Freedom's Limits: Speech, Association, and Movement in the Australian Legal System' (Speech, ALRC Freedoms Symposium, Constitutional Centre of Western Australia, Perth, 29 September 2015)
[143] UN General Assembly, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, 25 November 1981, A/RES/36/55, Article 6(i).

upon the Religious Declaration as an appropriate authority for the interpretation of the scope of Article 18.[144]

112. In response to growing sense of the need for greater understanding of the scope of Article 20, in 2008 the United Nations High Commissioner for Human Rights promulgated the *Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence*. That document states:

> It is often purported that freedom of expression and freedom of religion or belief are in a tense relationship or even contradictory. In reality, they are mutually dependent and reinforcing. The freedom to exercise or not exercise one's religion or belief cannot exist if the freedom of expression is not respected, as free public discourse depends on respect for the diversity of convictions which people may have. Likewise, freedom of expression is essential to creating an environment in which constructive discussion about religious matters could be held. Indeed, free and critical thinking in open debate is the soundest way to probe whether religious interpretations adhere to or distort the original values that underpin religious belief.[145]

The Rabat Plan goes onto to highlight that while acts that would constitute breaches of Article 20 go unpunished, domestic laws overly restricting speech could have a chilling effect:

> It is of concern that perpetrators of incidents, which indeed reach the threshold of article 20 of the International Covenant on Civil and Political Rights, are not prosecuted and punished. At the same time members of minorities are de facto persecuted, with a chilling effect on others, through the abuse of vague domestic legislation, jurisprudence and policies. This dichotomy of (1) non-prosecution of "real" incitement cases and (2) persecution of minorities under the guise of domestic incitement laws seems to be pervasive.[146]

113. These various authorities lend support to the contention that clause 12 gives effect to the protections to religious belief recognized under the international law which Australia has ratified in a way that is consistent with protections to speech under that law. Rather than being characterized as an effort intended to license offensive comments, the clause can be seen as an exercise attempting to conserve the tolerant approach to religious discourse that has long been characteristic of our open and liberal democracy. As such, the protection is posed as a shield against discriminatory complaints against 'moderately' expressed religious views, not a sword.

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[144] *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v Sri Lanka,* Communication No 1249/2004, UN Doc CCPR/C/85/D/1249/2004 (2005).
[145] Annual report of the United Nations High Commissioner for Human Rights, appending the *Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence* A/HRC/22/17/Add.4 8, appendix [10].
[146] Ibid appendix [11].

Appendix III – By what Means does International Law Protect Religious Corporations?

114. The body of this submission has set the context of the Bill's attempt to protect religious bodies from discrimination and has established why additional protection is required beyond that which is currently offered in the RDB. The following section canvasses relevant international law that supports the contention that religious corporations may be protected from discrimination as a means to adequately give effect to the religious freedom rights of individuals. The AHRC asserts that 'it is an axiomatic principle of international law that human rights extend only to humans.'[147] In itself, this is a non-contentious statement of general human rights principles (with the exception of Article 1 of the ICCPR concerning the collective rights of 'peoples'). However, to extend this principle to the absolute conclusion that human rights law precludes corporations from making complaints where discriminatory action against them places a limitation on the religious freedom rights of individuals goes too far. As illustrated by the following discussion, a wide range of international bodies and the domestic courts of certain countries have recognised that, due to the unique communal aspects of religious belief, corporate bodies may assert rights on the basis of their religious beliefs.

United States and Canadian Law

115. Rienzi notes that in the United States:

> both legally and socially, businesses are understood to be capable of having a religious identity if that identity is relevant to their status as a victim of discrimination.[148]

For example, in *Sherwin Manor Nursing Ctr., Inc. v. McAuliffe* the Seventh Circuit Court of Appeals upheld a complaint of religious discrimination by a privately operated (non-charitable) nursing facility owned and operated by Jews:

> Sherwin presents a cognizable equal protection claim since it alleges that it was subjected to differential treatment by the state surveyors based upon the surveyors' anti-Semitic animus.[149]

Similarly in *The Amber Pyramid, Inc. v. Buffington Harbor Riverboats* it was held that 'a 'minority-owned corporation, like Amber Pyramid, assumes an "imputed racial identity" from its shareholders.'[150]

116. In the 2014 decision of the United States Supreme Court in *Burwell, Secretary of Health and Human Services et al v Hobby Lobby Stores Inc et al* ('*Hobby Lobby*'), the Court held that 'closely held' business corporations can assert religious freedom rights, acknowledging that '[f]urthering their religious freedom also "furthers individual religious freedom"'.[151] The United States Supreme Court recognised:

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[147] Australian Human Rights Commission, *Submission on the Religious Discrimination Bill*: Religious Freedom Bills | Australian Human Rights Commission.

[148] Mark Rienzi, 'God and the Profits: Is there religious liberty for money makers?' (2013) 21(59) *George Mason Law Review*, 94.

[149] 37 F.3d 1216, 1221 (7th Cir. 1994).

[150] L.L.C., 129 F. App'x. 292, 295 (7th Cir. 2005), (quoting *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc*., 368 F.3d 1053, 1059 (9th Cir. 2004)).

[151] *Burwell, Secretary of Health and Human Services et al v Hobby Lobby Stores Inc et al, 573 U.S. (10th Cir, 2014)* ('*Burwell, Secretary of Health and Human Services et al v Hobby Lobby Stores Inc et al, 573 U.S. (10th Cir, 2014)*').

> A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the people (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights … are extended to corporations, the purpose is to protect the rights of these people.[152]

117. Again, in *Ontario (Human Rights Commission) v. Brockie* the Canadian Supreme Court held that the Ontario Human Rights Commission 'ought not to require Mr. Brockie to print material of a nature that could reasonably be considered to be in direct conflict with the core elements of his religious beliefs', including those beliefs on the immorality of same-sex conduct.[153] Mr Brockie's business took a corporate form.

European Court of Human Rights

118. Turning to the European Convention context, these rights are affirmed in the jurisprudence of the European Court of Human Rights (ECHR). A ruling of the ECHR is not binding in Australian law. The ECHR has developed the 'margin of appreciation' doctrine which has seen a substantial departure from the jurisprudence under the ICCPR, which is the relevant international instrument to which Australia is a signatory. Nevertheless, in certain respects the jurisprudence of the ECHR can be informative as a statement of the requirements of international human rights law, to which Australian courts look for guidance and may be informative in considering the application of human rights law to corporate bodies.[154]

119. As Ahdar and Leigh recognise, bodies exercising jurisdiction under the Convention have 'accepted that it was artificial to distinguish between rights of the individual members and of the religious body itself.'[155] Accordingly, 'The importance of the collective dimension to religious freedom has emerged as an important theme in Convention jurisprudence'.[156] In *X and Church of Scientology v Sweden* the European Commission of Human Rights held that a church could exercise Article 9 religious freedom rights on behalf of its members: '[w]hen a church body lodges an application under the Convention, it does so in reality, on behalf of its members. It should therefore be accepted that a church body is capable of possessing and exercising the rights contained in Article 9 (1) in its own capacity as a representative of its members.'[157] This can be seen as an extension of the Court's reasoning in *Hasan & Chuash v Bulgaria:* 'religious communities traditionally and universally exist in the form of organised structures' necessitating the recognition that 'participation in the life of [such communities] is a manifestation of one's religion.'[158] Similarly the Court has recognised that 'Were the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable.'[159] Applying these principles, subsequent decisions have confirmed

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[152] *Burwell v Hobby Lobby Stores Inc*, 134 S Ct 2751, 2768 (Alito J for Roberts CJ, Scalia, Kennedy, Thomas and Alito JJ) (2014) (emphasis in original).
[153] (2002) Carswell Ont 2518 Ont. Sup. Ct. (Div.Ct.) [58].
[154] See for example *Cobaw* (n 46). As a further example, reference to such judgements may be had by Courts applying the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic).
[155] Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2nd ed, 2013) 138.
[156] Ibid.
[157] (1979) 16 DR 68, 70.
[158] *Hasan and Chaush v Bulgaria (European Court of Human Rights, Grand Chamber, Application no. 30985/96, 26 October 2000)* (n 30).
[159] *Case of Fernández Martínez v Spain* (n 110).

that religious corporations are direct beneficiaries of the rights conferred under Article 9 and may exercise those rights in their own capacity,[160] with the European Court of Human Rights (ECHR) clarifying:

> a complaint lodged by a church or a religious organisation alleging a violation of the collective aspect of its adherents' freedom of religion is compatible ratione personae with the Convention, and the church or organisation may claim to be the "victim" of that violation within the meaning of Article 34 of the Convention.[161]

On the question of commercial businesses, the European Court of Human Right's Guide to Article 9 states 'the Commission and the Court would appear to leave it open whether Article 9 applies to a profit-making activity conducted by a religious organisation'.[162]

120. With specific reference to the right to freedom from discrimination, the Court has recognized the ability of corporations to make discrimination claims. In *Cha'are Shalom Ve Tsedek v. France* the Court confirmed that religious corporations may take the benefit of the Article 14 protections from discrimination.[163] In that matter the applicant, a Jewish association, considered that the meat slaughtered by an existing Jewish organisation no longer conformed to the strict precepts associated with kosher meat, and sought authorisation from the state to conduct its own ritual slaughters. This was refused on the basis that it was not sufficiently representative within the French Jewish community, and that authorised ritual slaughterers already existed. Although the ECHR found in the circumstances that there was no actual disadvantage suffered by the organisation since it was still able to obtain meat slaughtered by the required method from other sources, it held that the association could assert rights under Article 14 (freedom from discrimination).

121. In respect of State funding to incorporated bodies, *Verein Gemeinsam Lernen v Austria* confirms that private schools have a right to non-discriminatory conditions of existence, including equal access to State funding for schools of their type.[164] That right is based upon Article 14 of the European Convention in the context of Article 2 of the First Protocol. As Aroney and Taylor note, the European jurisprudence is also relevant to the standards applied under the ICCPR. which 'are usefully supplemented by those established by the ECHR as interpreted by the European Court of Human Rights (ECtHR) on issues not specifically faced by the Human Rights Committee, the body charged with implementing the ICCPR.'[165]

United Nations Jurisprudence

122. Article 18.1 of the ICCPR in its express terms protects the right to exercise the 'freedom, either individually *or in community with others* and in public or private, to

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[160] See in particular *Kontackt-Information-Therapie and Hagen v Austria* No. 11921/86, 57 DR 81 (Dec 1988), 88; *A.R.m. Chappell v UK*, No. 12587/86, 53 DR 241 (Dec. 1987), 246; *Iglesia Bautisti 'El Salvador' and Ortega Moratilla v Spain* No. 17522/90 72 DR 256 (Dec 1992).
[161] European Court of Human Rights, *Guide on Article 9 of the European Convention on Human Rights Freedom of thought, conscience and religion* (30 April 2020), https://www.echr.coe.int/Documents/Guide_Art_9_ENG.pdf.
[162] Ibid.
[163] *Cha'are Shalom Ve Tsedek v. France* [GC], No. 27417/95, 27 June 2000.
[164] (1995) 20 EHRR CD 78.
[165] Aroney and Taylor (n 65) 45.

manifest his religion or belief in worship, observance, practice and teaching.' General Comment 22 further elaborates:

> The right to freedom of thought, conscience and religion (which includes the freedom to hold beliefs) in article 18.1 is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in *community with others.*[166]

As Evans notes, 'while human rights belong to individuals, the right to manifest religious freedom collectively means that it has an organisational dimension', whereby it 'is for the individual, rather than the state, to decide whether to exercise the right individually and/or collectively.'[167]

123. Article 6 of the 1981 *Religious Declaration*, a statement by the General Assembly that has been utilised by the Human Rights Committee in interpreting the scope of Article 18's protections, recognises a range of rights that are by their nature necessarily expressed through corporate vehicles.[168] These include the right 'to establish and maintain appropriate charitable or humanitarian institutions', the maintenance of places of worship, and the observance of ceremonies and holidays.[169] In 2005 the United Nations Human Rights Committee (UNHRC) found that Sri Lanka had breached both Articles 18 (freedom of religion) and 26 (freedom from discrimination) by refusing the incorporation of an Order of Catholic nuns whose activities included providing 'assistance to others' as a 'manifestation of religion and free expression'.[170] The complaint was brought by eighty individual sisters, reflecting the procedures under the Optional Protocol, which permit of individual complaints only. The UNHRC concluded:

> As to the claim under article 18, the Committee observes that, for numerous religions, including according to the authors, their own, it is a central tenet to spread knowledge, to propagate their beliefs to others and to provide assistance to others. These aspects are part of an individual's manifestation of religion and free expression, and are thus protected by article 18, paragraph 1, to the extent not appropriately restricted by measures consistent with paragraph 3. The authors have advanced, and the State party has not refuted, that incorporation of the Order would better enable them to realize the objects of their Order, religious as well as secular, including for example the construction of places of worship. Indeed, this was the purpose of the Bill and is reflected in its objects clause. It follows that the Supreme Court's determination of the Bill's

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[166] *Human Rights Committee, General comment No. 22 (48) (art. 18),* 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993), [1] ('*Human Rights Committee, General comment No. 22 (48) (art. 18),*').

[167] Carolyn Evans, *Legal Protection of Religious Freedom in Australia* (Federation Press, 2012) 35.

[168] *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v Sri Lanka,* Communication No 1249/2004, UN Doc CCPR/C/85/D/1249/2004 (2005). [7.2].

[169] UN General Assembly, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, 25 November 1981, A/RES/36/55, Article 6.

[170] *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v Sri Lanka,* Communication No 1249/2004, UN Doc CCPR/C/85/D/1249/2004 (2005).

> unconstitutionality restricted the authors' rights to freedom of religious practice and to freedom of expression… [171]

124. The focus maintained by the UNHRC was on the effect of the discriminatory denial of incorporated status on the exercise of the individual rights of the members of the body. It is clear that the Committee considered that a limitation placed upon the ability of individuals to exercise their religious freedom rights through a corporate vehicle placed an illegitimate limitation on the religious manifestation of the members.[172] The reasoning is summarised by Aroney (albeit it another context) as follows:

> If it is essentially an individual's right to believe and practice, then the freedom will indirectly protect the beliefs and practices of religious groups and organisations in so far as this is necessary to protect the rights of individuals to manifest and practice their religious beliefs.[173]

125. Adopting an approach even more generous than that adopted by the ECHR in *Verein Gemeinsam Lernen v Austria*,[174] in *Waldman v Canada*, the UNHRC held that the differential treatment granted by Ontario to Roman Catholic religious schools (which were publicly funded) as opposed to schools of other religions (which were not) amounted to discrimination against the author (and other individuals).[175] The distinction drawn by the State could not be considered to be reasonable and objective, and thus violated Article 26. Again the UNHCR focused on the effect that the treatment of a corporate body would have on individual religious freedom rights:

> The issue before the Committee is whether public funding for Roman Catholic schools, but not for schools of the author's religion, which results in him having to meet the full cost of education in a religious school, constitutes a violation of the author's rights under the Covenant.[176]

Again, the principle that human rights are enjoyed by individuals did not preclude the conclusion that discriminatory treatment between religious corporations can amount to a limitation on individual religious freedom rights as collectively enjoyed by those corporations.

126. It should be noted that the First Optional Protocol to the ICCPR recognizes the competence of the UNHRC to receive and determine complaints from individuals claiming to be victims of a violation by the respondent State of any ICCPR rights.[177] That limitation to individuals is a procedural stipulation of the First Optional Protocol, and does not confine any rights within the ICCPR of individuals which are exercised collectively. As individuals enjoy the applicable rights under Article 18, it is technically correct to state that corporate bodies do not have human rights. However, the right of

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[171] Ibid [7.2].
[172] Nicholas Aroney, 'Freedom of Religion as an Associational Right' (2014) 33(1) *University of Queensland Law Journal* 153.; Dwight Newman, *Community and Collective Rights* (Hart, 2011).
[173] Aroney (n 172) 154.
[174] (1995) 20 EHRR CD 78.
[175] *Waldman v Canada* Case No 694/1996, Views adopted on 3 November 1999, [10.5]-[10.6].
[176] Ibid [10.2].
[177] *Optional Protocol to the International Covenant on Civil and Political Rights*, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, Article 1.

individuals includes the right to come together collectively in associations. As the foregoing discussion demonstrates, the United Nations jurisprudence recognises that discriminatory treatment against a corporation may impact upon that individual right.

127. Furthermore, religious freedom is not the only individual right recognised as incorporating a collective expression for its full enjoyment under the Covenant. As leading jurist Manfred Nowak also acknowledges, the communal and associational aspects of religious freedom are further supported by Article 22. Article 22 protects the 'right to freedom of association with other people.' Nowak explains that this right includes the collective right of an existing association to represent the common interests of its members.[178] Freedom of association becomes a nonsense if it cannot be exercised through legally incorporated persons.

128. The Human Rights Committee has recognised that the freedom of expression under Article 19 necessitates protections to incorporated 'commercial and community broadcasters' or media.[179] Such is in recognition of the fact that the legitimate exercise of certain individual Covenant rights can only be fully enjoyed through the grant of protections to incorporated entities. Article 18.4 recognises the liberties of 'parents' in the religious and moral education of their children. Article 23 recognises the family as 'the natural and fundamental group unit … entitled to protection by society and the State.' Again, the Human Rights Committee recognises that 'the persons designed to be protected [by Article 27] are those who belong to a group and share a common culture, religion and/or language'.[180] Article 1 explicitly recognises the collective rights of 'peoples' (although, as noted above, the machinery of the Optional Protocol prevents this right being the subject of a complaint to the UNHRC). In addition, although the ICCPR is the primary instrument on which the RDB seeks its authority (relying on the external affairs power), it also lists the Convention on the Rights of the Child as an instrument to which it 'gives effect' in clause 64. Aroney and Parkinson note that Articles 3.2 and 5 concerning the 'responsibilities, rights and duties of parents' and 'the members of the extended family or community as provided for by local custom' 'reflect an understanding that individual rights are often exercised within a social context.'[181]

129. In short, the underlying principle within the United Nations jurisprudence is that things done to corporate entities can impact on the religious freedom or other human rights of individuals. To that extent, the jurisprudence under the ICCPR recognises both the individual and collective dimensions of religious manifestation. Given the propensity of religious belief to inspire collective effort, to fail to so recognise would provide incomplete protection. As recognised by the ECHR, the principle that human rights are enjoyed by individuals does not preclude the ability of a corporate body to initiate a religious discrimination complaint as a litigant due to the impact upon the religious exercise of its members.

130. To provide a concrete and pertinent example, where a government limits the expression by a religious institution of its traditional view of marriage, this imposes a

[178] Manfred Nowak, *CCPR Commentary* (Engel, Kehl am Rhein, 1993) 386–9.
[179] United Nations Human Rights Committee, *CCPR General Comment No 34 Article 19: Freedoms of opinion and expression,* UN Doc CCPR/C/GC/34 (12 September 2011) [39].
[180] United Nations Human Rights Committee, *CCPR General Comment No 23: Article 27 (Rights of Minorities),* UN Doc CCPR/C/21/Rev.1/Add.5 (26 April 1994) [5.1], [5.2].
[181] Nicholas Aroney and Patrick Parkinson, 'Associational Freedom, Anti-Discrimination Law and the New Multiculturalism' (2019) 44 *Australasian Journal of Legal Philosophy* 1, 9.

limitation on the effective exercise of the rights of the members of that institution through their designate representatives. It limits the ability of the members to define the particular religious character and ethos of the institution that they have chosen to create, what Aroney and Parkinson term 'the right to shape the identity and culture' of their religious institution.[182] This is the kind of limitation that would enliven Article 18, in conjunction with Article 26, providing the rudimentary elements sufficient to seek a determination within a domestic court as to whether direct or indirect discrimination had occurred under legislation giving effect to the external affairs power. As Aroney and Parkinson assert 'if legislative approaches to discrimination policy are to be consistent with the full range of human rights that ought to be recognised and protected, then they should equally recognise and respect the communal aspects of the international human rights standards and their associated jurisprudence.'[183] Applying this framework, there is a strong argument that the Commonwealth may provide corporate religious bodies with the ability to make a discrimination complaint on the basis that the Commonwealth is enacting a law that implements obligations in a treaty, or secures benefits under a treaty.

Constitutional Considerations

131. The external affairs power authorises a potentially broad range of Commonwealth laws on any subject matter which is the subject of rights and obligations arising out of an international treaty.[184] As noted by Gibbs CJ in *Commonwealth v Tasmania* (*Tasmanian Dams* case), 'there is almost no aspect of life which under modern conditions may not be the subject of an international agreement, and therefore the possible subject of Commonwealth legislative power'.[185] If the Commonwealth law is for the purpose of implementing rights or obligations under a treaty, it will be supported by the external affairs power. In the seminal *Victoria v Commonwealth* (*Industrial Relations* case), the joint judgment further confirmed there has been 'a continual expansion in the range of the subject matter of treaties', and this expansion has been well recognised.[186] The implication is the Commonwealth can legislate for the purpose of implementing rights and obligations by reference to a specific treaty under the external affairs power. 'The legislative power was designed to authorise the implementation of treaties which bound Australia … accepted independently by the Commonwealth of Australia'.[187]

132. The *Industrial Relations* case also outlined the applicable test: the law 'must be reasonably capable of being considered appropriate and adapted to implementing the treaty', and the law 'must prescribe a regime that the treaty has itself defined with sufficient specificity to direct the general course to be taken by the signatory states'.[188] The first aspect (conformity) entails a proportionality analysis which considers the purpose of the treaty, and 'it is for the legislature to choose the means by which it carries into or gives effect to the treaty'; 'the validity of the law depends on whether its purpose

[182] Ibid 12-13.
[183] Ibid 19-20. See also Rex Ahdar, 'Companies as Religious Liberty Claimants' (2016) 5(1) *Oxford Journal of Law and Religion* 1.
[184] As held by the majority in *Commonwealth v Tasmania* (1983) 158 CLR 1, 125 (Mason J) ('Tasmanian Dams').
[185] Ibid 100 (Gibbs CJ).
[186] *Industrial Relations* (1996) 187 CLR 416, 478 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).
[187] Ibid 483. See also J Gleeson, 'The Australian Constitution and International Law' (2015) 40 *Australian Bar Review* 149.
[188] *Industrial Relations* (1996) 187 CLR 416, 486-487.

or object is to implement the treaty… And the purpose of legislation which purports to implement a treaty is considered… to see whether the legislation operates in fulfilment of the treaty and thus upon a subject which is an aspect of external affairs'.[189] However, 'deficiency' in implementation 'is not necessarily fatal to the validity of the law'; partial implementation is sufficient where the deficiency is not 'so substantial as to deny the law the character of a measure implementing the Convention' or it is a deficiency which does not render the law 'substantially inconsistent with the Convention'.[190] The second aspect (specificity) requires that the treaty embodies precise obligations, rather than mere aspirations which are 'broad objectives' permitting 'widely divergent policies'.[191]

133. In terms of applying the *Industrial Relations* case specifically, Article 18(1) provides a precise obligation. The manifestation of belief through worship, observance, practice and teaching in community with others is protected, including public sharing and the promulgation of religious beliefs.[192] Furthermore, the UN *Declaration on the Elimination of All Forms of Intolerance and Discrimination based on Religion or Belief* states that the right to freedom of religion includes freedom to worship and assemble, establish charitable and humanitarian institutions, and appoint appropriate leaders consistent with the requirements and standards of the religion.[193] It follows that there is a close connection between Article 18 and other fundamental human rights including freedom of association (Art 25). Freedom of religion in conjunction with freedom of association under the ICCPR thus protects the right to found an association based on a common purpose, the right of that association to be recognised as and function as a distinct legal person, and the right of such an association to select and regulate members of the association in accordance with the common interest of the association, including expulsion of those who breach the terms of the association.[194] International law therefore prescribes a clear right to freedom of religion which includes freedom to manifest religion in in community with others. Manifesting religion in community with others entails the creation and continuance of incorporated and unincorporated religious associations which function as distinct legal persons for a common purpose. Since persons form and incorporate religious associations as a function of exercising their rights of freedom of religion and association, the right entails an obligation not to discriminate against such bodies, which in turn presumes the ability of such bodies to seek redress in the event of such discrimination. The right also correspondingly entails the ability of religious individuals to seek redress against a body in the event of discrimination.

134. The Religious Discrimination Bill ('RDB') is also reasonably capable of being considered appropriate and adapted to implementing the relevant international law obligations. As intimated above, the purpose of the RDB in this respect is to protect the religious freedom of religious corporations by protecting them against discrimination

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[189] Ibid 487.
[190] Ibid 489.
[191] Ibid 486. Though the 'absence of precision does not… mean any absence of international obligation.' See *Tasmanian Dams* (1983) 158 CLR 1, 261-2 (Deane J).
[192] Nicholas Aroney, 'Can Australian Law Better Protect Freedom of Religion?' (2019) 93(9) *Australian Law Journal* 708, 711.
[193] Ibid 711-712; *Declaration on the Elimination of All Forms of Intolerance and Discrimination based on Religion or Belief*, GA Res 36/55, UN GAOR, 36th sess, 73rd plen mtg, Supp No 51, UN Doc A/RES/26/55 (25 November 1981) Art 6.
[194] Aroney (n 192) 712; Manfred Nowak, *CCPR Commentary* (Engel, Kehl am Rhein, 1993) 386-389; Rivers (n 98) 34-38.

in their own right. The RDB may legitimately implement these specific obligations by empowering religious corporations as litigants in religious discrimination matters. The obligations include the 'right of a group to a legal framework making possible the creation of juridical persons' and 'the collective right of an existing association to represent the common interests of its members'; these two rights necessarily entail the ability of religious corporations to sue in their own right, including in relation to discrimination claims.[195] 'Religious communities need to be able to secure legal personality status within a society in order to exercise many of their collective religious freedoms'.[196] Articles 22 and 27 of the ICCPR also protect the right of freedom of association in community with others. As noted above, Article 6 of the 1981 Declaration concordantly affirms an array of freedoms which are communal in expression and necessitate the recognition of legal personality, such as the maintenance of places of worship and the establishment of charitable institutions. The overlapping protections of the ICCPR and 1981 Declaration demonstrate that under international law, freedom of religion requires freedom from religious discrimination, and freedom from religious discrimination in turn requires the capacity to be a litigant.[197]

[195] Nicholas Aroney and Patrick Parkinson, 'Associational Freedom, Anti-Discrimination Law and the New Multiculturalism' (2019) 44 *Australasian Journal of Legal Philosophy* 1, 8.
[196] Ibid 10.
[197] Ibid 11; See the discussion in Paul Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge University Press, 2005) 235-292.

Submission to the Australian Law Reform Commission's Inquiry

'Religious Educational Institutions and Anti-Discrimination Laws'

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Contents

Introduction

1. This document is made as a submission to the Australian Law Reform Commission's (ALRC) Inquiry into 'Religious Educational Institutions and Anti-Discrimination Laws' (the Inquiry).[1] It responds to the ALRC Consultation Paper issued on 27 January 2023.[2] It first considers potential reforms to the regime for the employment of staff within religious educational institutions. It then turns to consider reforms in respect of their treatment of students. As the ALRC relies heavily on international law in offering the four 'propositions' and 14 'technical proposals' outlined in the Consultation Paper, Appendix A provides a critical analysis of the ALRC's treatment of that law.

The ALRC Terms of Reference

2. The key three pivotal considerations within the terms of reference for the Inquiry are contained within the request for recommendations on reforms that would 'ensure that an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed:
    1. must not discriminate against a student on the basis of sexual orientation, gender identity, marital or relationship status or pregnancy;
    2. must not discriminate against a member of staff on the basis of sex, sexual orientation, gender identity, marital or relationship status or pregnancy;
    3. can continue to build a community of faith by giving preference, in good faith, to persons of the same religion as the educational institution in the selection of staff.'
3. In the following discussion, these three considerations are referred to as limbs 1, 2 and 3. There is a critical tension between limbs 1 and 2, which proceed on the assumption that religious educational institutions are discriminating on a range of protected attributes, and limb 3, which permits such institutions to select staff so to 'build a community of faith'. In response to the terms of reference the ALRC has proposed four

[1] https://www.alrc.gov.au/inquiry/anti-discrimination-laws/terms-of-reference/
[2] Australian Law Reform Commission *Consultation Paper, Religious Educational Institutions and Anti-Discrimination Laws* (27 January 2023).

'propositions' and 14 'technical proposals'. For ease of reference, Appendix B provides the four propositions.

President Derrington's Prior Proposal

4. The above terms of reference replace the terms of reference of a prior referral first made by then Attorney General Christian Porter on 10 April 2019. The prior referral extended to both religious institutions and religious educational institutions.
5. The prior referral requested recommendations for reforms that 'should be made in order to limit or remove altogether (if practicable) religious exemptions to prohibitions on discrimination, while also guaranteeing the right of religious institutions to conduct their affairs in a way consistent with their religious ethos'.[3] To the extent that the prior referral requested the removal of exemptions while 'guaranteeing the right of religious institutions to conduct their affairs in a way consistent with their religious ethos' it also reflected the tension between a prohibition on discrimination and the ability to 'build a community of faith' contained within the three limbs of the current referral. This commonality between the two references is critical to the ongoing relevance of the publicly available work of the ALRC on the prior referral.
6. On 04 September 2019, during the currency of the prior referral, the (still current) President of the Australian Law Reform Commission, Justice Sarah Derrington, gave a speech in which she outlined her 'preliminary thoughts on amendments to the *Sex Discrimination Act*'.[4] Those thoughts were offered not as concluded recommendations for Government, but as a proposal that would eventually be put out for formal public consultation subsequent to the passage of the *Religious Discrimination Bill*.
7. Acquitting the prior terms of reference, Derrington J's speech provided, what effectively amounted to, drafting provisions to be inserted into the *Sex Discrimination Act 1984* (Cth) to 'remove altogether (if practicable) religious exemptions to prohibitions on discrimination, while also guaranteeing the right of religious institutions to conduct their affairs in a way consistent with their religious ethos'. Although the drafting proposed by her Honour addressed both religious institutions and religious educational institutions, it is the drafting in respect of the latter that remains relevant to the current inquiry. This is because it attempts to reconcile the tension expressed within both terms

[3] Available at https://www.alrc.gov.au/wp-content/uploads/2019/04/Religious-Exemptions-Original-Terms-of-Reference-1.pdf The terms of reference were subsequently amended on 29 August 2019. The amended terms are available here: https://www.alrc.gov.au/inquiry/review-into-the-framework-of-religious-exemptions-in-anti-discrimination-legislation/terms-of-reference/.
[4] Sarah Derrington, 'Of Shields and Swords – Let the Jousting Begin!' Speech, Freedom19 Conference, 4 September 2019, https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-s-derrington/s-derrington-j-20190904.

of reference, between a prohibition on discrimination and the ability to 'build a community of faith'.

Staff within Religious Educational Institutions

8. Justice Derrington proposed the following outline of a provision that would pertain to the employment of staff within religious educational institutions (as noted above, the regime was also to be proposed to all religious institutions, not just religious educational institutions):

> This section could provide, similarly, that a person *does not discriminate* against another person by *conduct within the meaning of the Act* when acting on behalf of a religious institution in relation to the employment (or refusal to employ) a person, including conduct relating to the allocation of particular duties or responsibilities. Religious institutions would have the freedom to *prefer to hire* (or not) if:
>
> - the conduct is *consistent (or not)* with the religious beliefs and practices of the institution;
> - the conduct has the effect of preferring (or refusing to employ) a candidate for employment on the grounds that the candidate *adheres (or does not)* to the religious beliefs and practices of the institution, *or conducts himself or herself in accordance with* the religious beliefs and practices or religious purposes of the institution; and
> - the institution has a publicly available written policy, to which it adheres, that sets out its position in relation to the manner in which persons employed or engaged by the institution are expected to *conduct themselves consistently* with the religious beliefs and practices or religious purposes in the context of the course of their employment.
>
> Such a section would respond to (and adopt) Recommendations 5 of the Religious Freedom Review. *Its intent would be to have the effect that no person can be discriminated against in relation to their employment on the basis of any protected attribute alone*. Rather, the onus would be on the institution to establish that any decision to *prefer a candidate for employment*, or to refuse employment, *is consistent [with] its religious beliefs and practices or its religious purpose* as set out in a policy to which the institution adheres (it cannot selectively enforce the policy).

> Such a section would have the effect that the existing provisions of the Act (Part II, Div 1) would continue to operate so as to make it unlawful for a person to discriminate in relation to a person's employment during the period of the person's employment (s 14(2)). There would be no ability to terminate a contract of employment purely on the basis that an employee subsequently exhibits an attribute that is said not to accord with the religious beliefs or practices of the institution. Rather, there would be an ability to terminate a person's employment only *where the employee has breached a written agreement to conduct him or herself in accordance with the particular ethos of the institution*.
>
> Such a section would be intended to replace section 38, which could be repealed. Appropriate drafting should also then enable the religious exemptions within the Fair Work Act 2009 to be repealed.[5]

9. It will be observed that within this framework Derrington J makes a distinction between prospective and existing staff. A religious institution may only rely on the exception 'where the [existing] employee has breached a written agreement to conduct him or herself in accordance with the particular ethos of the institution'. It appears that this proposal presumes a certain interaction with section 8 of the *Sex Discrimination Act 1984* (SDA) (further outlined at paragraph 27 below), to the effect that the action of the school is to be considered not to be 'on the ground of' any particular attribute displayed by the employee, but rather taken in response to (or 'on the ground of') the breach of contract engaged in by the employee. Modifications are proposed to Derrington J's proposal below in order to resolve any uncertainty as to the application of section 8 by equating the framework for existing employees with that which is to be applied to prospective employees. It should also be noted that Derrington J's claim that '[a]ppropriate drafting should also then enable the religious exemptions within the Fair Work Act 2009 to be repealed' needs further consideration because the exemptions within that Act relate to a range of protected attributes outside of those covered by the SDA. For consistency, the provisions pertaining to the conduct of religious educational institutions under the Fair Work Act should be aligned with the ultimate framework adopted in the SDA.

[5] Ibid (emphasis added).

Justice Derrington's Proposal Resolves Equality and Religious Freedom According to International Law

10. Justice Derrington's framework turns on the critical distinction between the proposition 'that no person can be discriminated against in relation to their employment on the basis of any protected attribute alone' and the ability of a religious institution to act 'consistent [with] its religious beliefs and practices or its religious purpose'. Justice Derrington's proposal is that if the latter is proven, the former is met: a religious institution '*does not discriminate'* where its acts are 'consistent [with] its religious beliefs and practices or its religious purpose'. To that extent Justice Derrington's proposal can be seen to directly resolve the tension within the three limbs of the current terms of reference.
11. It can thus be said that Justice Derrington's regime holds the key to aligning limbs 1 and 2 (which require that a religious educational institution 'must not discriminate' on a range of protected attributes) with limb 3 (by which they 'can continue to build a community of faith by giving preference, in good faith, to persons of the same religion as the educational institution in the selection of staff'). It also aligns with the balance between the right to freedom from discrimination and religious freedom within international law, which I have outlined at paragraphs 26 to 35 of the attached article.
12. Justice Derrington's proposal is also consistent with the drafting of Part 2 of the *Religious Discrimination Bill,* which included provisions that clarified, for example, that 'this section sets out circumstances in which a religious body's conduct *is not discrimination* under this Act.' That legislation correctly reflected the balance between the right to non-discrimination and religious freedom within international law (outlined at paragraphs 26 to 35 of the attached article). The ALRC's terms of reference request that

> The ALRC should also have regard to the Government's commitment to introduce legislation to (among other things) prohibit discrimination on the basis of religious belief or activity, subject to a number of appropriate exemptions. In doing so, the ALRC should consider whether some or all of the reforms recommended as a result of this inquiry could be included in that legislation.

13. It may be reasonable to assume that the Government will commence the drafting of a separate Commonwealth protection against religious discrimination by taking the existing draft of the *Religious Discrimination Bill 2021* as its initial template. Drawing these threads together, if it is Federal Labor's intention to continue the proposal that

conduct by a religious institution 'is not discrimination' under the *Religious Discrimination Bill,* that regime should also be reflected within the ALRC's drafting offered in substitution for section 38 of the *Sex Discrimination Act.*

14. Justice Derrington's proposal declares that a religious institution '*does not discriminate'* where its acts are 'consistent [with] its religious beliefs and practices or its religious purpose'. Drafting modelled on such a framework that declares that a religious institution 'does not discriminate' when it 'build[s] a community of faith by giving preference, in good faith, to persons of the same religion as the educational institution in the selection of staff' would acquit the existing terms of reference and align the *Religious Discrimination Act* with the *Sex Discrimination Act's* treatment of religious educational institutions.

The Provision Requires the Religious Educational Institution to Demonstrate its Actions are Consistent with its Religious Beliefs

15. Beyond its offer of a resolution of the interests at the core of the existing reference, Derrington J's provision proposes that the behaviour of the religious educational institution must be '**consistent with**' religious beliefs. This is to be preferred to tests that impose standards of 'conformity' or 'avoidance of injury to religious susceptibilities', which have been restrictively interpreted. These two tests, as stated within the then *Equal Opportunity Act 1995* (Vic), were extensively considered by the Victorian Court of Appeal in *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd (Cobaw).*[6] That matter concerned a faith-based camping ground that declined a booking request on the basis of its religious objection to the activities proposed to be undertaken by the applicant. The majority judgements exemplify the application of a strict interpretation of these two tests that artificially constrains religious assertions of belief.
16. The interpretation applied to the phrase 'conforms with the doctrines of the religion' by Maxwell P was that 'the doctrine requires, obliges or dictates that the person act in a particular way when confronted by the circumstances which resulted in their acting in the way they did'[7] and 'as requiring it to be shown that conformity with the relevant doctrine(s) of the religion gave the person no alternative but to act (or refrain from acting) in the particular way.'[8]

[6] *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* 308 ALR 615 ('*Cobaw*') Maxwell P.
[7] Ibid [286] (Maxwell P).
[8] Ibid [286].

17. In respect of the 'reasonably necessary' test, at the time of the actions considered in *Cobaw* the test did not include the word 'reasonably', requiring instead that the actions 'are necessary to avoid injury to the religious sensitivities of adherents of the religious body's religion'. The inclusion of the word 'reasonably' introduced an objective element to the determination of what is 'necessary to avoid injury', displacing subjective assessment. In respect of the 'necessary' test the Victorian Court of Appeal held that the following statement of the judge at first instance was correct:

> in order for it to be necessary to engage in discriminatory conduct to avoid injury to the religious sensitivities of members of a religion, the injury which would be caused if the discriminatory conduct were not permitted must be *significant, and unavoidable*. The persons engaging in the discriminatory conduct must have been *required or compelled by the doctrines of their religion or their religious beliefs to act in the way they did, or had no option other than to act in the way they did to avoid injuring, or causing real harm to the religious sensitivities of people of the religion*. The religious sensitivities of people of the religion would be injured if *matters intimately or closely connected with, or of real significance to the doctrines, beliefs or practices of the adherents of the religion are not respected*, or are treated with disrespect.[9]

As an aside, the jurisprudence is replete with judicial warnings to avoiding regard to whether actions are 'intimately' connected with a religion.[10] President Maxwell, with whom Neave JA agreed, also stated:

> it would need to be shown that for the body to be required to act in a non-discriminatory fashion — by not doing the act in question — would be an affront to the reasonable expectation of adherents that the body be able to conduct itself in accordance with the doctrines to which they subscribed and the beliefs which they held.[11]

The inclusion of the word 'reasonably' in the Victorian legislation indicates that the above formulations of the 'necessary to avoid injury' test must now be objectively evident to a court.

18. The interpretations of the 'conformity' and 'necessary to avoid injury' requirements applied in *Cobaw* impose strict tests that require a religious body to demonstrate, effectively, that no other course of action was open to it. The interpretations have very

[9] Ibid [299] (emphasis added).
[10] See Fowler, Mark 'Judicial Apprehension of Religious Belief under the Commonwealth Religious Discrimination Bill', in Michael Quinlan and A. Keith Thompson (eds) *Inclusion, Exclusion and Religious Freedom in Contemporary Australia*, (Shepherd Street Press, 2021) 95-6.
[11] *Cobaw* (n 5) [301].

significant consequences. Possibly the most wide-ranging (and entirely logical) consequence of those interpretations is that drawn by Maxwell P himself: because a religious body is not compelled to offer its services to the wider market, no question of 'conformity with doctrines' or 'necessity to avoid injury' can arise where it offers those services. As Maxwell P noted: 'CYC has chosen voluntarily to enter the market for accommodation services'.[12] On Maxwell P's reasoning the 'voluntary' nature of the religious institution's act in offering services to the public obviates any question of 'conformity with doctrines' or 'necessity to avoid religious injury' that would arise for its subsequent actions. That interpretation would render any 'voluntary' act of a religious body in providing, for example, education or other charitable services, or public services under Government funding, as automatically precluded from exemptions within anti-discrimination law. In the context of the ALRC's Inquiry, the application of Maxwell P's interpretation would have the result that religious educational institutions would be unable to retain their religious ethos in respect of both their employment practices and the activities they undertake. Justice Derrington's proposal addresses such concerns by adopting a test that requires that the institution act in a manner that is 'consistent with' its asserted religious beliefs. At the conclusion of this document, I make comment on the means by which such an institution may evidence its beliefs.

Other Welcome Facets of Justice Derrington's Proposal

19. Other key elements of Derrington J's framework that are worthy of support include the following:
    a) By proceeding from the proposal that 'a person **does not discriminate** against another person' Derrington J avoids relegating the question of religious freedom to the 'reasonableness' test for indirect discrimination (under section 7B of the *Sex Discrimination Act 1984* (Cth) (SDA)) or the 'on the ground of' test within the provisions pertaining to direct discrimination (see sections 5 to 7A). As the relevant act is not 'discrimination', the questions of the 'reasonableness' of the act, or that which comprised the relevant 'ground' for the act, simply do not arise.
    b) The provision does not name any particular protected attribute. Instead, it operates in respect of '**conduct within the meaning of the Act**'. As her Honour stated elsewhere in her speech, the proposal proceeded on the basis that 'there is no *a priori* determination of which attributes should be included in an exemption for religious bodies'.[13]

[12] Ibid [269]. See also Neave JA at [431].
[13] Derrington (n 3).

c) The provision states the question of an employee's '**adherence**' and whether their '**conduct [is] in accordance with**' the religious beliefs as two separate limbs, both of which could be separately relevant to an employee's suitability. My understanding is that many religious schools seek to employ persons who personally share the relevant faith. Such is considered critical to their ability to model faith to the coming generation. Justice Derrington's proposal permits the continuation of such models by eschewing a singular focus on the actions of the staff member and whether they 'accord' with the beliefs.

d) The provision recognises that conduct that is inconsistent with religious beliefs may be relevant to the determination of an employee's suitability. In this Derrington J departs from the fraught model now introduced in Victoria under the *Equal Opportunity Act 2010*, which is outlined at paragraphs 36 to 42 of the enclosed article. As argued in that article, in that regard the Victorian model is inconsistent with the applicable international human rights law.

e) Justice Derrington's framework expressly encompasses the notion that a religious educational institution may **preference** staff. Correctly drafted this will assist in avoiding negative inferences being drawn by the temporary employment of persons who do not share the faith of the religious educational institution (paragraph 45 of the enclosed article outlines the difficulties that arise under regimes that preclude such preferencing). Part 2 of the *Religious Discrimination Bill* contained a model that enabled 'preferencing'. Again, in the interest of streamlining the ALRC's proposal with the drafting of the *Religious Discrimination Bill,* following Derrington J's proposal, the ALRC's drafting could specifically recognise the ability to preference staff.

f) Justice Derrington's framework applies to not only applicants for employment, but also **existing staff**. Limb 3 of the new terms of reference seeks a regime that allows religious educational institutions to give 'preference, in good faith, to persons of the same religion as the educational institution *in the selection of staff*'. The reference to the 'selection of staff' could suggest that the regime sought is only to be applied at the point of employment, and not during the term of employment. Over time such a test could lead to a serious white-anting of the religious ethos of an institution. Justice Derrington's proposal answers this concern, to the extent that it applies to both applicants and existing staff. (It should be noted, that the phrase '*the selection of staff*' in the current terms of reference could also reasonably be applied to the appointment of existing staff for additional responsibilities or benefits.)

g) In offering a resolution between the *prima facie* contesting notions that a religious educational institution 'must not discriminate' but can exercise an ability to 'build a community of faith' Derrington J avoids the complexities of the recently legislated amendments to the Victorian *Equal Opportunity Act 2010.* Although purporting to offer a reconciliation of the same principles, those Victorian amendments set up a regime that seeks to disqualify consideration of non-religious activity on the part of an employee (rendering that regime inconsistent with international law, as outlined at paragraphs 36 to 42 of the enclosed article).

20. The following elements of Derrington J's proposal are potentially problematic and require further amendment or consideration, along the following lines:

h) The provision needs to make clear that it not only applies to a person 'acting on behalf of a religious institution', but also to the religious institution itself.

i) The notion that the provision would only apply to an existing employee 'where the employee has breached a written agreement to conduct him or herself in accordance with the particular ethos of the institution' goes beyond the recommendations of the Expert Panel, which only required that a copy of a 'publicly available policy' be provided to 'employees and contractors and prospective employees and contractors'.[14] Similarly the *Religious Discrimination Bill 2021* required that 'the conduct must be in accordance with a publicly available policy'. However, as we have seen, those schools that have sought to comply with the Expert Panel's recommendations have been subject to substantial negative media scrutiny. An alternative to such tests may be to retain the requirement that a religious educational institution must act in 'good faith', as is required under the terms of reference and also current section 38(1) of the SDA, but to also stipulate that, in order to demonstrate that it had acted in 'good faith', a religious educational institution is required to make its religious requirements known within the applicable employment documentation. This would be sufficient to balance an educational religious institution's ability to maintain its ethos with the important concern for equitable disclosure to employees.

It can be said that current law already drives religious institutions to make their expectations contractually clear in order to successfully rely on statutory exemptions in a court of law. Indeed, this reflects the expectations stated by the Victorian Court of Appeal in *Cobaw* in respect of supplies to the public by faith-

[14] Expert Panel on Religious Freedom, *Religious Freedom Review*, 18 May 2018, recommendation 5, 2.

based institutions. Whether a religious institution's requirements have been made clear as a matter of contract will also be a relevant consideration when seeking to rely upon the current 'good faith' test under section 38(1) of the *Sex Discrimination Act 1984* (Cth). The above proposal clarifies that such disclosure is a necessary component of the 'good faith' test (operating in addition to the other facets of that test). Consideration will need to be given to the precise terms of this proposal to ensure that sufficient latitude is provided to avoid effectively removing the freedoms accorded to religious educational institutions at international law consequent on poor or sloppy drafting of employment contracts. What can be said in defence of the proposal, however, is that where a religious institution makes its requirements known to staff, it is acting equitably, consistent with the argument that its actions do not amount to technical 'discrimination'.

Multiple Reasons under Section 8 of the SDA

21. It is also noted that by avoiding the naming of any particular attribute on which a religious institution must not discriminate and by stating that a religious institution 'does not discriminate' when it acts to maintain its religious ethos, Derrington J's proposal avoids the complicated questions that arise under section 8 of the SDA where multiple 'reasons' may be said to underpin the one act. Section 8 provides:

> A reference in subsection 5(1), 5A(1), 5B(1), 5C(1), 6(1), 7(1) or 7AA(1), section 7A or subsection 28AA(1) to the doing of an act by reason of a particular matter includes a reference to the doing of such an act by reason of 2 or more matters that include the particular matter, whether or not the particular matter is the dominant or substantial reason for the doing of the act.

The section acknowledges that multiple reasons may underpin the one discriminatory act, including non-discriminatory reasons. It provides that the presence of non-discriminatory reasons (even 'dominant or substantial' non-discriminatory reasons) will not disqualify a decision-maker's reference to discriminatory reasons (even where those discriminatory reasons are non-dominant or non-substantial reasons). Drafting that permits a religious educational institution to act for the *reason* of 'building a community of faith' but which also provides that religious educational institution 'must not discriminate' on the basis of certain protected attributes could result in the religious institution not being able to act. This is because, even though the 'dominant or substantial' reason for the action may have been for the non-discriminatory reason of

'building a community of faith', section 8 will operate so to render the secondary discriminatory reason as untouched by the exemption. By avoiding the naming of any particular attribute on which a religious institution must not discriminate and by stating that a religious institution 'does not discriminate' Derrington J's proposal avoids this outcome.

22. The concern is accentuated by a close consideration of the precise phrasing of limb 3 of the terms of reference. In omitting to state any other protected attribute apart from the consideration of a person's 'religion', limb 3 of the terms of reference leaves open the prospect of a regime similar to that which is now law in Victoria, and which is recommended for adoption in Queensland and Western Australia, namely that an institution may only discriminate on the ground of a person's inconsistent religious belief or religious activity. In Victoria this has opened the door to great uncertainty for religious institutions, requiring that they consider the extent to which an employee's activity that is inconsistent with the religious institution's belief (but not itself a form of 'religious activity') can be informative of the employee's own belief (see paragraphs 39 to 42 of the enclosed article).

23. Depending on how the ALRC's legislative proposal is drafted, drawing a distinction between permissible discrimination on the basis of religious belief and activity and non-permissible discrimination in respect of any other protected attribute could require a determination of the relevant 'reasons' under section 8 where there are multiple relevant protected attributes. If a Court finds that there are multiple reasons, and if the exemption operates only in respect of religious belief, the institution would not have an exemption in respect of any other protected attribute that was a 'reason' by operation of section 8. This would mean that the religious institution could not act to 'build a community of faith'.

24. It is important to observe that this is the effect of Propositions B and C put by the ALRC. The ALRC proposes at proposition B that '[r]eligious educational institutions should not be allowed to discriminate against any staff (current or prospective) on the grounds of sex, sexual orientation, gender identity, marital or relationship status, or pregnancy'. At proposition C the ALRC proposes that '[i]n relation to selection, appointment, and promotion, religious educational institutions should be able to preference staff based on the staff member's religious belief or activity, where this is justified because … the criteria for preferencing in relation to religion or belief would not amount to discrimination on another prohibited ground (such as sex, sexual orientation, gender

identity, marital or relationship status, or pregnancy), if applied to a person with the relevant attribute'. In both respects the ALRC draws upon the complicated test for determining the 'ground' of an allegedly discriminatory act within anti-discrimination law. The implications of that test for Propositions B and C may not be readily apparent to the non-legally trained.

25. The ALRC are relying on the 'on the ground of' test, which looks to the 'real reason' for the action. As noted above, section 8 of the SDA recognises that there can be multiple reasons for the one act. Thus, even though an act may be done 'on the basis' of the inconsistent religious beliefs of the person in question, if a court holds that a separate attribute is also a reason (it need not even be a substantial reason) by operation of section 8, the separate prohibition from discrimination (at subsections 5(1), 5A(1), 5B(1), 5C(1), 6(1), 7(1) or 7AA(1), section 7A or subsection 28AA(1), as may apply) will be breached. This means that Propositions B and C would remove all discretion wherever a person is otherwise protected under the SDA, even where their role is to teach religion.

Justice Derrington's Proposal Modified

26. Justice Derrington's proposal could be modified to retain the above enumerated strengths while addressing the above listed concerns in the following manner:

> "A religious educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, or a person acting on behalf of such a religious educational institution, does not discriminate against another person by conduct within the meaning of the Act ~~when acting on behalf of a religious institution~~ in relation to the employment of (or refusal to employ) a person, including conduct relating to the allocation of particular duties or responsibilities. Religious educational institutions would have the freedom to prefer to hire (or not) if:
>
> a) the conduct is consistent (or not) with the genuinely held religious beliefs and practices of the institution;
>
> b) the conduct has the effect of preferring (or refusing to employ) a candidate for employment or an employee on the grounds that the candidate or employee adheres (or does not) to the genuinely held religious beliefs and practices of the institution, or conducts himself or herself in accordance with the genuinely held religious beliefs and practices or religious purposes of the institution; and

c) the institution engages in the conduct in good faith. In determining whether the institution has acted in good faith, regard may be had to whether it has made ~~a publicly~~ available to employees or prospective employees a written policy, to which it adheres, that sets out its position in relation to the manner in which persons employed or engaged by the institution are expected to conduct themselves consistently with the genuinely held religious beliefs and practices or religious purposes in the context of the course of their employment."[15]

Such a section would substantively respond to ~~(and adopt)~~ Recommendations 5 of the Religious Freedom Review. *Its intent would be to have the effect that no person can be discriminated against in relation to their employment on the basis of any protected attribute alone*. Rather, the onus would be on the institution to establish that any decision to *prefer a candidate for employment*, or to refuse employment, or to refuse to continue the engagement of an existing employee *is consistent [with] its religious beliefs and practices or its religious purpose* as set out in a policy to which the institution adheres (it cannot selectively enforce the policy).

~~Such a section would have the effect that the existing provisions of the Act (Part II, Div 1) would continue to operate so as to make it unlawful for a person to discriminate in relation to a person's employment during the period of the person's employment (s 14(2)). There would be no ability to terminate a contract of employment purely on the basis that an employee subsequently exhibits an attribute that is said not to accord with the religious beliefs or practices of the institution. Rather, t~~In order for the religious educational institution to engage in such conduct it must act in 'good faith'. Accordingly, a court may consider whether ~~here would be an~~the ability to terminate a person's employment ~~only~~ flowed from ~~*where*~~ *the employee~~'s has~~ breach ~~of ed~~ a written agreement to conduct him or herself in accordance with the particular ethos of the institution*.

Such a section would be intended to replace section 38, which could be repealed. Appropriate drafting should also then enable the religious exemptions within the Fair Work Act 2009 to be repealed.[16]

27. Whereas Derrington J's proposal placed the emphasis on establishing that the action was taken 'on the basis of' the breach of contract in the case of existing employees

[15] Sarah Derrington, 'Of Shields and Swords – Let the Jousting Begin!' Speech, Freedom19 Conference, 4 September 2019, https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-s-derrington/s-derrington-j-20190904.
[16] Ibid (emphasis added).

(see paragraph 9 above), the proposed drafting removes any doubt as to the operation of section 8 of the SDA by stating that the regime that has regard to the consistency of conduct and the adherence of individuals applies to both prospective and existing employees.

'Good faith'

28. It is necessary to clarify the intended scope of the term 'good faith' within the proposed exception. This is because, as French J (as he then was) stated in *Bropho v Human Rights and Equal Opportunity Commission & another (Bropho),* '[t]he particular construction will be adapted to the particular statute or rule of law in which the words are used.'[17] It should be clarified that the requirement that a religious educational body act in 'good faith' is not intended to import the separate and distinct requirement of 'reasonableness', as understood at law. A 'reasonableness' requirement could subject the content of religious beliefs to a merits-based assessment by a secular court. Instead, 'good faith' is intended to import a subjective requirement of honesty and of not knowingly pursuing an improper purpose when acting consistently with a religious belief. It also requires actions to be assessed according to their fidelity to the norms the wider provision prescribes. In *Bropho*, French J summarised these twinned principles as follows:

> In a statutory setting a requirement to act in good faith, absent any contrary intention express or implied, will require honest action and fidelity to whatever norm, or rule or obligation the statute prescribes as attracting the requirement of good faith observance….[18]

In the context of the proposed religious educational bodies exception, the 'norms' that are applicable include the freedom of religious persons to associate in community with one another and the rights of parents to ensure the religious and moral education of their children, consistent with Australia's obligations to respect freedom of religion and freedom of association.

Evidencing the Relevant Beliefs

29. A further modification to Derrington J's wording as outlined above proposes that regard be had to the 'genuinely held' beliefs associated with the institution. In her speech Derrington J said:

[17] (2004) 204 ALR 761 [87] (French J).
[18] At 93.

> Assuming it is accepted, as it appears to be on both sides of government, that there is a legitimate balancing exercise to be undertaken between the right to equality and the right to freedom of religion, it seems fraught for secular law to provide in legislation, from time to time, which doctrines, tenets and beliefs or teachings of a particular creed are deemed an acceptable basis on which to discriminate and which are not – subject always to the overriding limitations on the right to freedom of religion that are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others.[19]

30. A 'genuineness' or 'sincerity' test reflects the settled position developed by the highest courts in Australia, England, Canada and the United States as a means to prevent judicial determination of doctrinal disputes.[20] As I outlined at paragraphs 24 to 37 of my submission to the Senate Inquiry on the *Religious Discrimination Bill 2021* (attached), that test can be applied to the evidencing of not only the beliefs of individuals, but also religious institutions. Whether a particular position is genuinely held could be assessed through reference to the institution's written statements of belief (although care would need to be taken to avoid prejudicing smaller institutions that do not have the resources to develop extensively articulated statements of belief), the conduct of the institution and the sincere testimony of its leaders. In substance this reflects the evidentiary approach that was applied by the New South Wales Court of Appeal in *OV & OW v Members of the Board of the Wesley Mission Council*.[21] Such a test should be applied when determining whether conduct was undertaken in order to 'preserve the religious ethos' of a school, as is proposed in respect of students at paragraph 33(b) below. This would also be consistent with the approach outlined above whereby a religious educational institution would be required to make its religious requirements known within the applicable documentation provided to families in order to demonstrate that it had acted in 'good faith'.

Students within Religious Educational Institutions

31. Her Honour proposed the following regime for consultation in respect of students within religious educational institutions:

> Educational institutions

[19] Derrington (n 3).
[20] See further Fowler (n 9).
[21] *OV & OW v Members of the Board of the Wesley Mission Council* (2010) 79 NSWLR 606 ('*Wesley Mission*').

This section could apply to educational institutions which are also religious institutions. Similarly, it could provide that a person does not discriminate against another person by conduct within the meaning of the Act when acting on behalf of an educational institution in relation to the admission (or non-admission) of a student to an educational institution if:

- the conduct is *consistent with* religious beliefs and practices of the institution;
- the conduct has the effect of preferring (or refusing to admit) a student on the grounds that the student (or his or her parents) are adherents of the religious beliefs and practices of the institution, and where necessary, the student is recognised by the institution as having the relevant religious status; or conducts themselves in accordance with the religious beliefs and practices or religious purposes of the institution; and
- the institution has a publicly available written policy, to which it adheres, that sets out its position in relation to its religious beliefs and practices or religious purposes in the context of the environment of the educational institution.

Such a section would respond to (and largely adopt) Recommendation 7 of the Religious Freedom Review. Its intended effect would be that *no student could be discriminated against at the time of admission to an institution on the basis of any protected attribute alone*. Rather, *the onus would be on the institution to establish that any decision to prefer or refuse a student is consistent with its religious beliefs and practices or its religious purpose as set out in a policy to which the institution adheres* (it cannot selectively enforce the policy). It would also be consistent with the principle of integrity and transparency to protect the inherent dignity of those who might otherwise be surprised or confronted by a religious institution's adherence to particular religious beliefs and practices.

Such a section would have the effect that the existing provisions of the Act (s 21) would continue to operate so as to make it unlawful for a person to discriminate in relation to a student on any ground during the student's term of enrolment or in relation to exclusion or expulsion from the institution. This is consistent with the findings of the Religious Freedom Review.[22]

[22] Derrington (n 3) (emphasis added).

32. Key elements of Derrington J's framework to observe include the following:
    a) Again, the proposal provides that an educational institution is **not discriminating** when its actions are '**consistent with its religious beliefs and practices or its religious purpose**'**.** This accords with international law, as noted above, and in the attached article (paragraphs 26 to 35). As also outlined above, the adoption of that proposal would acquit the obligations of the current ALRC referral.
    b) Again, by proceeding from the proposal that 'a person **does not discriminate** against another person' Derrington J avoids relegating the question of religious freedom to the 'reasonableness' test for indirect discrimination under section 7B. The question of the 'reasonableness' of the action does not arise as the act is not 'discrimination'. For the same reason the question of whether the action was taken 'on the ground of' a protected attribute does not arise under the tests for direct discrimination under sections 5 to 7A.
    c) The provision does not name any particular protected attribute. Instead, it operates in respect of '**conduct within the meaning of the Act**'. This also addresses the concern that arises where multiple reasons are identifiable for an action under section 8, as discussed at paragraphs 21 to 25 above.
    d) The provision states that the behaviour of the religious educational institution must be '**consistent with**' religious beliefs. As outlined above at paragraphs 15 to 18 above, this is to be preferred to tests that impose standards of 'conformity' or 'avoidance of injury to religious susceptibilities', which have been strictly interpreted.[23]
    e) The provision states the question of a prospective student's '**adherence**' and whether their '**conduct [is] in accordance with**' the religious beliefs as two separate limbs, both of which could be separately relevant to a prospective student's suitability.
    f) Justice Derrington's framework expressly encompasses the notion that a religious educational institution may **preference** students. Justice Derrington's proposal reflects the exception that applies to religious educational institutions under Schedule 12, pt 2, s 5 of the *Equality Act 2010* (UK). That provision also permits religious educational institutions to give 'preference to persons of a particular religion or belief' in the selection of students.
    g) The provision recognises that conduct that is inconsistent with religious beliefs may be relevant to the determination of a prospective student's suitability.

[23] See for example *Cobaw* (n 5).

33. However, the following elements are problematic and require further amendment, along the following lines:

a) As noted above in respect of employees, those schools that have sought to comply with the Expert Panel's recommendation that schools adopt publicly available policies have been subject to substantial negative media scrutiny. An alternative to such tests may be to retain the requirement that a religious educational institution must act in 'good faith', as is required under current section 38(3), but to also stipulate that, in order to demonstrate that it had acted in 'good faith', a religious educational institution is required to make its religious requirements known within the applicable documentation provided to families. This would be sufficient to balance an educational religious institution's ability to maintain its ethos with the important concern for equitable disclosure.

b) In applying to the point of enrolment only, Derrington J's proposal will not address actions by existing students that undermine the ethos of a religious educational institution. By limiting its operation to the admission of students, Derrington J's proposal is also inconsistent with the recommendations of the Expert Panel.[24] The following provides examples of actions which could be held to be discriminatory in response to a complaint made in the absence of an exemption within discrimination law:

    a. An Anglican school which provides spiritual instruction or pastoral care from a priest does not make equivalent provision for pupils from other religious faiths.
    b. A Jewish school organises visits for pupils to sites of particular interest to its own faith, such as a synagogue or historical museum, but does not arrange trips to sites of significance to the faiths of other pupils.
    c. A child of a different faith claims that they were being treated less favourably because objects symbolic of a school's faith, such as the Koran, were given a special status in the school.
    d. A child of a different faith claims that they are being treated less favourably because a Christmas nativity is displayed or nativity performance is undertaken within a Catholic school, whereas equivalent festivities observed within their own religion are not.

[24] Expert Panel on Religious Freedom (n 13) [1.275].

e. A school requires that all enrolled students attend religious instruction classes, or a regular chapel service.
f. A school tells a group of existing students that they cannot operate a club that exists to advocate for the school to eschew its religious beliefs concerning marriage.
g. A student that is not heterosexual complains that the teaching of a schools' traditional view of marriage is discriminatory.
h. A school adopts a policy that students must use the facilities that correspond to their biological sex.

In examples (a) to (f) the protected attribute will be religious belief or activity. The examples are then to be determined according to the exception regime within the proposed *Religious Discrimination Bill.* The following analysis is relevant to the ALRC's recommendations on the regime concerning students under that legislation, noting that the terms of reference state that 'the ALRC should consider whether some or all of the reforms recommended as a result of this inquiry could be included in that legislation'. Examples (f) to (g) concern certain of the protected attributes listed at limb 1 of the terms of reference (and potentially also the religious belief or activity of a student). Consistent with the recommendations of the Expert Panel, religious educational institutions should retain the existing ability to refuse those complaints which if successful would undermine or impact detrimentally upon their distinct religious ethos (such as those outlined above). To fail to provide for such would undermine their ability to offer an education that gives effect to 'the liberty of parents … to ensure the religious and moral education of their children in conformity with their own convictions'. Such an outcome would be in contravention of Article 18(4) of the *International Covenant on Civil and Political Rights 1966* (for further detail on this right see the enclosed article at paragraphs 19 to 25).

One way to address this concern would be to extend Derrington J's proposal to existing students under both the *Religious Discrimination Bill* and the SDA. For greater clarity, the key elements of Derrington J's proposal that are applicable to both existing and prospective students could be combined with the regime currently enacted at Schedule 12, pt 2, s 5 of the *Equality Act 2010* (UK) concerning students and religious educational institutions. This would (in addition to Derrington J's core tests) require a school to demonstrate that its actions (clarified to be 'non-discriminatory') were taken 'to preserve the institution's religious ethos'. Under that Act, it is lawful to give 'preference to [students] of a particular religion or belief' where such is undertaken 'to preserve the institution's religious ethos'. Consistent

with Derrington J's proposal that such actions are 'not discrimination', it should be observed that under this additional requirement such a school would not be acting on the basis of any particular attribute. Instead, it would be acting in order to 'preserve [its] religious ethos'. Drawing upon Schedule 12, pt 2, s 5 of the *Equality Act 2010* (UK), Derrington J's proposal could then be combined with the current definition of a religious educational institution under the SDA and the additional requirement that such institutions act in 'good faith' in the following manner:

> (1) An educational institution that is conducted in accordance with doctrines, tenets, beliefs or teachings of a particular religion or creed or a person acting on behalf of such an institution does not discriminate against a student by conduct within the meaning of the Act where such conduct is:
>
> > (a) consistent with the genuinely held religious beliefs and practices of the institution or its religious purpose; and
> >
> > (b) undertaken in good faith to preserve the institution's religious ethos.
>
> (2) Without limitation, conduct under subparagraph (1) includes anything done in connection with:
>
> > (a) the curriculum of a school;
> >
> > (b) the adoption and maintenance of observances or practices that are consistent with or model the school's religious ethos (whether or not forming part of the curriculum);
> >
> > (c) acts of worship or other religious observances or practices organised by or on behalf of a school or in which a school participates (whether or not forming part of the curriculum).

Adopting the framework of the *Equality Act 2010* (UK) on which this drafting is modelled, the proposal would require the school to demonstrate that there is a link between the maintenance of the religious ethos and the conduct taken by the school, and that the student's conduct will impact on that ethos (see paragraphs 29 to 30 as to accepted judicial tests to evidence this). The proposal is accompanied by a requirement that the religious educational institution also act in 'good faith' (see comments above at paragraph 28). This proposal would address the concern that a schools' ethos may be undermined by students who are already enrolled at the school, including as illustrated by the examples provided on the preceding page.

c) Justice Derrington's proposal will not provide the certainty that religious educational institutions may continue to teach their beliefs in the absence of the existing exemption at section 38(3) of the SDA. Australian courts have recognised that, in certain contexts, comments can amount to *discrimination*, a statutory concept that is distinct from *vilification* (see for example *Nationwide News Pty Ltd v Naidu;*[25]*Qantas Airways v Gama*[26] and *Singh v Shafston Training One Pty Ltd and Anor*[27]*)*. On the removal of section 38, a separate provision will need to clarify that religious educational institutions can continue to teach in accordance with their religious beliefs. The following provision is modelled on provisions proposed as an amendment during Parliamentary debate on the *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018,* with modifications to align the drafting with Derrington J's proposal:

> (1) A person does not discriminate against a person where they engage in teaching activity if that activity is in good faith in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed.
>
> (2) In this section:
>
> > teaching activity means any kind of instruction of a student by a person employed or otherwise engaged by an educational institution that is conducted in accordance with doctrines, tenets, beliefs or teachings of a particular religion or creed.

d) As is the case in respect of Justice Derrington's proposal in respect of employment, the provision needs to make clear that it not only applies to a person 'acting on behalf of a religious institution', but also to the religious institution itself.

[25] *Nationwide News Pty Ltd v Naidu; ISS Security Pty Ltd v Naidu* [2007] NSWCA 377 [378] Basten J.
[26] (2008) 157 FCR 537, [78].
[27] [2013] QCAT 008 (ADL051-11) Michelle Howard, Member 8 January 2013.

ANNEXURE A

Contents

Introduction and Summary

1. This Annexure sets out an analysis of the ALRC's treatment of international human rights law. Demonstrating how the ALRC's four Propositions rely upon a deficient interpretation of the applicable requirements of international human rights law entails a separate exercise from the positing of recommendations for reform made in the body of the submission. The ALRC states its 'preliminary view' that Propositions B to D 'can be implemented in a way that is consistent with Australia's international legal obligations'.[1] A similar claim is made in respect of Proposition A.[2] Three central contentions underpin the ALRC's proposed framework. They are:
    a. Religious educational institutions cannot discriminate on the basis of attributes protected under the *Sex Discrimination Act 1984* (SDA), even in respect of religious teaching roles;
    b. Religious educational institutions can preference staff that share the relevant faith where 'participation in the teaching, observance or practice of the religion' is a 'genuine occupational qualification'; and
    c. Conduct by the religious educational institution should be proportionate to the objective of upholding its religious ethos.

    The consistency of each of these respective propositions with the obligations arising for Australia according to international human rights law is considered in the following three parts. This Annexure first analyses the effect of the Propositions (paragraphs 7 to 12) and considers the ALRC's claim that they are consistent with the law in Victoria (paragraphs 13 to 18). It then turns to analyse the respective key interpretations of international human rights law stated by the ALRC in support of the Propositions (Parts I to III). As set out below, the interpretation of Australia's international obligations developed in the Consultation Paper is lacking in several fundamental respects, each of which call into question the claims that the Propositions are consistent with international human rights law.
2. First, the following comments are made in respect of the proposal that religious educational institutions cannot discriminate on the basis of an SDA attribute:
    a. In support of Propositions B and C the ALRC reads the statements of the United Nations Human Rights Committee (UNHRC) and the United Nations High Commissioner for Human Rights to mean that wherever a protected attribute arises under the SDA, a religious institution loses its ability to act in accordance

[1] Australian Law Reform Commission *Consultation Paper, Religious Educational Institutions and Anti-Discrimination Laws* (27 January 2023) ('ALRC Consultation Paper') [51].
[2] Ibid [45].

with its beliefs and to determine its religious ethos. With respect, this claim relies upon a misapplication of the cited sources. Consecutive Special Rapporteurs have confirmed that the applicable standard for determining the permissible limitations upon religious institutions in respect of their employment practices is Article 18(3).[3] It is incorrect to claim that the statement relied upon by the ALRC in respect of permissible limitations on the basis of widely-held morals overrides the remaining jurisprudence concerning permissible actions undertaken in the maintenance of religious communities (see paragraphs 20 to 32).

b. The ALRC has failed to record, and thus consider the import of, several of the key statements made by United Nations Special Rapporteurs concerning religious institutional autonomy and the important role it plays in ensuring 'institutionalized diversity within a modern pluralistic society.[4] These statements contradict the interpretation the ALRC develops from a limited selection of statements from one Special Rapporteur concerning the treatment of 'internal dissidents' (see Annexure generally and paragraphs 24 to 32 in particular).

3. illustrating the concerns held, the ALRC has failed to record the central comment from a Special Rapporteur on Freedom of Religion or Belief concerning the specific situation of private schools under the ICCPR. Heiner Bielefeldt's 2010 comments offer a summary of the important recognition accorded to 'private denominational schools' within human rights law as a 'way for parents to ensure a religious and moral education of their children in conformity with their own convictions'. The Special Rapporteur emphasised the 'distinct' factors that arise in respect of those schools:

> The situation of religious instruction in private schools warrants a distinct assessment. The reason is that private schools, depending on their particular rationale and curriculum, *might accommodate the more specific educational interests or needs of parents and children, including in questions of religion or belief*. Indeed, many private schools *have a specific denominational profile which can make them particularly attractive to adherents of the respective denomination, but frequently also for parents and children of other religious or*

[3] Heiner Bielefeldt, *Report to the General Assembly of the Special Rapporteur on Freedom of Religion or Belief*, UN Doc A/68/290 (7 August 2013) ('Bielefeldt A/68/290') [60]; Heiner Bielefeldt, *Interim report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/69/261 (5 August 2014) ('Bielefeldt A/69/261') [41] see also [38]; Ahmed Shaheed, *Report of the Special Rapporteur on Freedom of Religion or Belief*, UN Doc A/HRC/43/48 (24 August 2020) ('Shaheed A/HRC/43/48') [59], [66], [74].

[4] Heiner Bielefeldt, *Report of the Special Rapporteur on freedom of religion or belief,* UN Doc A/HRC/16/53 (15 December 2010) ('Bielefeldt A/HRC/16/53') [54]-[55] (emphasis added).

belief orientation. In this sense*, private schools constitute a part of the institutionalized diversity within a modern pluralistic society.*[5]

For the reasons outlined below, by withdrawing the ability of private religious schools to maintain their distinct religious ethos, the ALRC's proposals undermine 'institutionalised diversity within [Australia's] modern pluralistic society'. The prohibition on any form of discrimination under the SDA, even when exercising a preference for persons of the same faith fails to take regard the existing jurisprudence that holds that regard must be had to the religious institution's own asserted beliefs and its self-conception of the requirements of those beliefs when weighing applicable limitations on religious institutions (see paragraphs 33 to 34). The prohibition frustrates the allowance the ALRC purportedly makes for a religious educational institution's ability to 'continue to build a community of faith by giving preference, in good faith, to persons of the same religion as the educational institution in the selection of staff.' In this respect Propositions B to D fail to acquit the ALRC's terms of reference.

4. At paragraphs 35 to 37 it is argued that inherent requirement/genuine occupational requirements/qualifications tests are best suited to meeting the needs of diversity as applied to *particular* roles within a wider secular organisation. They are ill-suited for religious ethos institutions. This is because where they are applied across every role within a religious institution, they have the potential to remove over time the very ethos of the institution itself.
5. In support of the 'genuine occupational qualifications' test the ALRC:
    a. erroneously applies the criteria for determining discriminatory conduct applying to all secular institutions to religious institutions and thus negates application of the specific criteria for limitation of religious manifestation, including through communities of religious believers, stated at Article 18(3). In so doing the ALRC essentially posits that Article 18 can only be expressed through Article 26. However, the two Articles contain distinct standards. They comprise two separate stand-alone criteria (see paragraphs 38 to 41).
    b. The ALRC places heavy reliance on European Council Directive 2000/78 (the Directive) issued under European Union labour law. It also relies on cases that have issued from the European Court of Justice under that Directive. The Directive is a key plank of the ALRC's argument that Propositions B, C and D concerning employment are consistent with international human rights law.[6]

[5] Bielefeldt A/HRC/16/53 (n 4) [54]-[55] (emphasis added).
[6] See the reliance placed upon the Directive at ALRC Consultation Paper (n 1) [53], [55], [60], [66], [103] and [A.47].

The ALRC's reliance on the Directive in interpreting Australia's human rights obligations is misplaced, for the primary reason that the Directive and the jurisprudence that has developed around it directly departs from the standards concerning religious institutional autonomy that have developed under the United Nations framework to which it is a signatory. Indeed, the 'distinct' nature of the Directive and its departure from the ICCPR and ECHR regimes has been observed by the United Nations High Commissioner for Human Rights (see paragraphs 42 to 48).[7]

c. The final source within international human rights law cited by the ALRC in support of its recommendation of a genuine occupations qualifications test is found in two Periodic Reviews by United Nations bodies. The first concerns the comments of the Committee on Economic, Social and Cultural Rights in its Periodic Review of Germany 2018 which were not repeated by the Human Rights Committee in its subsequent review of the same legislation. The second concerns the Concluding Observations of the Human Rights Committee on the fourth periodic review of Ireland.[8] The contextual pressures that gave rise to the UNHRC's concern for the application of Article 26 to employees within the Irish education section simply do not apply in Australia. This is because, contrasted with the position in Australia, non-denominational schools remain a tiny proportion of the overall number of schools within Ireland. Further, at no stage has the Human Rights Committee or the Committee on Economic, Social and Cultural Rights made a recommendation in their Periodic Reviews that Australia is non-compliant with the ICCPR or the ICESCR as a result of section 38 of the SDA (see paragraphs 49 to 54).

6. The application of a proportionality test as a condition for the exemption introduces high levels of uncertainty, both for religious institutions, and also their employees. This is illustrated by the range of religious practices that, as the ALRC admits, a religious institution would need to satisfy a Court are 'proportionate' in order for those practice to remain lawful under the Propositions (see paragraphs 55 to 56). Finally paragraphs 57 to 61 consider the ALRC's assertion that 'if an educational institution is in Queensland, and certain conduct is prohibited under Queensland law but not Commonwealth law, the educational institution must comply with the Queensland law.'[9] It is noted that this fails to take account of the operation of section 109 of the

[7] Office of the United Nations High Commissioner for Human Rights, Protecting Minority Rights: A Practice Guide to Developing Comprehensive Anti-Discrimination Legislation (United Nations and Equal Rights Trust, 2022) 54.
[8] ALRC Consultation Paper (n 1) [66]; [A.12], [A.24]-[A.25].
[9] Ibid [49].

Australian Constitution. As Rees, Rice and Allen have clarified with specific reference to the interaction between section 38 of the SDA and the more limited exemptions contained in Queensland and Tasmania anti-discrimination laws: 'were a court to find that a s 109 inconsistency exists, it is likely that the offending provision would be severable rather than a finding that the entire Act is invalid ... the State or Territory law is vulnerable … because it prohibits discriminatory conduct that the Commonwealth law allows.'[10]

Interpreting the Propositions Concerning Employment

7. In order to analyse the compliance of the ALRC Propositions with international human rights law, it is first necessary to understand precisely what it is those Propositions entail. The Propositions are set out at Appendix B. Propositions B, C and D respectively posit that a school must not discriminate on the basis of protected attributes under the SDA *even when* exercising a preference for persons who share their faith. The relevant excerpts within the Propositions are:
    a. Proposition B - 'Religious educational institutions should not be allowed to discriminate against any staff (current or prospective) on the grounds of sex, sexual orientation, gender identity, marital or relationship status, or pregnancy.'
    b. Proposition C – 'In relation to selection, appointment, and promotion, religious educational institutions should be able to preference staff based on the staff member's religious belief or activity, where this is justified because … the criteria for preferencing in relation to religion or belief would not amount to discrimination on another prohibited ground (such as sex, sexual orientation, gender identity, marital or relationship status, or pregnancy), if applied to a person with the relevant attribute.'
    c. Proposition D – 'Religious educational institutions should be able to expect all staff to respect their institutional ethos. A religious educational institution should be able to take action to prevent any staff member from actively undermining the institutional ethos of their employer. … Respect for an educational institution's ethos and codes of conduct or behaviour should not require employees to hide their own sex, sexual orientation, gender identity, marital or relationship status, or pregnancy in connection with work or in private life, or to refrain from supporting another person with these attributes.'

[10] Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 81-2.

As the ALRC clarifies, the 'Propositions interact — Proposition B (making discrimination on Sex Discrimination Act grounds unlawful) limits the operation of Propositions C and D (allowing for some differential treatment on the grounds of religion, but not where it is discriminatory under the Sex Discrimination Act).'[11]

8. The true effect of Propositions B to D must be understood in the light of section 8 of the SDA (set out at paragraph 21 in the body of this submission). In this respect the ALRC draws upon the complicated test for determining the 'ground' of an allegedly discriminatory act within anti-discrimination law. The implications of that test for Propositions B, C and D may not be readily apparent to the non-legally trained. The 'on the ground of' test looks to the 'real reason' for the action. As noted in the body of this submission at paragraphs 21-25, section 8 of the SDA recognises that there can be multiple reasons for the one act. Thus, even though an act may be done 'on the basis' of the inconsistent religious beliefs of the person in question, if a court holds that a separate attribute is also a reason (it need not even be a substantial reason under section 8), the separate prohibition from discrimination (at subsections 5(1), 5A(1), 5B(1), 5C(1), 6(1), 7(1) or 7AA(1), section 7A or subsection 28AA(1), as may apply) will be breached. This means that Propositions B and C would remove all discretion wherever a person is otherwise protected under the SDA, even where the religious institution seeks to prefer persons who share their faith; even where the role in question is to teach religion.
9. This understanding is consistent with the interpretation applied by the ALRC, as disclosed in the various examples provided to illustrate the operation of each Proposition. In respect of Proposition B these include:
    a. a school could no longer refuse to hire a teacher on the grounds that they are LGBTQ+;
    b. a university could not refuse to consider a lecturer's application for promotion because they were gay and in a same-sex relationship;
    c. a school could not refuse to consider a person's application for promotion to a leadership position because she was divorced and in a new relationship;
    d. a school could require a LGBTQ+ staff member involved in the teaching of religious doctrine or beliefs to teach the school's position on those religious doctrines or beliefs, as long as they were able to provide objective information about alternative viewpoints if they wished.[12]

[11] Ibid [51].
[12] Ibid [54].

e. Not allowing religious educational institutions to exclude staff members who do not adhere to or personally endorse particular beliefs of the religion around sexuality and relationships has the potential to interfere with institutional autonomy connected to the right to manifest religious belief in community with others, parents' freedoms in relation to their children's religious and moral education, and freedoms of expression and association.[13]

10. The ALRC provides the following examples to illustrate the operation of each Proposition C:

    a. a key aspect of this proposition is that preferencing on the grounds of religion cannot be used to justify discrimination in relation to attributes protected under the Sex Discrimination Act. For example, a religious educational institution could not refuse to consider a person as a 'practising' member of its religion because the person was LGBTQ+ or in a same-sex relationship, where the person adhered to other religious criteria that the institution reasonably applied. Discrimination could be based on a person's attributes, such as their sexual orientation or gender identity, or their beliefs about an attribute … this … is crucial to ensuring that Proposition B is not undermined in the implementation of Proposition C.[14]

    b. in selecting teachers of religion, a school could preference members of the religion who adhered to particular dietary restrictions or forms of dress, where this was proportionate in all the circumstances;

    c. it would be reasonable and proportionate for a school to preference an applicant for the position of religious education teacher who was willing to teach the school's particular beliefs around sexuality, as long as the teacher was permitted to objectively discuss the existence of alternative views about other lifestyles, relationships, or sexuality in a manner appropriate to the context.[15]

    d. However, this justification will not extend to differential treatment or detriment on Sex Discrimination Act grounds, because it 'is established law that there is no legitimacy in maintaining rules, policies or practices enacted with reference to religious or affiliated cultural doctrines or sensitivities that discriminate on the basis of sex, sexual orientation, gender identity or other characteristics'. While Proposition B permits discrimination on Sex Discrimination Act grounds in the context of some manifestations of religious belief (such as in relation to training ministers of the religion and in religious observance and practice), it is (for the

[13] Ibid [A.39].
[14] Ibid [59].
[15] Ibid [60].

reasons discussed in relation to Proposition B) necessary and proportionate to prohibit such discrimination more generally in the context of religious educational institutions[16]

11. In respect of Proposition D, the ALRC states:
    a. The difference [between Proposition D and section 25 of the Queensland *Anti-Discrimination Act 1991*] is in the limits on what can be considered in relation to employee conduct, with Proposition D not countenancing any consideration of matters protected by the Sex Discrimination Act.[17]
12. The prohibition on any form of discrimination under the SDA, even when exercising a preference for persons of the same faith, thus frustrates the allowance the ALRC purportedly makes for a religious educational institution's ability to 'continue to build a community of faith by giving preference, in good faith, to persons of the same religion as the educational institution in the selection of staff.' For the reasons further articulated below, in this respect the Propositions B to D fail to acquit the ALRC's terms of reference.

Victorian Equal Opportunity Act

13. Further, it is arguable that the ALRC erroneously asserts that Propositions B and C are consistent with the recent amendments to the exemptions for religious schools found in the Victorian *Equal Opportunity Act 2010.* The ALRC states that Proposition B is 'consistent with the law as it already applies in … Victoria'.[18] In respect of Proposition C it is claimed that:

> Limiting availability of the exception to particular staff is generally consistent with amendments to the law … in force in Victoria (which limits preferencing by reference to inherent requirements, and explicitly excludes discrimination on other grounds).[19]

14. Section 83A of the Victorian Equal Opportunity Act 2010 provides:

> **83A Religious educational institutions: employment**
>
> (1) A person may discriminate against another person in relation to the employment of the other person in a particular position by a relevant educational entity in the course of establishing, directing, controlling or administering an educational institution if—

[16] Ibid [69].
[17] Ibid 26, fn 91.
[18] Ibid [53].
[19] Ibid [60].

(a) conformity with the doctrines, beliefs or principles of the religion in accordance with which the educational institution is to be conducted is an inherent requirement of the position; and

(b) the other person cannot meet that inherent requirement because of their religious belief or activity; and

(c) the discrimination is reasonable and proportionate in the circumstances.

(2) The nature of the educational institution and the religious doctrines, beliefs or principles in accordance with which it is to be conducted must be taken into account in determining the inherent requirements of a position for the purposes of subsection (1)(a).

(3) This section does not permit discrimination on the basis of any attribute other than as specified in subsection (1).

15. As Minister Hutchins clarified on Hansard, to the extent that the amended Act permits religious educational institutions to continue to maintain their religious ethos in respect of their employment practices, institutions must now satisfy a three-fold test:

> conformity with the doctrines, beliefs or principles of the religion is an inherent requirement of the particular position, the person cannot meet that inherent requirement because of their religious belief or activity, and the discriminatory action is reasonable and proportionate.[20]

16. It is important to note that the chapeau to subsection 83A(1) extends the section to any form of discrimination under the Act when it states 'A person may discriminate …'. (The equivalent drafting also applies at section 82A, which concerns employment by religious institutions, inclusive of churches, synagogues, mosques and temples.) The section is to be contrasted with the exemption in respect of students within religious educational institutions contained at subsection 83(2), which only pertains to acts performed 'on the basis of a person's religious belief or activity', and which the Minister clarified is intended to not apply to acts performed on the basis of any other attribute. Section 83A thus contemplates the scenario that where an employee has an inconsistent religious belief, this will negate consideration of any other protected attribute. In effect, a person's inability to meet an inherent requirement 'because of' their 'religious belief or activity' will override consideration of any other protected attribute. To the extent that non-religious actions can be relevant, they would only be relevant to the extent that they demonstrate the absence of a religious belief (for example where non-religious actions determinatively conclude that the teacher no longer shares the religious belief of the school).

[20] *Victoria, Parliamentary Debates, Legislative Assembly* 28 October 2021, Natalie Hutchins, Minister, 4369, see also 4370.

17. That such is the result under the section was clarified by the Minister in the following two statements in the Second Reading Speech for the Bill introducing the provisions:

> A person being gay is not a religious belief. A person becoming pregnant is not a religious belief. A person getting divorced is not a religious belief. A person being transgender is not a religious belief. Under the Bill, a religious body or school would not be able to discriminate against an employee *only on the basis* that a person's sexual orientation or other protected attribute is inconsistent with the doctrines of the religion of the religious body (emphasis added).

However, the Minister then goes on to note:

> Many religions have specific beliefs about aspects of sex, sexuality, and gender. For example, some religions believe marriage should only be between people of the opposite sex. If a particular religious belief about a protected attribute is an inherent requirement of the role, and a person has an inconsistent religious belief, it may be lawful for the religious organisation to discriminate against that person.

18. As the Minister said 'a person may discriminate' where the three elements to the exemption at section 83A are satisfied, being:
    a. conformity with the doctrines, beliefs or principles of the religion is an inherent requirement of the particular position,
    b. the person cannot meet that inherent requirement because of their religious belief or activity, and
    c. the discriminatory action is reasonable and proportionate.[21]

On that analysis, the ALRC is in error in positing that Propositions B and C reflect the Victorian model. On the above analysis the Victorian model permits a school to select persons on the basis of religious faith, where they have an inconsistent religious belief, regardless of the presence of any protected attribute. In Victoria the relevant consideration is whether the person has an inconsistent religious belief or engages in an inconsistent religious activity. As set out below, on this account the Victorian law is consistent with the applicable human rights law (although as I say below the use of an inherent requirements test is not consistent with that law and the proportionality test raises significant uncertainties).

[21] Ibid.

The ALRC's Analysis of International Law

19. The ALRC states its 'preliminary view' that Propositions B to D 'can be implemented in a way that is consistent with Australia's international legal obligations'.[22] A similar claim is made in respect of Proposition A.[23] Three central contentions underpin the ALRC's proposed framework. They are:
    a. Religious educational institutions can preference staff that share the relevant faith where 'participation in the teaching, observance or practice of the religion' is a 'genuine occupational qualification'
    b. Religious educational institutions cannot discriminate on the basis of an SDA attribute, even in respect of religious teaching roles;
    c. Conduct by the religious educational institution should be proportionate to the objective of upholding its religious ethos.

    The consistency of each of these respective propositions with the obligations arising for Australia according to international human rights law is considered in the following three parts.

Part I - Religious Institutions Cannot Discriminate on the Basis of an SDA Attribute

20. The first key contention considered is that the prohibiting of discrimination on the basis of SDA grounds by a religious educational institution in their employment practices under Propositions B and C is consistent with international human rights law.[24] In respect of Proposition C the ALRC claims that

> a key aspect of this proposition is that preferencing on the grounds of religion cannot be used to justify discrimination in relation to attributes protected under the Sex Discrimination Act. For example, a religious educational institution could not refuse to consider a person as a 'practising' member of its religion because the person was LGBTQ+ or in a same-sex relationship, where the person adhered to other religious criteria that the institution reasonably applied. Discrimination could be based on a person's attributes, such as their sexual orientation or gender identity, or their beliefs about an attribute. As discussed further in the human rights analysis in Appendix [A.6]–[A.10] this is consistent with the way that the relevant rights have been interpreted by UN bodies, and

[22] ALRC Consultation Paper (n 1) [51].
[23] Ibid [45].
[24] Ibid [53], [59]-[60].

is crucial to ensuring that Proposition B is not undermined in the implementation of Proposition C.[25]

Reliance on General Comment 22

21. The first authority that the ALRC provides for its claim that the qualification that discrimination must not occur on the basis of attributes protected under the SDA where a religious institution exercises a preference for religion is (care of the summary provided by the High Commissioner for Human Rights) the General Comment statement of the UNHRC on permissible limitations under Article 18 where the limitation is made on the basis of morals.[26] The cited statement from the General Comment is as follows: "the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations ... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition".[27] Relying on that statement the Office of Human Rights has claimed that it 'is established law that there is no legitimacy in maintaining rules, policies or practices enacted with reference to religious or affiliated cultural doctrines or sensitivities that discriminate on the basis of sex, sexual orientation, gender identity or other characteristics'.[28] It is this statement on which the ALRC relies in positing that a religious institution must not discriminate on the basis of an attribute protected under the SDA where exercising a preference for religious believers.[29]
22. In support of Propositions B and C the ALRC reads the statements of the UNHRC and the Office of the High Commissioner to mean that wherever a protected attribute arises under the SDA, a religious institution loses its ability to act in accordance with its beliefs and to determine its religious ethos. With respect, this is a misapplication of the jurisprudence. The UNHRC General Comment's statement concerning limitations on religious manifestation made on the basis of morals, and the Office of the High Commissioner's statement in reliance on it, are both to be read to be consistent with the remaining jurisprudence under Article 18 concerning limitations on religious manifestation, including the right to community manifestation of religious belief, as outlined in my enclosed article for the Australian Journal of Law and Religion.

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[25] Ibid [59].
[26] Ibid [69]. Recalling that Article 18(3) permits limitations that are 'prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.' The citation provided by the ALRC is to the Office of the United Nations High Commissioner for Human Rights (n 8) 149, which cites Human Rights Committee, General Comment No. 22 (1993), para. 8; and General Comment No. 34 (2011).
[27] Human Rights Committee, *General Comment No 22* (1993) [8]; and *General Comment No 34* (2011).
[28] ALRC Consultation Paper (n 1) [69] citing Office of the United Nations High Commissioner for Human Rights (n 8) 149.
[29] Ibid [69], [A.6].

Consecutive Special Rapporteurs have confirmed that the applicable standard for determining the permissible limitations upon religious institutions in respect of their employment practices is Article 18(3).[30] The statement of the Office of the High Commissioner relied upon by the ALRC itself relies upon the statements of Special Rapporteurs in which these principles are affirmed.[31]

23. Thus, the General Comment's claim in respect of limitations on the basis of morals is to be read consistent with the strict principles for limitations on religious manifestation outlined in that document, as applied to the context of religious schooling in *Delgado Páez v Columbia;*[32] and as outlined in the enclosed journal article at paragraph 6. In General Comment 22 the UNHRC states those principles as follows:

> Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18. The Committee observes that paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant.[33]

The General Comment's statement on limitations on the basis of morals is thus also to be read consistently with the statement of the Special Rapporteur that '*private schools constitute a part of the institutionalized diversity within a modern pluralistic society'.*[34] It is incorrect to claim that the statement made in respect of permissible limitations on the basis of widely-held morals overrides the remaining jurisprudence concerning permissible actions undertaken in the maintenance of religious communities. The ALRC itself acknowledges this when it later correctly asserts:

> where the aim or effect of criteria for preferencing on the grounds of religion is differential treatment in relation to (at least) sex, sexual orientation, or gender identity, such preferencing will engage equality and non-discrimination rights under the relevant treaty. It is a separate question whether that discrimination is nevertheless to be permitted, which is to be considered in line with the limitation criteria set out in Article 18(3) of the ICCPR.[35]

[30] Bielefeldt A/68/290 (n 3) [60]; Bielefeldt A/69/261 (n 3) [41] see also [38]; Shaheed A/HRC/43/48 (n 3) [59], [66], [74].
[31] Office of the United Nations High Commissioner for Human Rights (n 8) 149; including Bielefeldt ibid and Shaheed ibid.
[32] *William Eduardo Delgado Páez v Colombia* Communication No. 195/1985, U. N. Doc. CCPR/C/39/D/195/1985 (1990), [5.7] ('*Delgado Páez*').
[33] ALRC Consultation Paper (n 1) [8].
[34] Bielefeldt A/HRC/16/53 (n 4) [54]-[55] (emphasis added).
[35] ALRC Consultation Paper (n 1) [A.9].

Despite this acknowledgement, the ALRC fails to appreciate its import by positing at paragraph [69] that the presence of a protected attribute under the SDA automatically disentitles a religious school from seeking to preserve its religious ethos through its employment practices.

Special Rapporteur Ahmed Shaheed

24. The second authority cited for the ALRC's proposition that a religious educational institution should not be permitted to act where a protected attribute arises under the SDA is the statements of the immediate past Special Rapporteur, Ahmed Shaheed in his 2020 Report to the Human Rights Council. Making the same error of conflating the standards under Article 26 with those under Article 18, the ALRC also cites Special Rapporteur Shaheed's statement that religious beliefs cannot be a legitimate justification for 'violence *or discrimination* against women and girls or against people on the basis of their sexual orientation or gender identity'.[36] As the following analysis shows, this is not to be read as negating any differential treatment that might arise within religious institutions in pursuit of the freedoms protected under Article 18. In that context, the ALRC also quotes former Special Rapporteur Shaheed's questioning of the idea that 'religion should be "all or nothing" — either you choose to take part in a religion and must accept its inequalities, or you must cease to belong to that religion'.[37] The ALRC also cites the former special rapporteur's view that

> the rights of individuals should be protected even within groups, by creating an enabling environment where dissenters are protected against incitement to violence, and are able to assert their agency through the exercise of their fundamental human rights, including freedom of expression, right to information, freedom of religion or belief, the right to education, the right work [sic], freedom from coercion and equality before the law, among others. Equal liberties and protections in society, such as the right to equality and non-discrimination or the right to physical integrity, can only be maintained if individuals are never deemed as having waived said rights and liberties, even by voluntarily joining an organization.[38]

These comments are cited in support of the contention that schools should be required to employ persons who do not share their religious beliefs. In addition to the reliance placed upon Shaheed's comments for the propositions that religious educational

[36] Ibid [A.8] citing Shaheed A/HRC/43/48 (n 3) [69] (emphasis added).
[37] ALRC Consultation Paper (n 1) 41, [A.16].
[38] Ibid [A.17] citing Shaheed A/HRC/43/48 (n 3) [52].

institutions should not be permitted to discriminate on SDA protected attributes, Shaheed's 2020 Report to the Human Rights Council is the sole authority derived from international human rights law in support of Proposition A. It is cited in support of the statement that 'the fact of exclusion is in itself a significant burden on the person's rights … particularly where membership of a religious community is part of a person's family and social identity.'[39]

25. However, the ALRC fails to report that in that same document former Special Rapporteur Shaheed goes on to acknowledge:

> Freedom of religion or belief includes the right to maintain the internal institutional affairs of religious community life without State intervention (A/69/261, para. 41; and A/HRC/22/51, para. 25). As outlined by the Special Rapporteur's predecessor, the autonomy to determine the rules for appointing religious leaders or for governing "monastic life", for example, allows religious communities to adhere to the self-understanding of the respective group and their traditions (A/69/261, para. 41). It must also be noted, however, that the autonomy of religious institutions falls within the forum externum dimension of freedom of religion or belief, which, if the need arises, can be restricted in conformity with the criteria spelled out in article 18 (3) of the International Covenant on Civil and Political Rights (A/68/290, para. 60).[40]

In this the Special Rapporteur draws upon the statements of prior Special Rapporteur Heiner Bielefeldt, which contain the following strong statement concerning the interaction of Article 18(3) and religious institutional autonomy:

> It should be noted in this context that religious institutions constitute a special category, as their raison d'être is, from the outset, a religious one. Freedom of religion or belief also includes the right to establish a religious infrastructure which is needed to organize and maintain important aspects of religious community life. For religious minorities this can even become a matter of their long-term survival. The autonomy of religious institutions thus undoubtedly falls within the remit of freedom of religion or belief. It includes the possibility for religious employers to impose religious rules of conduct on the workplace, depending on the specific purpose of employment. This can lead to conflicts with the freedom of religion or belief of employees, for instance if they wish to manifest a religious conviction that differs from the corporate (i.e., religious) identity of the institution. Although religious institutions must be accorded a

[39] ALRC Consultation Paper (n 1) [A.17], [A.34].
[40] ALRC Consultation Paper (n 1) [66].

broader margin of discretion when imposing religious norms of behaviour at the workplace, much depends on the details of each specific case.[41]

26. In the same statement cited by the ALRC as authority for its contention that a religious institution may never discriminate in respect of an attribute protected under the SDA, Ahmed Shaheed also cites the prior statement of Special Rapporteur Bielefeldt concerning the importance of preserving institutional autonomy for religious minorities, including in respect of religious schools:

> Positive measures are often urgently needed to facilitate the long-term development of a religious minority and its members. The added value of article 27 of the International Covenant and similar minority rights provisions is that they call upon States to undertake such measures, which thus become an obligation under international human rights law. According to article 4(2) of the 1992 Minorities Declaration, States should "take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national laws and contrary to international standards". This requires a broad range of activities. For instance, support measures may include subsidies for schools and training institutions, the facilitation of community media, provisions for an appropriate legal status for religious minorities, accommodation of religious festivals and ceremonies, interreligious dialogue initiatives and awareness-raising programmes in the larger society. Without such additional support measures the prospects of the long-term survival of some religious communities may be in serious peril, which, at the same time, would also amount to grave infringements of freedom of religion or belief of their individual members.[42]

Without further clarification, the ALRC could be perceived as failing to provide a complete and accurate representation of the accounts of the Special Rapporteurs.

Special Rapporteur Heiner Bielefeldt

27. The ALRC also separately quotes former Special Rapporteur Heiner Bielefeldt's assertion that '[i]ndeed, as a human right, freedom of religion or belief can never serve as a justification for violations of the human rights of women and girls'[43] in support of its proposition that a religious institution should not be permitted to discriminate in

[41] Bielefeldt A/69/261 (n 3) [41].
[42] Heiner Bielefeldt, *Report of the Special Rapporteur on Freedom of Religion or Belief*, UN Doc A/HRC/22/51 (24 December 2012) ('*Report of the Special Rapporteur on Freedom of Religion or Belief*').('Bielefeldt A/HRC/22/51') [25].
[43] Bielefeldt, UN Doc A/68/290 (n 3) [30] cited at ALRC Consultation Paper (n 1) [A.8].

respect of the attributes protected by the SDA. The ALRC also relies upon prior Special Rapporteur Bielefeldt's criticism of the fact that 'many women from religious minorities feel exposed to the expectation that they have to choose one of two seemingly contradictory options: allegedly, they can either emancipate themselves by more or less abandoning their religious tradition, or they can keep their religious heritage, thereby forfeiting their claims to freedom and equality' as 'an artificial antagonism'.[44] Both of these statements are cited in support of the proposition that a religious institution cannot discriminate on the basis of an attribute protected under the SDA.[45]

28. However, the ALRC fails to apprehend the import of the following lengthy statement made by Special Rapporteur Bielefeldt within the same document:

> 57. Freedom of religion or belief also covers the right of persons and groups of persons to establish religious institutions that function in conformity with their religious self-understanding. This is not just an external aspect of marginal significance. Religious communities, in particular minority communities, need an appropriate institutional infrastructure, without which their long-term survival options as a community might be in serious peril, a situation which at the same time would amount to a violation of freedom of religion or belief of individual members (see A/HRC/22/51, para. 25). Moreover, for many (not all) religious or belief communities, institutional questions, such as the appointment of religious leaders or the rules governing monastic life, directly or indirectly derive from the tenets of their faith. Hence, questions of how to institutionalize religious community life can have a significance that goes far beyond mere organizational or managerial aspects. Freedom of religion or belief therefore entails respect for the autonomy of religious institutions.
>
> 58. It is a well-known fact that in many (not all) denominations, positions of religious authority, such as bishop, imam, preacher, priest, rabbi or reverend, remain reserved to males, a state of affairs that collides with the principle of equality between men and women as established in international human rights law. Unsurprisingly, this has led to numerous conflicts. While the Special Rapporteur cannot provide a general recipe for handling such conflicts in practice, he would like to point to a number of relevant human rights principles and norms in this regard.
>
> 59. It cannot be the business of the State to shape or reshape religious traditions, nor can the State claim any binding authority in the interpretation of

[44] Bielefeldt Ibid [35] cited at ALRC Consultation Paper (n 1) [A.16].
[45] ALRC Consultation Paper (n 1) [A.8] and [A.16].

religious sources or in the definition of the tenets of faith. Freedom of religion or belief is a right of human beings, after all, not a right of the State. As mentioned above, questions of how to institutionalize community life may significantly affect the religious self-understanding of a community. From this it follows that the State must generally respect the autonomy of religious institutions, also in policies of promoting equality between men and women.

60. At the same time, one should bear in mind that freedom of religion or belief includes the right of internal dissidents, including women, to come up with alternative views, provide new readings of religious sources and try to exercise influence on a community's religious self-understanding, which may change over time. In situations in which internal dissidents or proponents of new religious understandings face coercion from within their religious communities, which sometimes happens, the State is obliged to provide protection. It should be noted in this regard that the autonomy of religious institutions falls within the forum externum dimension of freedom of religion or belief which, if the need arises, can be restricted in conformity with the criteria spelled out in article 18, paragraph 3, of the International Covenant, while threats or acts of coercion against a person may affect the forum internum dimension of freedom of religion or belief, which has an unconditional status. In other words, respect by the State for the autonomy of religious institutions can never supersede the responsibility of the State to prevent or prosecute threats or acts of coercion against persons (e.g., internal critics or dissidents), depending on the circumstances of the specific case.

61. In addition, freedom of religion or belief includes the right to establish new religious communities and institutions. The issue of equality between men and women has in fact led to splits in quite a number of religious communities, and meanwhile, in virtually all religious traditions, reform branches exist in which women may have better opportunities to achieve positions of religious authority. Again, it cannot be the business of the State directly or indirectly to initiate such internal developments, which must always be left to believers themselves, since they remain the relevant rights holders in this regard. What the State can and should do, however, is to provide an open framework in which religious pluralism, including pluralism in institutions, can unfold freely. An open framework facilitating the free expression of pluralism may also

improve the opportunities for new gender-sensitive developments within different religious traditions, initiated by believers themselves.[46]

29. The ALRC understand special Rapporteur Shaheed's comment that religious institutions should be required to include internal dissidents who defy their beliefs and must not 'discriminate' as encompassing the reach of actions that would comprise technical discrimination under the SDA. The ALRC cite Shaheed's questioning of the idea that 'religion should be "all or nothing" — either you choose to take part in a religion and must accept its inequalities, or you must cease to belong to that religion'[47] as authority for the idea that a religious educational institution must not discriminate on the basis of a protected attribute under the SDA.[48] That proposition is inconsistent with the jurisprudence concerning Article 18. It extends well beyond Special Rapporteur Bielefeldt's emphasis on pluralism through enabling the ability of dissidents to form their own institutions, subject to the proviso that States have an obligation to intervene in the case of 'coercion' of internal dissidents. Where Special Rapporteur Shaheed references 'discrimination' as impermissible, Special Rapporteur Bielefeldt references only 'coercion'. Under international law the notion of 'coercion' is strictly defined.[49] It is clear from the jurisprudence concerning the prohibition on coercion, that coercion does not include the imposition of requirements that employees adhere to and act consistently with their employers beliefs. The ALRC's application of Shaheed's comments defies the interpretation applied by all other prior Rapporteurs and the UNHRC in interpreting Article 18, including the UNHRC's consideration of Catholic schools statements in *Delgado Páez v Colombia*[50] (see enclosed journal article at paragraph 6). It also defies the ECHR's very clear statements concerning religious institutional autonomy in such seminal cases as *Hasan v Bulgaria,* wherein the Court said:

> the believer's right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully free from arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which article 9 affords. It directly concerns not only the organisation of the community as such but also the effective enjoyment of

[46] Bielefeldt A/68/290 (n 3) [57]-[61].
[47] ALRC Consultation Paper (n 1) 41, [A.16].
[48] ALRC Consultation Paper (n 1) [A.16].
[49] Bielefeldt, Heiner, Nazila Ghanea-Hercock and Michael Wiener, *Freedom of Religion or Belief : an International Law Commentary* (Oxford University Press, 2016), pt 1.2.
[50] *William Eduardo Delgado Páez v Colombia* Communication No. 195/1985, U. N. Doc. CCPR/C/39/D/195/1985 (1990), [5.7] ('*Delgado Páez*').

> the right to freedom of religion by all its active members. Were the organisational life of the community not protected by article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable.[51]

30. The ALRC acknowledges that membership of a 'faith community' is 'something [that is] personal and fundamental'. It acknowledges that religious schools are religious communities.[52] However, it then proceeds to recommend that a religious community should be required to continue to be formed by persons who do not, or who no longer, share its beliefs. In this the ALRC misunderstands the nature of religious faith and of religious community. The rationale for this requirement is stated by the ALRC in support of Proposition B: 'exclusion from any area of public life on Sex Discrimination Act grounds is a serious interference with a person's dignity, particularly where it relates to exclusion from something as personal and fundamental as a faith community'.[53] However, as Aroney points out this entails a very serious failure of logic:

> if any individual can decide whether he or she qualifies for membership of an organisation, no organisation will be able to maintain its distinctive identity. This *reductio ad absurdum* suggests that a radical individualist conception of religious liberty is simply incompatible with the existence of religious associations and communities as distinguishable groups within a society.[54]

Special Rapporteur Nazila Ghanea-Hercock

31. Moreover, judging from her prior statements the current Special Rapporteur will be reticent to support the interpretation applied by the ALRC to the comments of Special Rapporteur Shaheed. The current Special Rapporteur has, prior to her appointment when writing in co-authorship with former Special Rapporteur Bielefeldt made the following comments:

> to demand that States should directly enforce women's right of equality within religious institutions would lead to highly problematic consequences. It would give the State a genuine authority over the definition of theological issues,

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[51] *Hasan and Chaush v Bulgaria* (European Court of Human Rights, Grand Chamber, Application no. 30985/96, 26 October 2000, ('*Hasan and Chaush v Bulgaria*'). See also *Serif v Greece* Second Section, no 38178/97 Eur Court HR ('*Serif v Greece*').

[52] See, for eg, ALRC Consultation Paper (n 1) [49]. Indeed, the third limb of the terms of reference acknowledge this wherein they state the ALRC should recommend laws that 'ensure that an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed … can continue to build a community of faith'.

[53] ALRC Consultation Paper (n 1) [A.42].

[54] Nicholas Aroney, 'Freedom of Religion as an Associational Right' (2014) 33(1) *University of Queensland Law Journal* 153, 184.

> thereby creating enormous new risks for freedom of religion or belief, particularly in countries governed by authoritarian or totalitarian Governments. It can neither be the business of the State to shape or reshape religious traditions, nor should the State claim any theological authority in the interpretation of religious sources or in the definition of the tenets of faith. Going along that road and giving the State the authority to decide on certain theological issues could result in heavy-handed State interferences and concomitant abuses, to the detriment of autonomous religious life. Freedom of religion or belief is a right of human beings, after all, not a right of the State. From this it follows that the State must generally respect the autonomy of religious institutions, also when it seeks to promote equality between men and women.[55]

32. Ghanea-Hercock and Bielefeldt go on to clarify that

> freedom of religion or belief includes the right to establish new religious communities and institutions. The issue of equality between men and women has in fact led to splits in quite a number of religious communities, and meanwhile in virtually all religious traditions reform-branches exist in which women may have better opportunities to achieve positions of religious authority, including leadership positions. Again, it cannot be the business of the State directly to initiate such internal developments, which must always be left to believers themselves; they are and remain the relevant rights holders in this regard. What the State can and should do, however, is to provide an open framework in which religious pluralism, including pluralism in understanding and shaping of religious institutions, can unfold freely.[56]

This aligns with Bielefeldt's comments as Special Rapporteur emphasising the importance of institutional diversity and the freedom of dissidents to establish new institutions as a means to retain the character of existing institutions (see paragraph 28). Bielefeldt and the current Special Rapporteur's account defies the ALRC's interpretation of prior Rapporteur Shaheed's comments to the extent that the ALRC asserts that religious institutions should be required to continue to employ persons who no longer share the beliefs of the institution.

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[55] Heiner Bielefeldt, Nazila Ghanea-Hercock and Michael Wiener, *Freedom of Religion or Belief: an International Law Commentary* (Oxford University Press, 2016) 380-1.

[56] Ibid 387.

Is the ALRC Correct when it says Religious Institutions can be Required to Ignore Certain Beliefs?

33. To conclude consideration of the ALRC's contention that a religious school cannot act in respect of its beliefs concerning an attribute protected under the SDA it is necessary to understand how international law treats the interaction between religious institutional autonomy and the protection against discrimination on the basis of the SDA attributes. The following example provided by the ALRC of the effect of Proposition C illustrates the ALRC's proposal that certain beliefs should be earmarked as not suitable for a religious institution to enact:

> a religious educational institution could not refuse to consider a person as a 'practising' member of its religion because the person was LGBTQ+ or in a same-sex relationship, where the person adhered to other religious criteria that the institution reasonably applied.[57]

The ALRC is correct when it asserts in its comments on the UNHRC and the European Court of Human Rights (ECtHR) jurisprudence that 'None of these cases have involved alleged direct discrimination on the grounds of sex, sexual orientation, or gender identity.'[58] However, the existing jurisprudence holds that regard must be had to the religious institution's own asserted beliefs and its self-conception of the requirements of those beliefs when weighing applicable limitations on religious institutions. A central relevant determinant is how the institution itself conceives of the impact the conduct or belief in question will have on the ethos of the institution. *Siebenhaar v Germany*, for which the ALRC offers only brief passing reference, is the classic example of this principle. The comments made on that decision in the attached journal article are of immediate relevance:

> The Court restated its jurisprudence that 'except in very exceptional cases, the right to freedom of religion as understood by [lit. "such as intended by"] the Convention excludes any assessment on the part of the State of the legitimacy of religious beliefs or of the methods of expressing them'.[59] From that jurisprudence flowed the Court's affirmation of the Church's own conception of the conduct or beliefs of its employees that would detrimentally impact on its ability to 'form a community of service *regardless of their position or*

[57] ALRC Consultation Paper (n 1) [59]
[58] Ibid [A.19].
[59] See also *Hasan and Chaush v Bulgaria* European Court of Human Rights, Grand Chamber, Application no. 30985/96, 26 October 2000.

professional functions'.[60] That jurisprudence is consistent with the frequently adopted approach that courts should apprehend the genuineness, or sincerity, of the religious beliefs in question.[61]

34. *Siebenhaar v Germany* reflects the Court's long maintained practice of placing high regard on the ability of religious institutions to define their own beliefs. The decision shows that enfolded within this practice is a willingness to have regard to an institution's assertions as to what is necessary for the maintenance of its religious ethos. This application of these principles within the United Nations jurisprudence is summarised by former Special Rapporteur Bielefeldt:

> It cannot be the business of the State to shape or reshape religious traditions, nor can the State claim any binding authority in the interpretation of religious sources or in the definition of the tenets of faith. Freedom of religion or belief is a right of human beings, after all, not a right of the State… *questions of how to institutionalize community life may significantly affect the religious self-understanding of a community. From this it follows that the State must generally respect the autonomy of religious institutions, also in policies of promoting equality between men and women.*[62]

The proposition that a religious institution can act on its beliefs in respect of persons who do not hold their beliefs, provided those persons are not protected by SDA protected grounds, compels religious institution to render a distinction between theological precepts. The ALRC's Propositions mean that religious institutions may act to preserve their ethos where a person's inconsistent religious belief is a factor, but cannot not preserve their ethos where an attribute under the SDA is a factor (by operation of section 8 of the SDA, as outlined above). This does not reflect the regard that international law has for an institution's own ability to interpret the implications of its religious commitments.

Part II - Genuine Occupational Qualification Tests

35. In the following section I consider the ALRC's contention that a 'genuine requirement'[63] (later described as a 'genuine occupational qualification'[64] and a 'genuine occupational

[60] *Siebenhaar v Germany* European Court of Human Rights Application no 18136/02 [9] [tr author] (emphasis added).
[61] See Mark Fowler, 'Judicial Apprehension of Religious Belief under the Commonwealth Religious Discrimination Bill' in Michael Quinlan and A Keith Thompson (ed), *Inclusion, Exclusion and Religious Freedom in Contemporary Australia* (Shepherd Street Press, 2021); Neil Foster, 'Respecting the Dignity of Religious Organisations' (2020) 47(1) *University of Western Australia Law Review* 175.
[62] Bielefeldt A/68/290 (n 3) [57]-[61] (emphasis added).
[63] ALRC Consultation Paper (n 1) 22.
[64] Ibid [66], [A.36].

requirement'[65]) test, as is incorporated within Proposition C, is consistent with Australia's international obligations. The ALRC draws upon three sources of international law to make three separate interpretive claims that such a test is consistent with international human rights law. The first concerns the understanding that Article 26 of the ICCPR is the relevant consideration in respect of religious institutions practice toward employees. The second relies upon the European Council Directive 2000/78. The third relies upon Periodic Reviews of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights. Before turning to consider whether the ALRC's claims are correct, it is necessary to consider the nature and effect of genuine occupational qualification tests for religious institutions.

Genuine Occupational Qualification Tests are not Suitable for Religious Institutions

36. Genuine occupational requirements tests, drawn from wider labour law, are particularly suited to the situation of accommodating the unique aspects of a particular role within a wider secular organisation or undertaking. As Aroney and Taylor posit

> The inherent requirements test exists to meet the generic needs of all organisations, whatever their nature or purpose. It is not a substitute for the specific protections accorded to religious organisations under the ECHR as interpreted by the ECtHR.[66]

Section 14 of the New South Wales *Anti-Discrimination Act 1977,* concerning an exception to the prohibition on racial discrimination, provides a useful illustration of this principle. The following activities are listed therein as 'genuine occupational qualifications':

> (a) participation in a dramatic performance or other entertainment in a capacity for which a person of a particular race is required for reasons of authenticity,
>
> (b) participation as an artist's or photographic model in the production of a work of art, visual image or sequence of visual images for which a person of a particular race is required for reasons of authenticity,
>
> (c) working in a place where food or drink is, for payment or not, provided to and consumed by persons in circumstances in which a person of a particular race is required for reasons of authenticity, or

[65] Ibid [93], [97].
[66] Nicholas Aroney and Paul Taylor, 'The Politics of Freedom of Religion in Australia' (2020) 47(1) *University of Western Australia Law Review* 42, 57.

(d) providing persons of a particular race with services for the purpose of promoting their welfare where those services can most effectively be provided by a person of the same race.

Genuine occupational requirements/qualifications and inherent requirements tests are best suited to meeting the needs of diversity as applied to *particular* roles within a wider secular organisation. They are ill-suited for religious ethos institutions. This is because where they are applied across every role within a religious institution (as opposed to particular roles within a dramatic production (subsections 14(a) or (b) above), or waiters within a Thai restaurant (subsection 14(c)), or an aboriginal health worker within a secular hospital (subsection 14(d)) they have the potential to remove over time the very ethos of the institution itself. Further, as the test is specific to the individual role in question, and is to be determined in light of the employing institution, the ability of existing judgements to guide future conduct in respect of other institutions or roles will be limited.

37. The decision of the Queensland Anti-Discrimination Tribunal in *Walsh v St Vincent de Paul Society Queensland*[67] provides a classic illustration of how this is the case. In that matter the religious institution respondent was unable to implement a requirement that the President of its local chapter be a Catholic because it had in the past employed a person who was not a Catholic. In finding that its desire to appoint a Catholic was unlawful, the Tribunal effectively negated the Society's control over the ethos of the organisation through that central role. As argued in the enclosed journal article:

> If the temporary occupation of a teaching position by a person who is not able to perform religious devotions can provide evidence that such an activity is not an 'inherent requirement', there is nothing limiting that evidence from applying to all equivalent teaching positions. Thus, any equivalent teacher that no longer shares the religious beliefs of the school could assert the temporary employment of another teacher as evidence for their subsequent unlawful dismissal. If each equivalent teaching position can be performed without the relevant requirement, this element of the school's efforts to reflect its religious ethos in its interactions with its students will be lost. Over time such a test has the distinct potential to 'white-ant' an institution through the amassing of evidence arising from the temporary placement of non-adherents in response to transitory staff shortages. The maintenance of the school's ethos could then

[67] *Walsh v St Vincent de Paul Society Queensland (No.2)* [2008] QADT 32 ('*Walsh*').

be relegated to roles such as the chaplain and the leadership of the school (presuming such persons also retain the religious beliefs of the school).

Misapplication of Article 26 of the ICCPR

38. The first interpretation of international law cited by the ALRC in support of a 'genuine occupational qualification' test is associated with a particular application of Article 26 of the ICCPR. The ALRC makes the following claim in support of the imposition of a 'genuine occupational qualification' test at Proposition C:

> Some stakeholders involved with religious educational institutions have suggested that it is important that they be able to preference individuals on religious grounds for all roles within their schools, in order to create a 'community of faith' or to maintain a 'critical mass' of co-religionists, where staff are seen as authentic role models for living a religious life. However, preferencing staff on the grounds of religion disadvantages those who are not of the same religion, and can have particular impacts on those from minority religious communities, *so such preferencing must be justified as reasonable, entailing consideration of proportionality*. *In the context of employment by religious institutions, such preferencing is generally considered reasonable where a job has explicitly religious or doctrinal content. In these circumstances, the religious grounds for preferencing can be seen as a 'genuine occupational qualification' for the role*.[68]

39. Here, the ALRC applies the criteria for determining discriminatory conduct applying to all secular institutions to religious institutions. In so doing it negates application of the specific criteria for limitation of religious manifestation, including through communities of religious believers, stated at Article 18(3) (the same issue was identified in respect of the ALRC's reliance on General Comment 22 above at paragraphs 21 to 23). As authority for the above proposition the ALRC cites a discussion by the Office of the United Nations High Commissioner for Human Rights, wherein the Commissioner canvasses the obligations pertaining to secular organisations, including businesses, that arise under the prohibition on discriminatory conduct under Article 26 of the ICCPR.[69] In so doing the ALRC conflates the Article 18 and Article 26 standards. The two Articles contain distinct standards. They comprise separate stand-alone criteria. As Special Rapporteurs Shaheed and Bielefeldt have both clarified, the applicable

[68] ALRC Consultation Paper (n 1) [57] (emphasis added).
[69] The citation provided is to the Office of the United Nations High Commissioner for Human Rights (n 8) 51–6. See also ALRC Consultation Paper (n 1) [69].

standard for determining the permissible limitations upon religious institutions in respect of their employment practices is Article 18(3).[70] It is in that context that Bielefeldt makes the claim that 'religious institutions constitute a special category, as their *raison d'être* is, from the outset, a religious one. Freedom of religion or belief also includes the right to establish a religious infrastructure which is needed to organize and maintain important aspects of religious community life.'[71]

40. This misunderstanding also arises in the ALRC's subsequent reliance on the General Comment that sets out the UNHRC's view on Article 26 in support of the genuine occupational qualification test:

> Proposition C is framed so that it allows for differential treatment of prospective staff on legitimate grounds — preferencing in relation to religion where it is a genuine requirement of the role to be involved in the teaching, observance, or practice of religion. In such a case, religious affiliation, belief, or adherence can be considered a genuine occupational qualification. This is justified because this is a reasonable and objective criterion that pursues the legitimate aim of allowing a school to maintain its religious ethos and teach its religious doctrine, as long as such criteria are used in a proportionate way.[72]

41. At the Annexure the ALRC correctly observes that General Comment 18 states:

> the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.[73]

The ALRC also cites the 'proportionality' analysis adopted by the UNHRC in *Yaker v France* as authority for its proposition that 'a proportionality analysis is relevant to determining whether particular preferencing is justified under international law.'[74] However, that matter concerned a woman who 'was stopped for an identity check while wearing her niqab on the street in Nantes' and who 'was then prosecuted and convicted of the minor offence of wearing a garment to conceal her face in public.'[75] It

[70] Bielefeldt A/68/290 (n 3) [60]; Bielefeldt A/69/261 (n 3) [41] see also [38]; Shaheed A/HRC/43/48 (n 3) [59], [66], [74].
[71] Bielefeldt A/69/261 (n 3) [41]. The full quote is provided above at [28].
[72] ALRC Consultation Paper (n 1) [68].
[73] Human Rights Committee, *General Comment No 18: Non-discrimination*, 39th sess, UN Doc HRI/GEN/1/Rev.9 (Vol I) (10 November 1989) 197 [13].
[74] Human Rights Committee Views: Communication No 2747/2016, UN Doc CCPR/C/123/D/2747/2016 (17 July 2018) (*Yaker v France*) ALRC Consultation Paper (n 1) [A.5].
[75] Ibid [2.1].

applies the general principles of discrimination as apply to a State party. To apply this standard to the criteria for determining limitations upon religious manifestation under Article 18 is an error. The equation of Article 18 with the criteria for determining discriminatory conduct in Article 26 explicates the erroneous statement that a genuine occupations qualification test is consistent with the ICCPR jurisprudence. Nowhere has a United Nations authority claimed that a 'genuine occupational requirements' test as applied to religious institutions is consistent with Article 18 of the ICCPR. Essentially, this is a failure to apply the applicable rules for limitations that apply to religious institutions. For the reasons put above in the discussion on the effect of genuine occupational requirements tests for religious institutions, it amounts to a lowering of the applicable standard.

European Council Directive 2000/78

42. The ALRC places heavy reliance on European Council Directive 2000/78 (the Directive) issued under European Union labour law. It also relies on cases that have issued from the European Court of Justice under that Directive. The Directive is a key plank of the ALRC's argument that Propositions B, C and D concerning employment are consistent with international human rights law.[76] The Directive is also specifically cited in respect of Proposition B.[77] Relying on the Directive the ALRC states that Proposition B 'reflects practice in a number of overseas jurisdictions considered, including the European Union framework law, implemented across most European countries.'[78] The Directive is also critical to the ALRC's proposal that a 'genuine occupational qualification test' should be adopted.
43. Article 4 of the Directive relevantly states:

> 1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.
>
> 2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national

[76] See the reliance placed upon the Directive at ALRC Consultation Paper (n 1) [53], [55], [60], [66], [103] and [A.47].
[77] See Ibid [55] fn 76
[78] Ibid [A.47].

> practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground. Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.

44. The ALRC's reliance on the Directive in interpreting Australia's human rights obligations is misplaced, for the primary reason that the Directive and the jurisprudence that has developed around it directly departs from the standards concerning religious institutional autonomy that have developed under the United Nations framework to which it is a signatory. It also departs from the jurisprudence of the European Court of Human Rights interpreting the European Convention for the Protection of Human Rights and Fundamental Freedoms.[79] The ALRC is aware of this. The jurisprudence of the European Court of Justice administering the Directive is cited by the ALRC as a basis to marginalise the much stronger protections to religious institutional autonomy developed by the European Court of Human Rights (considered in the attached paper):

> On the other hand, more recent decisions by the Court of Justice of the European Union have (in other employment contexts) adopted a more restrictive view of institutional autonomy, including concerning marital status, and the state's margin of appreciation in relation to it.[80]

As I outlined in the attached article there is no basis to assert that the ICCPR and the ECHR frameworks mandate a genuine occupational requirements test for religious

[79] *European Convention for the Protection of Human Rights and Fundamental Freedoms* opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('*ECHR*').
[80] ALRC Consultation Paper (n 1) [A.21]. The judgements cited are *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* (Court of Justice of the European Union, Grand Chamber, C-414/16, ECLI:EU:C:2018:257, 17 April 2018) and *IR v JQ* (Court of Justice of the European Union, Grand Chamber, C-68/17, ECLI:EU:C:2018:696, 11 September 2018).

institutions. Rather those frameworks depart from such a test in formulating standards that require reference to a stricter range of factors. As noted above at paragraph 22 the applicable standards under the ICCPR jurisprudence include the standards for limitation under Article 18(3). As the enclosed journal article shows, the ECHR jurisprudence incorporates decisions that have no regard to genuine occupational requirements tests and which incorporate a range of factors that are not relevant to such a test.

45. Aroney and Taylor have summarised the key points of the Directive's departure from the relevant human rights law in their 2020 analysis.[81] Their analysis was thorough, and the key contentions are worth quoting directly. The first is that

> the Directive expressly acknowledges "the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos".[82]

This is an important clarification. For the reasons noted above, when applied to every role within a religious institution genuine occupational qualification tests have the potential to remove over time the very ethos of the institution itself. This is why the European Directive recognises that the standard 'genuine occupational requirements test' as applied to secular contexts must be modified to take account of the impact of the test on the ethos of the religious institution in its application.

46. Aroney and Taylor further note that

> it is important to distinguish the purpose and coverage of the Directive (as an aspect of EU labour law) from the human rights protection provided by the ECHR across a broader spectrum. The Directive draws its inspiration at a general level from the protection against discrimination as a universal right expressed in various UN instruments. The ECHR is mentioned in that context (with obvious relevance given its signatories).[83]

The 'distinct' nature of the Directive and its departure from the ICCPR and ECHR regimes has also been observed by the Office of the United Nations High Commissioner for Human Rights:

[81] Aroney and Taylor (n 65).
[82] Ibid 57.
[83] Aroney and Taylor (n

> The approach to justification under the European Union equal treatment directives is perhaps the most distinct among international and regional instruments: under the directives, direct discrimination cannot be justified. Instead, a series of limited exceptions to the anti-discrimination law framework are established, which permit differential treatment only when the criteria set out under the directives are met. These include some narrow, ground-specific, exceptions, established on the basis of age, and religion or belief; and a broader exception covering “genuine occupational requirements”, which may be applied to all grounds listed under the directives (and applies to both direct and indirect discrimination). In practice, this approach serves to limit the areas in which (otherwise) directly discriminatory measures may be adopted. In situations in which a policy or measure falls within the scope of an exception under national law, it must still be shown to be necessary and proportionate to its aim.[84]

However, it is this ‘distinct’ body of law that the ALRC relies upon in asserting that the proposed regime is consistent with Australia’s international obligations.

47. Aroney and Taylor further observe that:

> much closer to the Directive's own purpose, and mentioned separately, is the 1958 ILO Convention concerning Discrimination in Respect of Employment and Occupation. The titles of the Directive and the ILO convention signify their commonality. Article 1.2 of the ILO convention takes a "requirements-based" approach (as does the Directive) in providing that "[a]ny distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination." The inherent requirements test exists to meet the generic needs of all organisations, whatever their nature or purpose [see paragraphs 36 to 37 further above]. It is not a substitute for the specific protections accorded to religious organisations under the ECHR as interpreted by the ECtHR. The Directive acknowledges this through the express acknowledgement that organisations which have a religious ethos have a positive right to require employees to act in good faith and with loyalty to that ethos.

48. On the basis of the Directive’s distinctiveness, Aroney and Taylor summarise that:

[84] Office of the United Nations High Commissioner for Human Rights (n 8) 54.

> Considered on their own terms, therefore, the Directive and ILO convention reinforce the point … about the inappropriateness of Australian anti-discrimination legislation treating, as exceptions, those provisions which give effect to religious freedom and related rights. It is for this reason that the Directive expressly articulates the legitimate need for loyalty to an organisation's religious ethos to be protected … it is important to mark the difference in approach between the Directive and the ECtHR (with its specialist human rights competence). The ECtHR's decisions in support of religious institutional ethos are appropriately more generous than the Directive's genuine and determining occupational requirements. In its determinations in a number of cases the ECtHR has found there to have been no violation of the rights of the employee, without applying narrow occupational requirements, even when the ethos requirements of the employer organisation impinge on the employee's fundamental human rights.[85]

The correctness of the claim that the ECtHR jurisprudence is 'more generous' than the Directive and that the Court has explicitly eschewed a reductive genuine occupation requirements test is further demonstrated by the analysis of the authorities provided at paragraphs 25 to 32 of the enclosed journal article. For these reasons the ALRC's reliance on the judgements of the European Court of Justice in *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV*[86] and *IR v JQ* is similarly misplaced.[87] As I argued in the enclosed article: 'the authorities do not accord with the simplistic distinction between teaching roles that demonstrate an inherent requirement and those more functional non-teaching roles that do not.' As argued therein, the decision of the ECtHR in *Siebenhaar v Germany*[88] directly refutes the assertion that a determinative 'genuine occupational qualifications' test 'will satisfy the requirements of international human rights law.' The ALRC makes only passing reference to this pivotal illustrative judgement. Paragraphs 25 to 32 of the enclosed article set out this argument in full. In summary, the European Council Directive is not applicable to Australia's international obligations and departs from the relevant human rights frameworks in several material respects.

[85] Aroney and Taylor (n 65) 57-8.
[86] Court of Justice of the European Union, Grand Chamber, C-414/16, ECLI:EU:C:2018:257, 17 April 2018.
[87] Court of Justice of the European Union, Grand Chamber, C 68/17, ECLI:EU:C:2018:696, 11 September 2018.
[88] *Siebenhaar v Germany* (n 59).

Comments Made in Periodic Reviews

Germany

49. The final source within international human rights law cited by the ALRC in support of its recommendation of a genuine occupations qualifications test is found in two Periodic Reviews by United Nations bodies. The first Periodic Review cited by the ALRC is the Periodic Review of Germany conducted by the Committee on Economic, Social and Cultural Rights in 2018:

> in its periodic review of Germany's compliance with the International Covenant on Economic, Social and Cultural Rights in 2018, the Committee on Economic, Social and Cultural Rights expressed its concern at the repeated reports of discrimination on grounds of religious belief, sexual orientation or gender identity in employment in non-ecclesiastic positions in church-run institutions, such as schools and hospitals (arts 2 (2) and 6). The Committee recommended that Germany review its General Equal Treatment Act, 'to ensure that no discrimination is permitted against non-ecclesiastical employees on grounds of religious belief, sexual orientation or gender identity'.[89]

Significantly, in its subsequent review of Germany for compliance with the ICCPR the Human Rights Committee made no mention of the same concern in its reference to *General Equal Treatment Act*.[90]

50. Australia has not signed or ratified the Optional Protocol to the International Covenant on Economic Social and Cultural Rights, even though it has ratified that Covenant, and is then part of the Periodic Review process. The differences between the obligations imposed by the ICCPR and the ICESCR are well-known. The latter contains weaker duties and is absent the stronger requirements applicable under the ICCPR. Whereas article 2(1) of the ICCPR obliges State parties 'to respect and to ensure [civil and political rights] without distinction of any kind' the ICESCR 'uses much more cryptic language about how the compliance of states to the treaty on economic, social and cultural rights will be monitored',[91] stating:

> Each state party to the present covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic

[89] ALRC Consultation Paper (n 1) [A.22]-[A.23].
[90] Human Rights Committee *Concluding Observations on the Seventh Periodic Report of Germany* CCPR/C/DEU/CO/7 (30 November 2021).
[91] Koldo Casla 'After 50 years, it's time to close the gap between different human rights' *The Conversation* (16 December 2016) https://theconversation.com/after-50-years-its-time-to-close-the-gap-between-different-human-rights-70239

> and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present covenant by all appropriate means, including particularly the adoption of legislative measures.

As Casla has said: 'It's difficult to assess compliance if rights are meant to be "achieved progressively", or to decide the "appropriateness" of the "means" authorities are making use of.'[92] Unlike the ICCPR, Australia has not adopted the Optional Protocol to the ICESCR, which would grant individuals the ability to make complaint to a body that can provide guidance on the respective obligations.

Ireland

51. The second Periodic Review cited by the ALRC as authority for its recommendation of a genuine occupations qualifications test (and also for the proposition that a religious educational institution must not discriminate on SDA grounds) concerns the Concluding Observations of the Human Rights Committee on the fourth periodic review of Ireland.[93] The pivotal quote underpinning the ALRC's assertion that religious educational institutions are to be treated distinctly from other religious institutions is found at [A.12]: 'The Human Rights Committee has indicated, however, that this autonomy is qualified with respect to all forms of discrimination in employment in the field of education.' At paragraphs [A.24]-[A.25] the ALRC states:

> In its periodic review of Ireland's compliance with the ICCPR in 2014 (prior to amendments to significantly restrict the operation of the relevant section of its Employment Equality Acts), the Human Rights Committee expressed concern that under section 37(1) of the *Employment Equality Acts*, religious-owned institutions, including in the fields of education and health, can discriminate against employees or prospective employees to protect the religious ethos of the institution (arts 2, 18, 25 and 27). The Committee recommended that Ireland amend the relevant section 'in a way that bars all forms of discrimination in employment in the fields of education and health'.[94]

52. However, the ALRC fails to point out the very important limitations to be placed upon the UNHRC's comment arising from context of the Committee's concern. In the same extract cited at paragraphs [A.24]-[A.25] the Committee states its concern 'about the slow progress in increasing access to secular education through the establishment of

[92] Ibid.
[93] ALRC Consultation Paper (n 1) [66]; [A.12], [A.24]-[A.25].
[94] Ibid [A.24]-[A.25].

non-denominational schools'.[95] Shortly before the Periodic Review in question O'Toole reported that in 2010/11 'approximately 96% of [Irish] primary schools remain under denominational patronage.'[96] The following table contains a breakdown of the Irish education sector as reported by Coolahan, J, C Hussey, and F Kilfeather in 2012:[97]

The Current School and Demographic Profile

Profile of Primary Schools in Ireland

There were some 3,169 primary schools in Ireland in 2010/2011. Currently 96% of primary schools are under denominational patronage, as noted in Table 1.

Table 1. Total number of primary schools by patron body (2010/11)*

Patron Body	No of Schools	% of Total
Catholic	2,841	89.65
Church of Ireland	174	5.49
Presbyterian	17	0.54
Methodist	1	0.03
Jewish	1	0.03
Islamic	2	0.06
Quaker	1	0.03
John Scottus Educational Trust Ld	1	0.03
Lifeways Ireland Ltd	2	0.06
An Foras Pátrúnachta na Scoileanna Lán-Ghaeilge Teo	57	1.80
Educate Together Ltd (national patron body)	44	1.39
Schools in Educate Together network with their own patron body	14	0.44
Vocational Education Committees**	5	0.16
Minister for Education & Skills***	9	0.29
Total	**3,169**	**100%**

*This table outlines the patronage of ordinary mainstream primary schools and does not include special schools

** Community National Schools are under the interim patronage of the Minister while draft legislation to confirm VEC patronage is being processed

***The Minister for Education and Skills is patron of the nine Model Schools.

[95] Ibid [21].

[96] Barbara O'Toole (2015) 1831–2014: an opportunity to get it right this time? Some thoughts on the current debate on patronage and religious education in Irish primary schools, *Irish Educational Studies*, 34:1, 91.

[97] J Coolahan, C Hussey, and F Kilfeather *The Forum on Patronage and Pluralism in the Primary School: Report of the Forum's Advisory Group,* (2012) Department of Education and Skills 29.

By way of contrast, in Australia in 2018 40.8% of secondary school children attended a private, or independent, school, as opposed to 59.2% of secondary school children who attended a public school.[98]

53. In the Irish context, genuine alternative employment opportunities for teachers that do not uphold the ethos of religious schools are simply not available. That this was the chief underlying concern of the Human Rights Committee was disclosed in its questions to the State Party, which included a request to '[p]lease provide information on steps being taken to ensure that the right of children of minority religions or non-faith are also recognized in the Education Act 1998, and the number of non-denominational primary schools that have been established during the reporting period.'[99] The inconsistency of the recommendations in respect of Ireland with the wider human rights framework surrounding religious schools as outlined above demonstrates that the UNHRC's comments are situation-specific and fail to contribute meaningfully to the argument that international law permits the Commonwealth to place limitations on Article 18 manifestation. The contextual pressures that gave rise to the UNHRC's concern for the application of Article 26 to employees within the Irish education section simply do not apply in Australia. This is not an authority that can be relied upon for limiting the freedoms protected under Article 18, as expressed through religious educational institutions within Australia.

Periodic Reviews of Australia

54. It should also be observed that section 38 of the SDA is a statutory provision with equivalent effect to those provisions referenced in the Human Rights Committee reports for both Ireland and Germany. At no stage has the Human Rights Committee or the Committee on Economic, Social and Cultural Rights made a recommendation in their Periodic Reviews that Australia is non-compliant with the ICCPR or the ICESCR as a result. Furthermore, in his compendium of the 'UN Human Rights Committee's Monitoring of ICCPR Rights', Taylor references no similar instance in which the UNHRC has expressed a view recommending that a State Party restrict the operation of a domestic law that permits religious educational institutions to maintain their religious ethos. To the contrary, in its 2017 Concluding Observations the Human Rights Committee welcomed '[t]he amendments to the Sex Discrimination Act 1984, prohibiting discrimination on the basis of sexual orientation, gender identity and

[98] Emma Rowe 'Counting National School Enrolment Shares in Australia: the Political Arithmetic of Declining Public School Enrolment' *The Australian Educational Researcher* (2020) 47(4) 517, 527.
[99] Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant List of Issues in Relation to the Fourth Periodic Report of Ireland Addendum Replies of Ireland to the List of Issues 111th session* (7–25 July 2014) CCPR/C/IRL/Q/4/Add.1 [26].

intersex status, in 2013'.[100] Those amendments introduced the exemptions applied to religious school in respect of the attributes of sexual orientation, gender identity and intersex status contained at section 38.

Part III - Proportionality Test

55. The application of a proportionality test as a condition for the exemption introduces high levels of uncertainty, both for religious institutions, and also their employees. This is illustrated by the range of religious practices that under section 38 of the SDA need only be justified by reference to whether the act was performed 'in order to avoid injury to the religious susceptibilities of adherents of that religion or creed', and having regard to whether the institution has acted in 'good faith'. By contrast, as the ALRC admits, under the Propositions a religious institution will now need to satisfy a Court that all of the following conduct is 'proportionate' in order for it to be lawful:
    a. In respect of Proposition A:
        i. the educational institution would be allowed to impose such policies (for example uniform or behaviour policies) that were reasonable and proportionate in the circumstances[101]
    b. In respect of Proposition C:
        i. in selecting teachers of religion, a school could preference members of the religion who adhered to particular dietary restrictions or forms of dress, where this was proportionate in all the circumstances;
        ii. a requirement for appointment or promotion that a staff member attend a particular temple, synagogue, mosque or church (for example) would need to be assessed on a case by case basis, by reference to the nature of the role and whether the requirement was proportionate to maintaining the religious ethos of the school[102]
    c. In respect of Proposition D:
        i. a university would not be prevented by the religious discrimination provisions of the Fair Work Act from terminating the employment of a social work lecturer who publicly denigrated the religion of the educational institution, if this was proportionate in the circumstances;

[100] Human Rights Committee *Concluding observations on the sixth periodic report of Australia,* (1 December 2017), CCPR/C/AUS/CO/6.
[101] ALRC Consultation Paper (n 1) [46].
[102] ALRC Consultation Paper (n 1) [60].

ii. a kindergarten could terminate the employment of a staff member who actively tried to convert parents of students to another religion, if this was proportionate in the circumstances (subject to the requirements of employment law). [103]

56. This amounts to a very serious incursion into the autonomy of religious institutions. Critically, if a Court considers that the action effecting the asserted belief is not 'proportionate', even where it is done in 'good faith', it will be unlawful. Because the test is situation specific, the ability of existing judgements to guide future conduct in respect of other institutions, positions or roles will be limited. The comments of the former and current Special Rapporteurs concerning religious institutional autonomy are apposite. Such a proposal permits a court to restrict the actions of religious institutions in conformity with their understanding of their religious tenets. The existing law which has regard to whether the institution is acting in accordance with a belief and acts in good faith avoids such an incursion.

Constitutional Invalidity and Claims that the Propositions are already Law and thus 'would be minimal or have no effect in practice'

57. In respect of Proposition A, the ALRC claims that 'the majority of states and territories have narrower exceptions for religious educational institutions than those that apply under the Sex Discrimination Act. As such, in a number of states and territories the effect of Proposition A would be minimal or have no effect in practice.'[104] The same statement is made in respect of Proposition B.[105] Curiously the ALRC asserts 'if an educational institution is in Queensland, and certain conduct is prohibited under Queensland law but not Commonwealth law, the educational institution must comply with the Queensland law.'[106] However this fails to take account of the operation of section 109 of the Australian Constitution, which provides 'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.' At Senate Estimates an officer of the ALRC indicated '[w]e're interested to hear more about this view'.[107]

58. Associate Professor Neil Foster argues that:

[103] ALRC Consultation Paper (n 1) [66].
[104] ALRC Consultation Paper (n 1) [48] see also [49], [A.36].
[105] Ibid [54], [55], [A.45].
[106] Ibid [49].
[107] Commonwealth of Australia, Senate Legal and Constitutional Affairs Legislation Committee, Estimates, Proof Committee Hansard, 125 (Matthew Corrigan).

> where a State or Territory law dealing with discrimination provides a narrower balancing clause in relation to religious bodies or educational institutions than the Commonwealth law provides, the State or Territory law will, to the extent of that inconsistency, be inoperative by virtue of s 109 of the Constitution, and the religious body will be free to act within the parameters permitted by the Commonwealth law.[108]

This is because the State laws remove or diminish entitlements under Commonwealth law to engage in conduct which would otherwise be unlawful discrimination. Rees, Rice and Allen make the same point with specific reference to the interaction between section 38 of the SDA and the more limited exemptions contained in Queensland and Tasmania anti-discrimination laws. They state 'were a court to find that a s 109 inconsistency exists, it is likely that the offending provision would be severable rather than a finding that the entire Act is invalid... the State or Territory law is vulnerable … because it prohibits discriminatory conduct that the Commonwealth law allows.'[109] Section 11 of the SDA attempts to deal with the question by stating that where an action has commenced in a State jurisdiction, the complainant may not make a complaint under the SDA.

59. The question of the Constitutional invalidity of State anti-discrimination law in interaction with a Commonwealth prohibition was considered by the High Court in *Citta Hobart Pty Ltd v Cawthorn*.[110] The matter concerned an argument that a prohibition against disability discrimination under Tasmanian law was invalidated by the Commonwealth *Disability Discrimination Act 1992* (Cth). The complainant had argued that the failure to provide wheelchair access to a Parliamentary building was discrimination under the State Act. It was argued in defence against the claim of disability discrimination that the State Act was invalidated because the Commonwealth Act did not make the failure to provide the ramp unlawful. The ramp was not required under Commonwealth law, and thus any prohibition under the State Act that required such a ramp was invalidated.
60. At first instance, the Tasmanian Civil and Administrative Tribunal made the decision that it did not have the jurisdictional authority to determine the complaint, as it required a decision as to the scope of the Commonwealth power. On appeal the Full Court of the Supreme Court of Tasmania held that the invalidity argument was 'misconceived' and returned the matter to the Tribunal for determination.[111] On appeal of the Full Court's decision, the High Court majority focussed on the question of whether the

[108] Foster, Neil J, (2022) 'Religious Freedom, Section 109 of the Constitution, and Anti-discrimination Laws' available at https://works.bepress.com/neil_foster/144/
[109] Rees, Rice and Allen (n 10) 81-2.
[110] [2022] HCA 16 (04 May 2022).
[111] Ibid [50] (Edelman J).

Tasmanian Civil and Administrative Tribunal had jurisdiction to consider the argument and did not determine whether the Commonwealth Act did invalidate the State Act. Rather, the majority found that 'the defence was genuinely raised in answer to the complaint in the Tribunal and was not incapable on its face of legal argument.'[112] In so holding the Court majority dismissed the prior finding of the Full Court of the Supreme Court of Tasmania that the invalidity argument was 'misconceived'.[113]

61. In substance the High Court affirmed that the question of the operation of the two Acts and the inconsistency of the State Act was a 'genuine' question to be determined (although it did not determine the question itself). Justice Edelman issued the same orders and in a separate judgement stated that there was a 'real question' to be determined, also overturning the decision of the Full Court of the Supreme Court of Tasmania.[114] As Rees, Rice and Allen argue, it is certain that the question of Constitutional invalidity in the context of discrimination law is an area of the law that requires greater clarification. As they acknowledge, the question of whether a more restrictive State or Territory law will be invalidated by a more accommodating Commonwealth remains a genuine issue.

[112] Ibid [9].
[113] Ibid [50] (Edelman J).
[114] Ibid [79]-[80] (Edelman J).