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Committee Secretary
Senate Legal and Constitutional Affairs Committee
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Dear Committee Secretary

Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018

Australian Lawyers for Human Rights (**ALHR**) is grateful for the opportunity to provide this submission in relation to the Committee's current Inquiry in relation to the *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018* and proposed amendments thereto (the **Inquiry**).

We refer also to ALHR's November 2018 submission to your Committee in relation to the general question of the desirability (or otherwise) of legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff. This document has been included as Schedule 3 (with Select References becoming Schedule 2) so that this Submission may stand alone without the need for cross referencing to another document. We have added some additional references to Schedule 2 which are highlighted.

About ALHR

ALHR was established in 1993 and is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

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Executive Summary

- ALHR submits that in the light of the terms of the *Convention on the Rights of the Child* (the **CRC**) and the explanatory comments from the UN Committee on the Rights of the Child (the **UNCRC**) it can be seen that **the Government amendments are not appropriate to reflect the protections that Australia is obliged at international law to provide to students who are children** and particularly students who are especially vulnerable because of their sexual orientation or gender identity.
- The proposed amendments put the interests (not human rights) of religious bodies (and perhaps the Federal Government) ahead of the human rights of school employees and ahead of the human rights and best interests of children even though, pursuant to Australia's binding international legal obligations, the best interests of children must be a primary consideration in matters relating to them.
- The amendments give less weight to the human rights of children and staff at a religious school, or to the best interests of the students, and greater weight to the theoretical possibility of offending the sensibilities of more conservative co-religionists, who are not necessarily even associated with the school in question.
- ALHR submits that the amendments should be rethought and that, in the absence of significant revision, the amendments proposed by the Greens should instead be adopted as more closely reflecting Australia's international legal obligations and as achieving a more proportionate balance of relevant human rights. Amendments to the same effect should be made to the *Fair Work Act*.

Part A – the Background to the Bill

1. The Bill and the Amendments

- 1.1 The ALP has proposed the *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018* (the **Bill**) which would remove exemptions in the existing *Sex Discrimination Act 1984* (the **Act**) which allow sexual discrimination against students by their religious schools on the basis of the religious sensibilities of some members of the particular religion (the **Exemptions**). The removal is justified on the basis of the vulnerability and need for protection of children. It is also justified on the basis that Australia has changed as a society since the Exemptions were incorporated into the Act. However the Bill would, in both the form proposed by the ALP and in the amended form proposed by the Federal Government, maintain existing exemptions which allow religious bodies to discriminate against staff who identify as lesbian, gay, bisexual or transgender, both in the educational and aged care sectors.¹
- 1.2 In the educational sector the two types of discrimination – against students and against staff – are **not separate because discrimination against staff indirectly harms students**, giving students the message that some types of discrimination are valid and justifiable. The harm is particularly severe for students from minority groups which are likely to be mistreated and who are most likely to require school pastoral care, such as LGBT students.² If LGBT students, for example, see LGBT school staff mistreated by the school, this occurrence is in itself a source of harm to those particularly vulnerable students.
- 1.3 **The amendments to the Bill proposed by the Government do not reflect Australia's binding international obligations as a party to the CRC to uphold the CRC's four core principles and:**
- **protect children from discrimination,**

¹ Sex Discrimination Act s 38 and s37(2)(b).

² Radcliffe, J. Ward, R. Scott, M. Richardson, S. 2013. *Safe Schools Do Better: Supporting sexual diversity, intersex and gender diversity in schools*. Safe Schools Coalition Australia.

- **ensure that in all actions concerning children, the best interests of the child are a primary consideration.**
- **protect children’s right to life, survival and development, and**
- **respect the views of the child.**

The amendments also seek to maintain the right of religious educational institutions to discriminate against staff on the basis of their inherent personal attributes as well as their behaviour.

- 1.4 While the amendments proposed by the Government appear to be derived from the External Panel Report to the Prime Minister of May 2018 produced by the committee chaired by the Honourable Philip Ruddock and entitled the ‘Religious Freedom Review’ (the **Ruddock Report**), the amendments proposed by the Government to the Bill do not reflect the exact terms of the relevant recommendations in the Report. Those relevant recommendations are that the best interests of the child should be ‘a primary’ consideration in any weighing of student rights against school rights (which is, of course, also consistent with the CRC).

2. The Ruddock Report

- 2.1 The Ruddock Report was clear that ‘religious freedom’ is not a protection for religions, but a human right for those holding religious beliefs,³ or being atheists or agnostics,⁴ with other human rights being ‘of equal weight and significance.’⁵ The Report stressed that in accordance with international law:

*“there is no hierarchy of rights: one right does not take precedence over another. Rights, in this sense, are indivisible.... Australia does not get to choose, for example, between protecting religious freedom and providing for equality before the law. It must do both under its international obligations”.*⁶

- 2.2 However, the Government’s proposed amendments to the Bill fail to sufficiently reflect Australia’s obligations under the CRC, which may have occurred because insufficient emphasis was placed in the Ruddock Report upon:

- **the primacy of the ‘best interests’ test, and its international legal status** as a substantive right, rule of procedure and fundamental interpretative principle for **all other** CRC Rights;
- the fact that the child may not have the same interests as the parents⁷ – that is, that it is the rights of the child themselves (to be free from discrimination, free from harm, to hold and manifest their own religion or no religion and to preserve their own identity) which should be balanced against the interests of the school/other stakeholders (see section 0 below);
- the rights of school staff to be free from discrimination, free from harm, to hold and manifest their own religion or have no religion, which should also be balanced against the interests of the school /other stakeholders (see section 9 below); and
- the way in which the rights of students and staff need to be analysed, including in relation to potential harm which students and staff might suffer, so that they can be properly

³ Ruddock Report, p 8, par 1.1.

⁴ Ruddock Report, p 13, par 1.34.

⁵ Ruddock Report, p 8, par 1.6.

⁶ Ruddock Report, p 13, par 1.37.

⁷ The emphasis in the Report is rather on the rights of parents to have their children educated in accordance with the faith of the parents: see pp 59 (par 1.228), 66 (1.260).

balanced against competing rights of other human stakeholders and against other relevant considerations.

2.3 The Ruddock Report fails to consider a key interpretative document in relation to the CRC, being the UNCRC's *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration*,⁸ cited here as 'Best Interests (2013)'. The Report also failed to consider the UNCRC's General Comments (references cited in Schedule 2):

- *No. 20 (2016) on the implementation of the rights of the child during adolescence* (cited here as 'Adolescence (2016)');
- *No 13 (2011) on the right of the child to freedom from all forms of violence* (cited here as 'Harms (2011)'); and
- *No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health* (cited here as 'Health (2013)');

all of which are also relevant to the matters discussed here. Nor does the Report consider the full range of rights under the CRC that are relevant to the issue of Exemptions from the Act. While these matters are discussed in more detail in section 8, we note particularly:

- Article 6 of the CRC, which refers to State obligations to ensure, to the maximum extent possible, the survival and development of the child in the context of their inherent right to life,
- Article 8 of the CRC, which specifies the right of the child to preserve their own identity (which includes sexual orientation and sexual identity and the child's own religious (or non-religious) beliefs),
- Article 12 of the CR, which specifies the right of the child to freedom of expression including freedom to seek, receive and impart information and ideas of all kinds subject to proportionate and necessary restrictions provided by law, and
- Article 19 of the CRC, which specifies the right of the child to be free from harm.

2.4 The Report also appears to rely (in the view of ALHR, erroneously) on various untested social and economic assumptions. The first of these was that the Federal Government will realistically be able to persuade religious educational institutions in remote locations (where the policies of that institution would have a disproportionate impact, there being few alternatives available to prospective students and prospective employees) not to discriminate excessively against staff or students who are not co-religionists.⁹ It was suggested that this could be done through government procurement policies but the Report did not consider which contracts between the school and Federal Government would be relevant nor what would happen if the Federal Government was not able to persuade the institution to change its policies.¹⁰

2.5 The second assumption, of greater concern, was that it is economically necessary for the Federal Government to allow religious bodies to continue to have the ability to discriminate in areas such as education and aged care because the Government relies on those bodies to provide a significant proportion of Australia's education and aged care. Is it that: "in the end it's all about the money"?¹¹ In the context of the call by some religious bodies for comfort that public funding would not in the future be tied to giving up exemptions from anti-discrimination law, the Panel commented that:

⁸ at https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf. In the English version the Committee is incorrectly described as the Committee on the Rights of 'the Children.'

⁹ Ruddock Report, p 52 par 1.185.

¹⁰ Ruddock Report, p 52 par 1.186.

¹¹ Tim Pitman, "Higher education policy in 2018: Culture wars reignite, but in the end it's all about the money", *The Conversation*, 28 December 2018, at <https://theconversation.com/higher-education-policy-in-2018-culture-wars-reignite-but-in-the-end-its-all-about-the-money-109080>

*In the absence of any concrete indications of a problem in Australia, the Panel was reluctant to recommend the enactment of 'anti-detriment' clauses to protect religious bodies from funding decisions based on their beliefs. Faith-based organisations are a significant provider of services in areas such as aged care, education and health. **The Panel was satisfied that governments would struggle to find other providers to deliver many such essential services if they [governments] chose to discriminate against faith-based organisations.*** (emphasis added)

- 2.6 No consideration was undertaken by the Panel as to whether alternative structures for providing those services are possible or preferable, or whether it is a desirable situation for governments to rely so heavily on providers which wish to have the freedom to act on exemptions from anti-discrimination legislation.

3 Summary of the Bill and amendments

- 3.1 We summarise below the terms of the Bill and the amendments proposed by the various parties. Some of the amendments relate to the situation of students and some relate to the situation of teachers or other employees.
- 3.2 The text of the relevant sections, as amended, is set out in Schedule 1, using different colours to indicate the different authors of the various amendments.
- 3.3 In summary:
- (1) the Greens do not support any religious exemptions which allow discrimination against students or staff.
 - (2) Centre Alliance wishes to amend (and extend) the religious exemptions which allow discrimination against staff to apply the exemptions to activities of religious educational institutions rather than religious bodies. This would mean that the exemptions apply even to organisations associated with churches but separately incorporated and which may have the primary purpose of education rather than the propagation of religion.¹²
 - (3) The ALP propose to remove exemptions which allow discrimination against students, but to maintain exemptions which allow religious bodies to discriminate against staff.
 - (4) The Government opposes amendment of section 37 (and perhaps also the removal of section 38(3) although this has not been made clear) and instead proposes to maintain 'reasonable' discriminatory activities against both students and staff by religious educational institutions, so long as the institution acts in good faith, and so long as it 'has regard to' the best interests of the child in imposing a discriminatory condition, requirement or practice. With the addition of a new paragraph (d), Section 7B would provide as follows:

The matters to be taken into account in deciding whether a condition, requirement or practice is reasonable in the circumstances include:

- (a) *the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; and*
- (b) *the feasibility of overcoming or mitigating the disadvantage; and*
- (c) *whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice; and*
- (d) *if the condition, requirement or practice is imposed, or proposed to be imposed, in relation to a student by an educational institution that is conducted in accordance with the goths, tenets, beliefs or teachings of a particular religion or creed:*

¹² See generally, Evans and Gaze, op cit, p 397.

- (i) *whether the condition, requirement or practice is imposed, or proposed to be imposed, in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed; and*
- (ii) *whether, in imposing, or proposing to impose, the condition, requirement or practice, the educational institution has regard to the best interests of the student.*
- (5) **However the new Section 7E deems a discriminatory exemption to be reasonable in certain circumstances, notwithstanding the matters raised in paragraphs (a) to (c) of section 7D.** In the circumstances of Section 7E, the issues in paragraphs (a) to (c) of section 7D are therefore not taken into consideration.
- (1) While the wording of the Government amendments appears to be largely derived from the Ruddock Report, **the wording fails to include an essential element of the Report’s Recommendation No. 7, which is that the ‘best interests’ of the child must be ‘the primary consideration in [the school’s] conduct.’**¹³ That the best interests of the child are the primary consideration is a requirement under article 3 of the CRC to which Australia is a party, and thus an international legal obligation upon Australian governments in drafting relevant legislation (see Part C, section 8).

Document	Change to Sexual Discrimination Act	Effect
Original Bill Wording (ALP)	addition of section 37(3) and deletion of section 38(3)	Remove exemptions which allow discrimination against students, maintain exemptions for religious bodies to discriminate against staff
Government Amendment No KQ 147	addition of section 37(3) is opposed	Exemptions which allow discrimination against students by religious bodies to be maintained
Government Amendment No KQ 148	addition of 7E Educational institutions established for religious purposes: reasonableness test	Exemption deemed reasonable where in accordance with publicly available policy and student’s best interests considered
Government Amendment No KQ 149	addition of 7F Educational institutions established for religious purposes	Nothing unlawful about religious teaching activity
Government Amendment No KQ 150	subsection 7B(2)(d)	Addition of good faith and best interests tests in relation to exemptions affecting students
Government Amendment No KQ 151	same wording as previous amendment but numbered differently	
Greens Amendment No 8601	delete 37(3)(b) and all of section 38	Remove both exemptions which allow discrimination against students, and exemptions which allow discrimination against staff
Centre Alliance Amendment No 8614	change ‘body’ to ‘educational institution’ in 37(3)(b)	Only allow educational institutions to discriminate against staff on the basis of religion

¹³ Expert Panel, *Religious Freedom Review*, Report to the Prime Minister, May 2018, <https://pmc.gov.au/domestic-policy/religious-freedom-review> (“Ruddock Report”), p 2.

Part B – Analysing the issues

4 Nature of possible exemptions

4.1 The two possible exemptions from anti-discrimination law for religious educational institutions which seem to be generally accepted in Australia, if not universally thought to be desirable, are that:¹⁴

- (1) institutions can operate only for pupils of a single sex; and
- (2) institutions can operate only for pupils of a particular religion. (In practice this effectively means: for pupils having parents of that particular religion).¹⁵

Other main types of exemptions include the following:

Students

- (3) institutions can discriminate in initial or continued enrolment of students on the basis of attributes of the child other than religious belief or gender (including sexual orientation and gender identity)
- (4) institutions can discriminate in initial or continued enrolment of students on the basis of attributes of the child's family (for example, parents of the same sex)

General

- (5) institutions can carry out acts or practices that conform with (or, more narrowly put, which are *required by*) the doctrines of the religion
- (6) institutions can carry out acts or practices that are seen to be necessary to avoid injury to the religious sensitivities of people of the religion

Employment

The following exemptions may be applied differently by educational institutions for teaching positions, management or leadership positions, or religious education positions. In the most extreme cases, the exemptions are applied in relation to all employees.

- (7) institutions can discriminate in relation to employment by requiring the employee to have the same religious belief or religious activity as the school teaches (that is, to be 'co-religionists')
- (8) institutions can discriminate in relation to employment by giving preference to employees who are co-religionists
- (9) institutions can discriminate in relation to employment by requiring the employee to have (or not have) particular characteristics - for example, relating to sex, gender identity, sexual orientation, marital status, parental status and status as a carer¹⁶
- (10) institutions can discriminate in relation to employment by requiring the employee to do (or not do) certain things – for example, by requiring teachers to adopt particular clothing conventions that relate to the school religion

¹⁴ Evans and Gaze op cit, p 396ff.

¹⁵ Evans and Gaze note that many religious schools understand that students may question or even reject their religion, particularly during adolescence. This means that where religious schools seek to limit their admissions to children of a particular faith, it is evidence of parental faith that is usually sought in practice: op cit, p 404.

¹⁶ This list is taken from a 2009 Pastoral Letter authored by the Catholic Archbishop of Melbourne and six Victorian Catholic bishops, cited in Evans and Gaze, p 399, Fn 46. The last items relating to status as a carer, parent or married person would appear to be intended to allow religious schools to evade their Fair Work Act obligations in relation to staff with family obligations.

- (11) institutions can discriminate in relation to employment only where there is an inherent or genuine occupational requirement for the person to be of a particular religion or to have (or not have) particular characteristics
- (12) institutions can refuse to discriminate in relation to employment but require all staff to be supportive of the ethos, philosophy or beliefs of the school. How this is policed can differ, however, depending upon the rigidity of the belief system involved.
- 4.2 It should be noted that, according to Evans and Gaze, there is often (although not always) a correlation between the approaches to discrimination in schools in relation to students and staff: schools that require their students to be of a certain religion generally tend to require the same of their staff, while schools with an open student admission policy also tend to have a purely merit-based employment policy.¹⁷
- 4.3 The Ruddock Report also considers the interests of parents of children in public schools in withdrawing their children from classes on topics that the parents find inconsistent with their religious beliefs. We do not discuss that type of exception or exemption here, but note that in this area also, the four core principles of the CRC should be given primacy, being: the best interests of the child, non-discrimination, the right to life, survival and development, and respect for the views of the child.¹⁸
- 4.4 It is unclear how many religiously-based schools currently wish to carry out direct or indirect discrimination against students and staff. The Ruddock Report says that evidence to the Expert Panel as to schools taking advantage of existing exemptions was conflicting.¹⁹ Evans and Gaze pointed out in 2010 that religious schools and communities take a diverse range of approaches to whether religious schools should have exceptions and whether they should use the exceptions they have. There is dissent and debate within the sector and among religious school leaders, they say, and there are different views on the appropriate reach of anti-discrimination laws not only between different religions or denominations but also within them:²⁰
- Legislators deciding on whether discrimination exceptions need to be tightened should be wary of claims that suggest that the religious school sector is homogenous or even that all the schools from a particular religious tradition are united in their position towards the exceptions or unconditionally support the position of their religious hierarchy. The diversity within the religious school sector makes the role and use of law, such as the religious exceptions, more complex than a simple conflict between freedom of religion and equality.*²¹
- 4.5 This situation appears unchanged today. In 2018, 34 Anglican schools signed a joint letter claiming the right to discriminate on religious grounds, but other Anglican schools did not feel the need to have such a right, the Principal of Sydney Anglican Girls School SCEGGS saying: "I don't want SCEGGS to have any exemption from any Discrimination Act or the Fair Work Act based on our religion ... SCEGGS has always demonstrated an ethos which includes acceptance, respect, love, inclusivity, social justice, equal rights, courage. We will continue to do so."²²
- 4.2 Perhaps the desire to take advantage of exemptions is connected with the confidence or otherwise of the school (meaning the senior staff and Board of Trustees, if any), as to the school's ability to convey its desired messages to its students. Some schools appear to believe that the school will not be able to communicate religious instruction to students unless at least all

¹⁷ Evans and Gaze, p 408.

¹⁸ Ruddock Report, p 70 ff.

¹⁹ P 62 par 1.243 in relation to discrimination against staff.

²⁰ Evans and Gaze, p 421.

²¹ Evans and Gaze, p 423.

²² Matilda Dixon-Smith, "Anglican schools' exclusion letter is at odds with the values we were taught in class", 5 November 2018, *ABC News online* at: <https://www.abc.net.au/news/2018-11-05/anglican-schools-right-to-discriminate-letter-opinion/10465276>

teaching staff are co-religionists, on the basis that faith is ‘caught not taught’ (a phrase the Expert Panel says it heard repeatedly during its review).²³

- 4.6 Other schools do not appear to share this view, as the SCEGGS principal has made clear. Similarly, the Emanuel School at Randwick in Sydney is a Jewish-religion-based school, which does not require either its teaching staff or its principals to be Jewish.²⁴ Staff are required to support the ethos and beliefs of the school including, within the school, some religious-based restrictions. The school appears satisfied that it is able to offer students a “Jewish learning experience.”²⁵

5. Who are the stakeholders?

Stakeholders

- 5.1 The Ruddock Report does not clearly identify all relevant stakeholders although it does refer to various points of view expressed by those making submissions to the Expert Panel.

5.2 It would appear that the relevant stakeholders in relation to the Bill are:

- The children and young people who are students of religious schools
- The principals of the schools
- The teaching and non-teaching staff
- The Boards of Trustees or similar school committees
- The parents of current students
- Other adherents of the particular religion, both local to the school and throughout Australia, including the parents of prospective students.

Depending upon the particular issue in question, some or all of these stakeholders may be involved to different degrees, for example the siblings of a student.

- 5.3 In addition, as mentioned at paragraph 2.5, it appears that the Expert Panel also regards the Federal Government as having a relevant interest in maintaining the existing religious exemptions from anti-discrimination law so that the relevant religious bodies can continue providing educational and aged care services in the manner they wish.

Can a school be a stakeholder?

- 5.4 While for ease of discussion one would normally refer to the interests of the school as a whole, or as an institution, the school itself has no rights or interests. Policies and procedures said to be for the ‘good of the school’ are likely to be aimed at minimising disputes, whether between students, between staff, or between the teaching staff and the parents of students. The ‘good of the school’ in the case of religious schools is also likely to be assessed by the degree to which the school is perceived to conform to the religious tenets of the students’ parents and possibly also to the tenets of the adherents of the particular religion who are not directly associated with the school but who form part of the wider community connected by that particular religion. It is the ‘adherents’ of the particular religion who are referred to as stakeholders in the existing wording

²³ Ruddock Report, p 56, par 1.210.

²⁴ See <https://www.emanuelschool.nsw.edu.au/about-our-school/school-history/>. The current and two preceding principals have not been Jewish: the current Head is Andrew Watts, and previous heads were Anne Hastings and Bruce Carter.

²⁵ To quote the website: “[The aim of the school is] To provide an authentic and relevant Jewish learning experience that nourishes future generations within a unified community, where individuals with different backgrounds come together in mutual respect.” at <https://www.emanuelschool.nsw.edu.au>.

of the *Sex Discrimination Act*, rather than people more closely associated with the particular religious school.²⁶

Who are adherents?

- 5.5 ‘Adherents’ of a religion are not defined in the *Sex Discrimination Act*. They would appear to be those who adhere or hold to a religion – that is, supporters or followers of the religion. Thus the adherents would include, for the purposes of relevant legislation, adult followers of the religion as a general group irrespective of their lack of connection to the school in question. Those parties most closely associated with the school have no particular rights in relation to the operation of the ‘religious’ exemption, which is premised upon the desires of the wider religious community.

Effect of the exemption

- 5.6 Understandably, having Exemptions based on the opinions of the wider religious community makes it difficult for a school principal, for example, to know how he or she may in practice rely upon an Exemption, as to do so requires them to make a decision not about the competing rights and interests of those most closely associated with the school, but about the theoretical beliefs and sensitivities of other followers of the relevant religion. If they wish to rely on the religious exemption, they must exercise a type of double think to create policies which on the one hand affect children and staff in their school but which, on the other hand, need to avoid potential offence to even a small number of persons not necessarily directly associated with the school.
- 5.7 Relevantly, it has been noted that the broad religious exemptions to Australian anti-discrimination legislation, coupled with the differences in legislation at State, Territory and Federal level, are confusing for school principals and leave principals ‘feeling vulnerable, unable to protect themselves or their staff by reference to law if an issue came to light in the media or in the religious community’.²⁷

6. What are religious susceptibilities?

- 6.1 The concept of avoiding ‘injury’ to the ‘religious susceptibilities’ of an adherent is common to various pieces of Australian legislation, including the *Fair Work Act*. The language is somewhat old-fashioned and in our view leads to unnecessary confusion. As mentioned, within any religion there will be different views and so the adherents will not be uniform in their opinions, irrespective of the dominant religious doctrines. This makes it more difficult to understand the concept of the ‘religious susceptibilities’ of ‘the adherents’ of a religion.
- 6.2 The online Oxford Dictionary definition of ‘susceptible’ is “the state or fact of being likely or liable to be influenced or harmed by a particular thing” or “A person's feelings, typically considered as being easily hurt.”²⁸ The Compact Oxford Dictionary explains the usage of the two meanings further – the first relates more to the capability of being physically affected by something (for example as in being ‘susceptible to measles’) while the second relates more to the capacity of having one’s emotions affected by something; being sensitive. In relation to this second usage, examples in the Dictionary include the following:
- *Emily is a good girl; but she has susceptibilities already (1754)*²⁹

²⁶ See sections 37(1)(d) and 38.

²⁷ Evans and Gaze, op cit, p 422.

²⁸ <https://en.oxforddictionaries.com/definition/susceptibility>

²⁹ 1754 RICHARDSON *Sir Charles Grandison* IV xxxiii 228:

- *The women, whose religious susceptibilities were often found extremely unmanageable (1846)*³⁰
- *It is curious to find him susceptible to the beginning of the Gothic Revival (1919)*³¹

6.3 Considering how much dispute there has been in Australia over racist speech which is 'offensive', it is interesting that the word 'susceptible' appears intended to protect extreme sensitivity or sensibility far beyond mere offensiveness. While purportedly the word has been interpreted by Australian courts in a more robust fashion - so that 'injury to the religious susceptibilities of adherents' requires more than 'mere offence',³² in practice the test seems to ignore any assessment of actual harm, focusing rather on potential harm. In *Hozack v The Church of Jesus Christ of Latter-Day Saints [1997]*, Madgwick J of the Federal Court held that even though there was no evidence of actual injury to the religious susceptibilities of the adherents to the Church, and even though the particular religious susceptibilities in question could not be adequately identified or proven:

the Church need only demonstrate that the decision ... was made in good faith for the purpose of avoiding injury to the religious susceptibilities of its adherents, not that any of its members were actually injured in such susceptibilities.

6.4 Madgwick J distinguished between offence to religious beliefs or dictates and offence to social mores, saying that:

(i) it is however necessary that avoidance of injury to religious susceptibilities be the Church's object. Action aimed at the avoidance of mere offence to the presumed social mores of church members, or of alarm to a faction not clearly amounting to "injury" to religious susceptibilities, would not suffice.

What are the religious susceptibilities of adherents?

6.5 In *Hozack*, Madgwick J did not attempt to establish the various views of religious adherents to the behaviour in question of the Church's employee, nor did he consider the adherents' personal sensitivities, relying rather on the evidence for the Church that the behaviour generally conflicted with Church doctrines in a significant manner. He emphasised that it was not the Court's role to assess the 'nature' or the 'cogency' of religious doctrines, saying that:

It was adequately shown ... that "religious" susceptibilities and the prevention of "injury" to them were at issue: Ms Hozack's relations had been adulterous; in her Church's view adultery itself could be a ground for loss of Temple-worthiness, as could her unrepentant attitude towards such adultery; and Temple-worthiness was required, apparently as a matter of religious doctrine, of Church members employed by the Church. Evidence was given on behalf of the respondent by Mr Cave and Mr Thompson, who have both held religious positions in the Church, relating to the Church's doctrines and principles. It is not necessary that I attempt to summarise their understanding of those doctrines here; it is sufficient to say that, in my opinion, the conditions of s 170DF(3) [injury to religious sensibilities] have been met.

6.6 It should be noted however that in *Members of the Board of the Wesley Mission Council v OV (No 2) [2009] NSWADTAP 57* the Administrative Decisions Tribunal expressed the view (in par 31) that the test of being "necessary to avoid injury to the religious susceptibilities of adherents of that religion" is broader than the test of whether a matter "conforms to the doctrines, tenets or beliefs of that religion." The Tribunal held that where any piece of legislation contains both categories (as exemptions), *'the existence of both categories means that acts or practices that do*

³⁰ 1846 GROTE *Greece* 1.i. 1. 39

³¹ 1919 Eng. Hist. Review Jan 168:

³² *Kerry Anne Hozack v The Church of Jesus Christ of Latter-Day Saints [1997] FCA 1300* (27 November 1997), [(1997) 79 FCR 441].

not conform to the doctrines of the religion are nevertheless protected' in the circumstances where the exception – that the religious susceptibilities of adherents might be injured – applies. But if that exemption is to be interpreted more broadly than the test of whether a matter conforms to the doctrines or beliefs of a religion, then the exemption would appear to come very close to a test of compliance with traditional cultural practices rather than with religion,³³ or to compliance with non-mainstream practices that have no basis in the relevant religious doctrine.

- 6.7 That same case decided that when considering injury to the religious susceptibilities of adherents 'more than one but not necessarily all the adherents must be affected' (par 53), saying at par 54 that:

at least 'some' or 'a proportion' of adherents must be affected. Whether the evidence is sufficient to satisfy the exemption will depend on the number affected and the percentage of all adherents affected if that evidence is available. Ultimately it will be a question of fact in each case as to whether the evidence supports a finding that the act or practice concerned would injure the religious susceptibilities of the adherents of the religion concerned.

- 6.8 Unfortunately the logical conclusion from this most recent case is that the 'religious sensibilities' of a particular religion which must be protected are likely to be those of its most conservative proponents – or those who have the most delicate sensibilities.

- 6.9 **It is submitted that the effect of the 'general exemptions' model which privileges 'religious sensibilities' is to protect the extreme sensitivities of people not directly involved in a school, while allowing substantial breaches of international human rights law obligations and harm with life-long effects to be visited upon people such as children and staff directly involved in the school.** We submit that:

- the fact that a sensibility is 'religious' gives it no higher status or right to legal protection than any other sensibility (that is, it should have no protection);
- only offences against religious doctrine, not against religious practices, should have protection (if any); and
- any test focusing on stakeholders who are not directly involved should be that a substantial proportion of them are likely to be affected.

Any other result is to give legal protection to the most extreme and potentially most negative characteristics of a particular religion or creed. The 'religious exemption' for religious susceptibilities or sensibilities might appear to accommodate multiculturalism but in practice it is likely to work against multiculturalism by privileging traditional or even extremist religious views.

7. The different legal models

Very few politicians are brave enough to ask whether there are basic contradictions between the values of an open democratic society and those of almost all fundamentalist religions, in which I include the Catholic Church and many of the fast growing evangelical Christian denominations.

³³ Abdullah Saeed, "Separation of men and women in lecture theatres: another Islamic controversy?", *The Conversation*, 29 April 2013, at <https://theconversation.com/separation-of-men-and-women-in-lecture-theatres-another-islamic-controversy-13776>, pointing out that 'of the 57 or so Muslim majority countries around the world, only a handful practice or officially condone strict separation of men and women in public events and spaces. Where it is practised, this is based on cultural norms and values that are often demeaning to women, including the restriction of women's roles and visibility in public life. Unfortunately,' he says, such cultural norms and practices are often justified using dubious interpretations and selective reading of some religious texts.'

*As soon as religions start trying to impose their views on non-believers they have crossed the line that makes a truly democratic and liberal society possible, but while this is seized upon where Muslims are concerned it is largely ignored when Christians do the same.*³⁴

- 7.1 There are a number of different legal models that can be used to protect religious bodies from the full application of general anti-discrimination. These can be described as the ‘general exemptions’ model (as in the Act), the ‘general limitations’ model and the ‘balancing’ model.

General exemptions

- 7.2 Under this model, institutions can carry out acts or practices that conform with (or, where more narrowly put, are *required by*) the doctrines of the religion, as well as acts or practices that are seen to be necessary to avoid injury to the religious sensitivities of people of the religion.
- 7.3 This is the model that has generally been adopted throughout Australia, rather than a more focused balancing, or proportionality test. As discussed above, this model tends to protect more conservative or extreme religious views and is not necessarily relevant to the interests of the stakeholders more closely involved in the particular issues. Nor does this model take into account the harms that are potentially caused to the persons who would otherwise be protected from discrimination or the nature of their rights that are being infringed. As Evans and Gaze note:

*the exceptions to the anti-discrimination laws ... [do not] provide any mechanism to consider the non-discrimination right that is overridden, whether it be a right of a student, a staff member or another person. There is no opportunity to consider the importance and impact of both the religious freedom interest and any non-discrimination claim and to see whether it is possible to reach a reconciliation of the two rather than resolving the conflict by giving one right absolute priority over the other.*³⁵

General limitations

- 7.4 The ‘general limitations’ model³⁶ is described in the Ruddock Report as incorporating clauses: *intended to set out the broad circumstances in which conduct that might be construed as discriminatory does not, in fact, amount to discrimination. Typically, such clauses have the following basic features:*
- *Conduct undertaken in good faith will not be discriminatory if it is undertaken to achieve a legitimate aim defined, for example, by reference to furtherance of another human right.*
 - *The conduct has been engaged in with the intention of achieving the legitimate aim.*
 - *The conduct must be a proportionate means of achieving that aim.*³⁷
- 7.5 The Report also notes that a ‘hybrid’ model has developed, for example in South Australia, which allows adverse employment decisions (for example) to be made by religious educational institutions on the grounds of sexual orientation, gender identity or intersex status, only if the institution provides a written policy position to the applicants, employees, prospective employees, and any person who requests it.³⁸ This model has the benefit of greater certainty, consistency and transparency in the application by religious educational institutions of the exemptions which they have been given in that State.

³⁴ Altman, op cit.

³⁵ Op cit, p 423.

³⁶ Ruddock Report, p 29 pars 1.57 and ff.

³⁷ Ruddock Report, p 42, par 1.130.

³⁸ *Equal Opportunity Act 1984* (SA) s 34(3).

7.6 The Government's amendments follow a hybrid model but fail, in our submission, to sufficiently identify relevant stakeholders, or give sufficient weight to the interests of the persons being discriminated against. **The amendments fail to require the 'best interests' of the child to be a primary concern and fail to require that the school's discriminatory conduct is a proportionate means of achieving its aims.** The Government's amendments prioritise religious freedom for schools, institutions and conservative adherents above the respective rights of LGBT children and teachers.

Balancing mechanism

7.7 As Evans and Gaze say, what is needed is a human rights 'balancing' mechanism whereby the relevant human rights involved are appropriately weighed up. **In the case of adults, the balancing would occur in accordance with the procedures for balancing conflicting human rights developed in international law.** The manner in which such a mechanism would work is described in Schedule 3 in section 5. **In the case of children, the balancing would also take into account the principles set out in the CRC.** In the school context, Shaheen Shariff suggests adopting the following steps:

Step 1: Identify all stakeholders and their significant arguments;

Step 2: Validate key concerns by matching and weighing similar competing arguments to determine which claims carry greater weight;

*Step 3: Ensure minimal impairment of infringed stakeholder rights.*³⁹

7.8 However we suggest additional steps which focus more clearly on the harms that would be caused by rights infringement, and which reflect Australia's legal human rights obligations and respect for the rules based international order so that the process would operate as follows:

1. *Identify all stakeholders;*
2. *Identify the human rights of each stakeholder that may be infringed and the likely degree of infringement and actual or potential harm;*
3. *Identify any other rights of each stakeholder that may be infringed and the likely degree of infringement and actual or potential harm;*
4. *Identify any particular vulnerabilities of each stakeholder that are relevant to the issues;*
5. *Where an exemption from human rights standards is sought, consider whether the party seeking the exemption is attempting in good faith to minimise their infringement of other stakeholder rights. Is their activity proportionate to the concerns they hold?*
6. *Consider what outcome would ensure minimal harm to all parties and minimal impairment of infringed stakeholder rights;*

7.9 **The Government's amendments do not take account of these steps but effectively adopt assumptions that particular procedures will represent a proportionate solution which ensures minimal impairment of stakeholder rights. ALHR does not agree that the proposed legislation would have that effect and fears the amendments will result in outcomes that disproportionately impact negatively on the human rights of students and teachers.**

³⁹ "Balancing Competing Rights: A Stakeholder Model for Democratic Schools," *Canadian Journal of Education* 29, 2 (2006): 476 at 481 at <https://files.eric.ed.gov/fulltext/EJ750395.pdf>

Part C – Balancing competing rights

8. UN Convention on the Rights of the Child and related materials

Relevant rights of the child

8.1 Here we consider in more detail the obligations of Australia under the CRC to which Australia is a party (and see also Schedule 3 sections 2 and 9 for Australia's international obligations more generally). As noted above, the CRC contains four guiding principles which are core requirements for all other CRC rights to be realised. The principles are:

- (1) **Non-discrimination (Article 2(1)):** as a party to the CRC, Australia must ensure children's rights are protected 'without discrimination of any kind', meaning the 42 Articles in the CRC apply to every child regardless of their religion, race, abilities, culture, socioeconomic status, gender, sexuality or what they think or say. The UNCRC has identified sexual orientation and gender identity as a ground for discrimination.⁴⁰

Article 2 reads in part as follows:

1. *States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's ... race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.*
2. *States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.*

Significantly, the UNCRC notes that '*the right to non-discrimination is not a passive obligation... but also requires appropriate proactive measures taken by the State to ensure effective equal opportunities for all children to enjoy the rights under the Convention...*'.⁴¹

- (2) **The best interests of the child (Article 3(1)):** in any decision or action the best interests of the child shall be assessed and taken into account as 'a primary consideration' of [Australian] legislators and interpreters of legislation, both in the public and private sphere.⁴² Article 3 is the cornerstone right of the CRC, and underpins other CRC rights. It is discussed further below. It has been defined by the UNCRC as:

1. a substantive right;
2. a fundamental interpretive legal principle; and
3. a rule of procedure.⁴³

Article 3 reads as follows:

1. *In all actions concerning children, whether undertaken by ... courts of law, administrative authorities or legislative bodies, **the best interests of the child shall be a primary consideration.***
2. *States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal*

⁴⁰ *Health* (2013) p 4 par 8.

⁴¹ *Best Interests* (2013), p 11, par 41.

⁴² UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC /C/GC/14

⁴³ *Ibid* paragraph 6.

guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

- (3) **Life, survival and Development (Article 6):** Australia must protect the child's inherent right to life and to the maximum extent possible the survival and development of the child. The UNCRC has very clearly stated that it 'expects States to interpret "development" in its broadest sense as a holistic concept, embracing the child's physical, mental, spiritual, moral, psychological and social development.'⁴⁴ Article 6 provides that:
1. *States Parties recognize that every child has the inherent right to life.*
 2. *States Parties shall ensure to the maximum extent possible the survival and development of the child.*
- (4) **Participation and freedom of expression (Article 12(1)):** The child who is capable of forming his or her own views must be assured the right to express those views freely in all matters affecting them, and those views must be afforded due weight in accordance with the age and maturity of the child. This principle, which highlights the role of the child as an active participant in the promotion, protection and monitoring of his or her rights, applies equally to all measures adopted by States to implement the CRC.⁴⁵ Article 12 provides as follows:
1. *The child 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 the child's choice.*
 2. *The exercise of this right may 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; or*
 - (b) *For the protection of national security or of public order (ordre public), or of public health or morals.*

In addition to these four core principles, other important aspects of the CRC are that:

- (5) A child has the right to preserve their own identity (Article 8(1)). Article 8 provides in part that: "States Parties undertake to respect the right of the child to **preserve his or her identity**, including nationality, name and family relations as recognized by law without unlawful interference." The UNCRC's guidance material emphasises that 'the right of the child to preserve his or her identity... must be respected and take into consideration in the assessment of the child's best interests,'⁴⁶ saying that all adolescents have the right to "freedom of expression and respect for their physical and psychological integrity, gender identity and emerging autonomy."⁴⁷
- (6) A child has the right to be protected from harm (Article 19(1)). Assessment of the child's best interests, says the UNCRC, 'must also include consideration of the child's safety, that is, the right of the child to protection against all forms of physical or mental violence, injury or abuse.... Sexual harassment, peer pressure, bullying, [and] degrading treatment....'⁴⁸ The assessment should not only relate to the present time but 'requires assessing the possibility of future risk and harm' as well.⁴⁹ According to the UNCRC: 'Groups of children which are likely to be exposed to violence include, but are not limited to, children: ... who are lesbian, gay, transgender or transsexual'.⁵⁰ Article 19 reads as follows:

⁴⁴ UN Committee on the Rights of the Child (CRC), *General comment no. 5 (2003): General measures of implementation of the CRC on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5

⁴⁵ *Ibid*

⁴⁶ *Best Interests (2013)*, p 13, par 55.

⁴⁷ *Adolescence (2016)*, p 9 par 34.

⁴⁸ *Best Interests (2013)*, p 16, par 73, drawing also upon *Harms (2011)*.

⁴⁹ *Best Interests (2013)*, p 16, par 74.

⁵⁰ *Harms (2011)*, p 27, par 72(g).

1. *States Parties shall take all appropriate legislative, administrative, social and educational measures to **protect the child from all forms of physical or mental violence, injury or abuse**, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.*
 2. *Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.*
- (7) A child has the right to hold a religion or not to hold any religion⁵¹ (Article 14(1)). Article 14(1) provides that “*States Parties shall respect **the right of the child to freedom of thought, conscience and religion***” subject to the limitations in 14(3), which are that:
- 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.;*
- (8) A child will develop its own rights in accordance with its evolving capacities (see for example Article 14(1)) and children should be recognised as right holders (discussed in more detail below).⁵² The parental role of ‘direction and guidance’ will change with the evolving capacities (and rights) of the child (Articles 5 and 14(2)). Article 5 provides that
- States Parties shall respect the responsibilities, rights and duties of parents ... to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention....*
- And Article 14(2) provides that:
- States Parties shall respect the rights and duties of the parents ... to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.*
- (9) A child has the right to enjoy the highest attainable standard of health (Article 24) and the UNCRC notes that ‘States parties have an obligation to ensure that children’s health is not undermined as a result of discrimination, which is a significant factor contributing to vulnerability.’⁵³
- (10) School discipline will respect the human dignity of the child (Article 28(2), which provides that *States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention*); and
- (11) Children’s education should develop each child’s personality, talents and abilities to the fullest potential, it should develop respect for human rights and fundamental freedoms and for the principles enshrined in the Charter of the United Nations, and for the child’s own and

⁵¹ See Part B paragraph 1.7 and Bielefeldt, op cit, par 15. The human right of freedom of religion or belief is not limited to traditional religions. It also encompasses agnosticism, atheism, secularism and other systems of belief which hold to a set of values and principles would traditionally be thought of more as philosophies than as religions. This interpretation of the human right stems both from its full title: “**freedom of thought, conscience, religion or belief**” and from interpretations made by human rights courts internationally and particularly in Europe. The interpretation also follows on from the logical argument that to have freedom of something you must also be able to be free from that thing or not have that thing.

⁵² See also *Best Interests (2013)*, p 6 par 16(a).

⁵³ *Health (2013)* p 4 par 8.

other cultures; it should prepare the child for life in a free society in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin (Article 29).

- 8.2 Consideration should also be taken of the UNCRC's *General Comment No. 20 (2016) on the implementation of the rights of the child during adolescence*. An adolescent is taken to be a child between the ages of 10 and 18 years.⁵⁴ This is of course the time during which a child may first question their sexuality and their faith, issues relevant to the religious exemptions under consideration here. The UNCRC notes that "any investment in young people risks being wasted if their rights throughout adolescence do not also receive adequate attention"⁵⁵ and that it is important to understand the evolving capacities of adolescents as rights-holders.⁵⁶ The UNCRC defines evolving capacities as "an enabling principle that addresses the process of maturation and learning through which children progressively acquire competencies, understanding and increasing levels of agency to take responsibility and exercise their rights."⁵⁷

What does a child's 'best interests' mean?

- 8.3 In the words of the UNCRC:

*The full application of the concept of the child's best interests requires the development of a rights-based approach, engaging all actors, to secure the holistic physical, psychological, moral and spiritual integrity of the child and promote his or her human dignity.*⁵⁸

That is, the child's best interests are linked with their other specific rights under the CRC as well as their general human rights. The way in which a rights-based approach may be used is discussed in the following section 9 and below in section 5 of Schedule 3.

- 8.4 The UNCRC provides guidance in relation to the meaning of the above principles, emphasising that each country which is a party to the CRC '*must respect and implement the right of the child to have his or her best interests assessed and taken as a primary consideration*'⁵⁹ including by amending domestic legislation where appropriate '*in all national laws and regulations...[and] rules governing the operation of private or public institutions providing services or impacting on children...*'.⁶⁰
- 8.5 **The UNCRC clarifies that the expression 'primary consideration' means that the child's interests must be highlighted and 'have high priority and [are] not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best.** Viewing the best interests of the child as 'primary', the UNCRC says, '*requires a consciousness about the place that children's interests must occupy in all actions and a willingness to give priority to those interests in all circumstances, but especially when an action has an undeniable impact on the children concerned.*'⁶¹
- 8.6 In its General Comment on Adolescents, the UNCRC notes that states parties 'need to ensure that appropriate weight is afforded to the views of adolescents as they acquire understanding and maturity'⁶² to ensure that their rights are given primacy, adding that:

Certain groups of adolescents may be particularly subject to multiple vulnerabilities and violations of their rights, including discrimination and social exclusion. All measures taken in

⁵⁴ Adolescence (2016), p 3, par 5.

⁵⁵ Adolescence (2016), p 5, par 11.

⁵⁶ P 4, par 7.

⁵⁷ P 6, par 18.

⁵⁸ *Best Interests (2013)*, p 4.

⁵⁹ *Best Interests (2013)*, p 5, par 13.

⁶⁰ Op cit, p 6.

⁶¹ *Best Interests (2013)*, p 10, pars 39 and 40.

⁶² *Adolescence (2016)*, P 7, par 22.

*respect of legislation, policies and programmes focused on adolescents should take into consideration intersecting violations of rights and the compounded negative effects on the adolescents concerned.*⁶³

Necessity of Focusing on the Child as the rights-holder

*The idea that children are people in their own right, not merely objects owned by their parents, has never been popular not even today.*⁶⁴

8.7 The best interests of the child must be assessed from the point of view of the child themselves, not the child's parents or the child's school, the child being the relevant 'rights-holder' in any balancing of their rights against those of a religious institution or stakeholder. In the words of the UNCRC: '*an adult's judgment of the child's best interests cannot override the obligation to respect all the child's rights under the Convention.*'⁶⁵

8.8 The evolving ability of the child to understand and voice their own views particularly needs to be taken into account in the context of the child's adolescent development. 'Understanding of, and respect for, the evolving capacities of adolescents have implications for the realization of adolescents' rights,' as the UNCRC notes.⁶⁶

8.9 Indeed, in the context of freedom of religion, it is the child whose religious preferences should be given priority, irrespective of the parents and of the school. As the UNCRC says:

*it is the child who exercises the right to freedom of religion, not the parent, and the parental role necessarily diminishes as the child acquires an increasingly active role in exercising choice throughout adolescence. Freedom of religion should be respected in schools and other institutions, including with regard to choice over attendance in religious instruction classes, and discrimination on the grounds of religious beliefs should be prohibited.*⁶⁷

8.10 Unfortunately, the Ruddock Report focuses very little on the rights of children as independent beings but rather upon the rights of parents to have their children educated in accordance with the faith of the parents⁶⁸ and the contractual relationship between the parents and the school. Thus the Report concludes that on the one hand, the ability of schools to discriminate against students on the basis of sexual orientation, gender identity and gender characteristics should be limited to the enrolment of new students only and should not apply to discrimination against existing students, but on the other hand it concludes that such a restriction need not apply if a contrary policy 'was clearly given in writing to the students' parents as the basis of their child's enrolment at the school.'⁶⁹ The fact that the child has no voice in this contractual relationship and that their interests are effectively not taken into account in the contract is ignored. Only at one point does the Panel briefly consider putting the rights of the child ahead of the rights of the parent, saying that:

*The Panel also heard that children often come to terms with their sexual orientation or gender identity at a school age, and that LGBT youth experience much better mental health outcomes in educational environments that are supportive and inclusive. This is also true for intersex children. In this sense, **rather than consider parental rights in isolation**, the Panel was asked to be mindful of the independent rights of the child. (emphasis added).*⁷⁰

⁶³ *Adolescence (2016)*, P 8, par 26.

⁶⁴ Dorothy Rowe, *Time on Our Side*, 1994, Harper Collins, p 127.

⁶⁵ *Harms (2011)*, p 23, par 61.

⁶⁶ P4, par7.

⁶⁷ *Adolescence (2016)*, p 12 par 33. See, for example, CRC/C/15/Add.194, paras. 32 and 33, and CRC/C/15/Add.181, paras. 29 and 30.

⁶⁸ see pp 59 (par 1.228), 66 (par 1.260).

⁶⁹ Ruddock Report, p 68 par 1.275.

⁷⁰ Ruddock Report, p 70 par 1. 281.

- 8.11 **Similarly, the Government’s amendments do not give high priority to the best interests of children and do not implement the Government’s CRC responsibilities to have the best interests of children assessed as a primary consideration nor to protect them from discrimination or other harm.**
- 8.12 The Ruddock Report does not consider the different situation of an adolescent child with increased abilities to understand and act on their rights, and the Government amendments do not provide any mechanisms recognising the different situation of adolescent students, thereby failing to support adolescents in their development. As the UNCRC notes, “the potential of adolescents is widely compromised because States parties do not recognize or invest in the measures needed for them to enjoy their rights.”⁷¹
- 8.13 From the child’s point of view, it is hard to imagine how the experience of discrimination can ever be in the child’s best interests. It is therefore very hard to see how the Government’s proposed wording is intended to achieve an appropriate and proportionate balancing of interests: **if the Government really intends to protect the ‘best interests’ of children in the full sense of that term as expounded by the UNCRC,⁷² then the Government would simply remove the right of religious educational institutions to discriminate against children for religious reasons.** To provide, rather, that those institutions have the right to discriminate in some circumstances (so long as their decision to do so is in good faith and has ‘regard to’ the best interests of the child as one of competing considerations) seems on the face of it to be self-contradictory and to misunderstand the true nature of the ‘best interests’ test, which makes the best interests of the child ‘a primary’ consideration.

9. Balancing harms and competing rights

*Most organised religions privilege men over women, and almost all of them privilege heterosexual relations over homosexual ones.*⁷³

- 9.1 In a proper balancing of competing interests and rights, as discussed in paragraph 7.8 above, the potential harms to all stakeholders must be carefully considered. Children and staff clearly have human rights which will be infringed by existing exemptions from the Act and the proposed Exemptions in harmful ways. This is particularly serious in the case of children because of their vulnerability, especially in the case of LGBT children, who are particularly prone to harm from sexual discrimination. **If the best interests of children are appropriately taken into account in protecting their rights under the CRC and under international human rights law, there can be no question of sexual discrimination against children being permitted under the Act.**
- 9.2 In the context of discrimination against children, no other stakeholders have relevant rights under international human rights law. Even assuming that ‘the school’ is a stakeholder, the school has no right to manifest the religious beliefs of its founding organisation in a discriminatory manner, and co-religionists or religious adherents have no right to control the manner in which the school treats its students. There is no human right to control or restrict different manifestations of, or procedures within, a particular religion. In refusing to discriminate against its students, a school is not discriminating against co-religionists. It is not restricting the behaviour of adherents of the same religion other than in the immediate school context. Adherents outside the school are not restricted in any way by the school and have no rights to have their particular version of the religion followed by the school.

Stakeholders

- 9.3 The relevant stakeholders in relation to the issue of religious exemptions to allow discrimination

⁷¹ *Adolescents (2016)*, p3 par 3.

⁷² *Best Interests (2013)*.

⁷³ Dennis Altman, “It’s not just Islam – most religions are discriminatory,” *The Conversation*, 1 May 2013 at <https://theconversation.com/its-not-just-islam-most-religions-are-discriminatory-13817>

against students in religious schools can loosely be divided into four groups:

- (1) the children who are the students,
- (2) their families,
- (3) the school: being principal, teaching staff, non-teaching staff, board of trustees or similar management structure, and
- (4) persons not within the school but sharing the school religion ('adherents of the religion').

9.4 It needs to be remembered, as noted previously, that the interests of the children are not necessarily the same as those of their parents. The child is likely to have been placed in the school because of the religion of the parents, not because of the views of the child. The child's own views may well change as they develop.

Situation of children

What discrimination might be involved? Are there any particular vulnerabilities of a stakeholder that are relevant to the issues?

9.5 The likely degree of infringement of a child's rights and the actual harm the child may suffer will depend upon the particular school's discriminatory practices. Given that most organised religions encourage discrimination against women and against homosexuality, it is likely that the discriminatory practices a school may seek to justify under the Exemptions to the Act will be related to a child's gender, sexual identity and sexual preferences. While there are likely to be intersecting discriminatory practices, relating to different personal characteristics of the victims, it must be remembered that children as a group are particularly vulnerable and that in particular LGBT children are likely to suffer under the Exemptions. In considering the likely harms to the child we have therefore focused upon LGBT children, as did the Ruddock Report.

Human Rights of the child which might be infringed

9.6 The human rights of the child which may be infringed, should they be allowed to suffer sexual discrimination along the lines common amongst organised religions, can generally be described as:

- The right to have their best interests taken into account as 'a primary consideration';
- The right to be protected from harm and violence;
- The right to be free from discrimination;
- The right to equality and to be treated with human dignity;
- The right to protection of their life, survival and development;
- The right to freedom of expression and participation in respect of their rights;
- The right to preserve their own identity;
- The right to freedom of religion (to hold a religion or not to hold any religion);
- The right to express their own rights in accordance with their evolving capacities; and
- The right to education (in a learning environment free of harm).

Potential harms to the child

9.7 **The potential harms to a child from the intersecting infringements of so many rights are profound and serious.** The Jesuit Social Services Report of 2006 found that same-sex attracted students in Catholic schools felt isolated, depressed and unsupported. They had much higher

rates of self-harm and suicide than their heterosexual peers.⁷⁴ Unfortunately little appears to have changed since then. The Ruddock Report notes that the Panel heard that:

LGBTI youth are an at-risk group for mental health issues and, due to a fear of outing themselves, are less likely to seek services or assistance from their teachers and school counsellors. The Panel heard accounts of LGBTI youth who felt bullied and unsupported at religious schools, particularly where schools adopted a stance that was less accepting of homosexual relationships generally. It was reported that many students are discovering their sexual orientation and gender identity in their mid-teens, during high school, and that this includes students in religious schools⁷⁵

and the Report comments in a footnote to the text quoted above that:

if the school chooses not to hire teachers on the basis of their sexual orientation or gender identity, or not to enrol new students who are openly gay or transgender, the Panel heard that this can have an indirect impact on existing students who may be same-sex attracted or transgender.

9.8 The UNCRRC notes that:

Adolescents who are lesbian, gay, bisexual, transgender and intersex commonly face persecution, including abuse and violence, stigmatization, discrimination, bullying, exclusion from education and training, as well as a lack of family and social support, or access to sexual and reproductive health services and information.⁷⁶ In extreme cases, they face sexual assault, rape and even death. These experiences have been linked to low self-esteem, higher rates of depression, suicide and homelessness.⁷⁷

9.9 The harmful effects described above are likely to have a negative outcome on the child's education, their future physical and mental health, and their future life opportunities. If the child's best interests are treated as a primary consideration, clearly it is essential that such harmful effects must be avoided and such negative outcomes prevented.

The situation of the child's family

9.10 While the parents of a child have the human right (and duty) to provide direction to the child in the exercise of his or her right to freedom of religion (Article 14.2 CRC) and in the child's exercise of their rights (Article 5 of the CRC), this must be done in a manner consistent with the evolving capacities of the child so that the child's own views are not repressed and are allowed to develop. The parental rights to provide direction do not override the child's rights, particularly as the child matures. The parents have their own human rights to freedom of religion, but this is personal to them and should not be imposed upon their children.

9.11 Other parental interests which may be relevant (but which are not rights and which would not appear to outweigh the desirability of avoiding harm to their child) are: desire for the safety of their child, desire for the child to follow the parental religion, nature of the parents' contract with the school.

The situation of the staff

9.12 The following requirements may be applied differently by educational institutions in relation to teaching positions, management or leadership positions, or religious education positions. In the

⁷⁴ Father Peter Norden, Jesuit Social Services, *Not So Straight: A National Study Examining How Catholic Schools Can Best Respond to the Needs of Same Sex Attracted Students*, 2006, cited in Evans and Gaze, op cit, p 414.

⁷⁵ Ruddock Report, p 64 par 1.257.

⁷⁶ See statement dated 13 May 2015 by the Committee of the Rights of the Child and other United Nations and regional human rights mechanisms, available from www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15941&LangID=E.

⁷⁷ *Adolescence (2016)*, p 9 par 33.

most extreme cases, the exemptions are applied in relation to all employees. Institutions can discriminate in relation to employment:

- (1) by requiring the employee to have the same religious belief or religious activity as the school teaches (that is, to be 'co-religionists');
- (2) by giving preference to employees who are co-religionists;
- (3) by requiring the employee to have (or not have) particular characteristics - for example, relating to sex, gender identity, sexual orientation, marital status, parental status and status as a carer;⁷⁸
- (4) by requiring the employee to do (or not do) certain things – for example, by requiring teachers to adopt particular clothing conventions that relate to the school religion;
- (5) only where there is an inherent or genuine occupational requirement for the person to be of a particular religion or to have (or not have) particular characteristics; or

institutions can refuse to discriminate in relation to employment but require all staff to be supportive of the ethos, philosophy or beliefs of the school. How this is policed can differ, however, depending upon the rigidity of the belief system involved (and the confidence of the school in imparting its belief system), and if policed unreasonably may involve indirect discrimination.

9.13 The principal and individual staff members, in their personal capacities, have similar personal human rights to those described above in relation to children. Clearly many of the above discriminatory practices will infringe the human rights of the staff affected, including:

- The right to be free from discrimination;
- The right to equality and to be treated with human dignity;
- The right to freedom of expression and participation in respect of their rights;
- The right to preserve their own identity; and
- The right to freedom of religion (to hold a religion or not to hold any religion).

9.14 The harms that will result from these rights infringements will be similar to the harms potentially suffered by students, although perhaps not in so severe a form: affected staff will feel excluded and rejected because of who they are. They may not be able to be employed or may lose their livelihood. In addition, discrimination against school staff by religious bodies indirectly harms school students, giving students the message that some types of discrimination are valid. Thus, if the students have the same characteristics as the staff who are discriminated against, discrimination against the staff is indirectly also discrimination against the students.

The situation of the school

9.15 In their administrative capacities, the school board, principal and religious teaching staff may wish the school's religion to be promulgated by example as well as by instruction, and may wish to have school mores and rules reflect religious doctrines. This may partly be for their own religious satisfaction, and partly to satisfy the parents of current students, prospective parents, prospective benefactors and other religious adherents. These wishes or interests are not however inherent rights.

9.16 As mentioned in section 5, policies and procedures said to be for the 'good of the school' are likely to be aimed at minimising disputes, whether between students, between staff, or between

⁷⁸ This list is taken from a 2009 Pastoral Letter authored by the Catholic Archbishop of Melbourne and six Victorian Catholic bishops, cited in Evans and Gaze, p 399, Fn 46. The last items relating to status as a carer, parent or married person would appear to be intended to allow religious schools to evade their Fair Work Act obligations in relation to staff with family obligations.

the teaching staff and the parents of students. The 'good of the school' in the case of religious schools is also likely to be assessed by the degree to which the school is perceived to conform to the religious tenets of the students' parents and possibly also to the tenets of the adherents of the particular religion who are not directly associated with the school but who form part of the wider community connected by that particular religion.

- 9.17 While it might be interesting to consider what potential harm the school would face if it were bound not to discriminate against students and staff, and could not obtain a religious-based Exemption from the Act, this is not actually relevant to the legislation or the Bill. The existing exemptions and proposed Exemptions relate only to harm to 'adherents of the religion', not to harm to the school. This makes consideration of the next issues somewhat complex.

The situation of the adherents of the religion

- 9.18 It is of course possible that persons sharing the religion of a particular school may be affronted or experience emotional upset if the school departs from traditional religious procedures or tenets, even if they are not directly associated with the school by virtue of having family at the school or living in the immediate area. However it is also possible that other persons sharing the school's religion who are advocates for religious progress may support changes made by the school and experience positive emotions from seeing the school move away from or reject sexual discrimination. Unfortunately the Exemptions do not take the potential benefits to religious adherents of lack of discrimination by a school into account, asking only that the school considers the sensibilities of those most likely to support religious traditionalism.
- 9.19 In our view, the more closely associated the stakeholder is with the school, the more relevant their interests will be to any Exemption. It is entirely inappropriate for a crucial test in relation to an Exemption to be the theoretical interests of coreligionists, potentially from an entirely different sect or stream of the particular religion, who may be far distant from the school geographically, philosophically and culturally.

Is the party seeking the exemption attempting in good faith to minimise their infringement of other stakeholder rights? Is their activity proportionate to the concerns they hold?

- 9.20 Where an exemption from human rights standards is sought, it is relevant whether the party seeking the exemption is attempting in good faith to minimise their infringement of other stakeholder rights, and whether the exemption is proportionate to the concerns of the party seeking the exemption. We submit that it is clear from the potential harms to children and staff described above that to protect the religious sensibilities of some but not all of the adherents of any religion by allowing sexual discrimination against anyone, and particularly against children, is a disproportionate infringement of the rights of those children and staff.
- 9.21 In our view there are many areas in which religious bodies seeking exemptions from the Act could minimise their infringement of other stakeholder rights (for example by refusing to discriminate in relation to employment and simply requiring staff to be supportive of the ethos, philosophy or beliefs of the school) but choose not to do so.

What outcome would ensure minimal harm to all parties and minimal impairment of infringed stakeholder rights?

- 9.22 In our view no human or other ascertainable rights of adherents of a religion or of members of a school are infringed if a school chooses not to allow sexual discrimination against students or staff. Primacy must be given to the interests and rights of the students under international human rights law and most importantly under the CRC. We do not believe that the indirect economic interests of the Federal Government should be relevant.

- 9.23 We consider that the outcome which would ensure minimal harm to all parties and minimal impairment of infringed stakeholder rights would be for religious exemptions to be removed in relation to students, and minimised in relation to staff so that Exemptions apply only where there is an inherent or genuine occupational requirement for the person to be of a particular religion or to have (or not have) particular characteristics.

10. Conclusion

Discrimination against children based on their sexual orientation or gender identity harms their chances of having their rights fulfilled and increases their risk of abuse, exploitation, violence and marginalization.

Legislation that is non-discriminatory, a change in social norms and greater awareness and access to knowledge on the issue are critical components of an enabling environment to protect LGBT children and parents from discrimination and support the realization of their rights.⁷⁹

10.1 Treatment of staff

It is an unacceptable position that a school's religious ethos should prevail over its employees' rights to be free from sexual discrimination – particularly in circumstances where the school is providing a public service and is funded at least in part by the taxpayer. ALHR submits that if freedom of religion were to be legislated without the counterbalance of a Human Rights Act (or an LGBT Rights Act), then only religious institutions that do not receive any public funding for their services should be allowed to discriminate against staff on the basis of the institution's religious laws.

10.2 Treatment of children

There is no reason to allow sexual discrimination against children in Australia, on a religious or any other basis. Australia has legal obligations under the CRC in particular to treat the best interests of children as a primary concern. The Exemptions completely fail to achieve this outcome because they are drafted in such a way as to give greatest weight to the potential negative emotions of co-religionists as a theoretical group, irrespective of a lack of association with the relevant school, while ignoring positive emotions engendered by non-discrimination and **completely failing to take account of the profound, real and life-changing harms that result from sexual discrimination against children.**

RECOMMENDATIONS

1. In the absence of significant revision to the Government's proposed amendments, the amendments proposed by the Greens should be adopted as more closely reflecting Australia's international legal obligations and as achieving a more proportionate balance of relevant human rights.
2. Amendments to the same effect should be made to the *Fair Work Act*.
3. The Commonwealth should adopt a Federal Human Rights Act which provides appropriate balances and protection for all human rights, as opposed to:
 - the piecemeal protection of select human rights suggested in relation to 'religious freedoms' legislation, and
 - the Bill which prioritises the theoretical possibility of offence to conservative religious adherents against actual harm and real infringements of human rights of vulnerable children.

⁷⁹ UNICEF Current Issues No.9 November 2014, 'Eliminating Discrimination Against Children and Parents Based on Sexual Orientation and/or Gender Identity' p.3.

If you would like to discuss any aspect of this submission, please email me at: president@alhr.org.au.

Yours faithfully

A handwritten signature in blue ink, appearing to read 'Kerry Weste', is written over a faint, light-colored circular stamp or watermark.

Kerry Weste
President
Australian Lawyers for Human Rights

Schedule 1 – the Bill and proposed amendments

The proposed changes to the Sexual Discrimination Act wording are marked (in the colours used in the table at par 3.3, page 7 above) on the relevant sections as set out below.

7B Indirect discrimination: reasonableness test

- (1) A person does not discriminate against another person by imposing, or proposing to impose, a condition, requirement or practice that has, or is likely to have, the disadvantaging effect mentioned in subsection 5(2), 5A(2), 5B(2), 5C(2), 6(2), 7(2) or 7AA(2) if the condition, requirement or practice is reasonable in the circumstances.
- (2) The matters to be taken into account in deciding whether a condition, requirement or practice is reasonable in the circumstances include:
 - (a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; and
 - (b) the feasibility of overcoming or mitigating the disadvantage; and
 - (c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice; and
 - (d) if the condition, requirement or practice is imposed, or proposed to be imposed, in relation to a student by an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed:
 - (i) whether the condition, requirement or practice is imposed, or proposed to be imposed, in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed; and
 - (ii) whether, in imposing, or proposing to impose, the condition, requirement or practice, the educational institution has regard to the best interests of the student.

[education]

7E Educational institutions established for religious purposes: reasonableness test

- (1) For the purposes of section 7B, a condition, requirement or practice imposed, or proposed to be imposed, in relation to a student by an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed is reasonable if:
 - (a) the condition, requirement or practice is imposed, or proposed to be imposed, in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed; and
 - (b) the condition, requirement or practice is imposed, or proposed to be imposed, in a manner that is consistent with a policy of the educational institution that complies with subsection (2); and
 - (c) if the student is a child—in imposing, or proposing to impose, the condition, requirement or practice, the educational institution has regard to the best interests of the child.
- (2) A policy of an educational institution complies with this subsection if the policy:
 - (a) is in writing; and
 - (b) is publicly available; and
 - (c) sets out the educational institution's policy in relation to adherence to its doctrines, tenets, beliefs or teachings; and
 - (d) complies with any other requirements prescribed by the regulations for the purposes of this paragraph.

[education]

7F Educational institutions established for religious purposes

- (1) Nothing in this Act renders it unlawful to engage in teaching activity if that activity:
- (a) is in good faith in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed; and
 - (b) is done by, or with the authority of, an educational institution that is conducted in accordance with those doctrines, tenets, beliefs or teachings.

- (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.

[education]

37 Religious bodies

- (1) Nothing in Division 1 or 2 affects:
- (a) the ordination or appointment of priests, ministers of religion or members of any religious order;
 - (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order;
 - (c) the selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice; or
 - (d) any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.
- (2) Paragraph (1)(d) does not apply to an act or practice of a body established for religious purposes if:
- (a) the act or practice is connected with the provision, by the body, of Commonwealth-funded aged care; and
 - (b) the act or practice is not connected with the employment of persons to provide that aged care.
- (3) Paragraph (1)(d) does not apply to an act or practice of an educational institution established for religious purposes if:
- (a) the act or practice is connected with the provision, by the institution, of education;

[addition opposed by government]

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Schedule 3 – November 2018 Submission

Discrimination by faith-based educational institutions

Australian Lawyers for Human Rights (**ALHR**) is grateful for the opportunity to provide this submission in relation to the Committee's current Inquiry as to the desirability (or otherwise) of

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

...

Executive Summary

1. **Faith-based educational institutions should not be permitted to discriminate against staff or students. There is no theoretical or practical justification for such an exemption from Australian anti-discrimination legislation. Nor is there any practical justification:** Discrimination is rightly made illegal because it is harmful. Discrimination is still harmful even if carried out by a faith-based institution. The harm is not diminished.
2. **Discrimination against children is reprehensible. It is also inconsistent with the UN Convention on the Rights of the Child.** Children are particularly vulnerable to faith-based discrimination, not only because of their comparative defencelessness but also because children are not usually free to pick their own religion (or non-religion) but are subject to the religious choices, including their schooling, that their parents make for them.
3. LGBTI children are particularly vulnerable children due to the risk of homophobic or transphobic bullying in schools. **Homophobic and transphobic bullying is perpetuated where permissible discrimination is able to exist in faith based institutions.**
4. Even if children who are students are not directly discriminated against by the faith-based institution in which they have been placed, they are **effectively taught (where discrimination by such institutions is permitted) that faith-based discrimination is legally and socially acceptable.** They may observe discrimination against other students or against staff. Discriminatory teachings and behaviour on the part of the institution foster an atmosphere of fear, inequality and division, not of safety, equality and inclusion. Discriminatory teachings set a path for both those discriminating and those discriminated against as to the way they may conduct themselves and see themselves as adults.
5. **Lack of theoretical justification:** There is no theoretical justification for such proposed exemptions. The right to express one's religious beliefs is a limited right which must be balanced against other types of rights and other peoples' rights. It does not 'trump' other rights, such as the right to be free from discrimination. **True freedom of religion is incompatible with discrimination. 'Religious freedom' does not mean freedom to visit harm upon others in the name of one's own religion.** A religion which does not respect the human rights of others does not reflect true religious freedom.⁸⁰
6. **The role of Government should be to remain neutral in religious matters and foster pluralism and tolerance as a means of promoting and preserving democracy.** A secular Australian democratic government should not privilege the right to act on 'religious' views which are discriminatory. It should remain neutral in religious matters, and should not support harmful religious behaviour. Where protection is desired for particular behaviour it will be relevant to what extent that behaviour

⁸⁰ Heiner Bielefeldt, A/71/269 Interim Report: Elimination of all forms of religious intolerance - The broad range of violations of freedom of religion or belief, their root causes and variables (2016), par 33, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/244/98/PDF/N1624498.pdf>.

reflects respect for the rights of others. Discrimination - by definition - does not respect the rights of others. Faith-based exemptions undermine diversity and detract from an inclusive democracy.

7. **Exemptions discourage theological reform:** Privileging the right to religiously-based discrimination encourages such harmful discrimination to continue and to become entrenched in a religion rather than encouraging beneficial theological reform.
8. **Human rights provide an appropriate standard and framework which should be applied:** Without the support of a human rights framework which provides the principles and procedures for the balancing of competing interests, religious freedom for everyone in Australia in every religious community is effectively impossible (because of the conflicts in tenets of different religions). Human rights entail **both rights and obligations**. Hence in so far as we are ourselves entitled to the protection of human rights, we must also respect the human rights of others.⁸¹ An extrinsic standard is also required so that society does not support only the dominant religion and does not suppress secularism, atheism or other religions. A human rights framework can provide that standard.⁸²

In the words of the current UN Special Rapporteur on Freedom of Religion or Belief, Ahmed Shaheed⁸³

all believers — whether theistic, non-theistic, atheistic or other — should join hands and hearts in articulating ways in which “faith” can stand up for “rights” more effectively, so that each enhances the other. Rejecting expressions of hatred within one’s own community and extending solidarity and support across faith or belief boundaries are honourable and meaningful actions.

9. In ALHR’s view, laws which allow faith-based educational institutions to discriminate against staff or students are counter to the human rights framework established by the rules-based international legal order and have no practical nor theoretical justification.

1. Introduction

- 1.1 This document focuses on the lack of theoretical justification for faith-based exemptions from anti-discrimination legislation. **The lack of practical justification is so clear that, in ALHR’s view, it does not need to be discussed in any detail.** We refer to some relevant statistics in section 9 below (see paragraphs 9.9 and 9.10).
- 1.2 Religious activities may themselves give rise to breaches of other human rights. ‘Religious’ practices often involve:
 - breaches of human rights of the group’s adherents; and
 - attempts to restrict the human rights of persons outside the religious group.

Discriminatory treatment of children, women, LGBTIQ persons and other religious and ethnic minorities on the part of religious groups are obvious examples.
- 1.3 It is submitted that the balancing of competing rights through a human rights-based process involving ‘reasonable accommodation’ is the best method of managing the practical problems resulting from these issues. There can be no truly free religious life without respect for the freedoms and human rights of others.⁸⁴

⁸¹ See generally, United Nations Human Rights Office of the High Commissioner, “What are Human Rights?” available at <<http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>>, accessed 10 February 2018.

⁸² Bielefeldt (2016), op cit, pars 28 to 30 and Shaheed, op cit, par 46.

⁸³ A/72/365 Interim Report: Elimination of all forms of religious intolerance (2017), par 78, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/270/09/PDF/N1727009.pdf>.

⁸⁴ Bielefeld (2016), par 33.

- 1.4 Adopting a human rights-based framework will also assist religions to develop, to progress towards a situation where they respect both the rights of their own members and the rights of those outside their religion.
- 1.5 While the 'right to believe' is a personal right which is exercised internally, the right to manifest or act upon one's religious belief externally so as to impact upon others is never absolute. Religious freedom does not mean freedom to visit harm upon others in the name of one's own religion.
- 1.6 When considering 'religious' freedom in the context of human rights, it needs to be stressed that manifestations of religious belief need to be considered both within the religion as well as outside the religion. That is, the infringements upon human rights which a religion places on its adherents need to be considered just as much as the infringements upon human rights which a religion seeks to place on non-believers.
- 1.7 Freedom of/from religion also involves the principle of equality amongst religions. No religion should be legally privileged above any other religion, nor above secularism, as that would result in inequality, and hence lack of freedom, of religion.⁸⁵ This principle is particularly important in multicultural Australia.
- 1.8 There is a great range of differentiation within traditional religious beliefs and organisations and it can be erroneous to attribute any specific views to religious communities as a whole. Even amongst traditional religions, the messages and behavioural requirements are not just different but often irreconcilable.⁸⁶ In Australia the Private Schools Directory website <http://www.privateschoolsdirectory.com.au> lists roughly twenty possible choices of religious school in addition to Catholic, Quaker, government, and non-denominational or multi-faith schools, being: Anglican, Anglican Uniting Church, Armenian Orthodox, Assemblies of God, Assyrian, Baptist, Brethren, Church of Christ, Church of England, Coptic Orthodox, Dutch Reform, Ecumenical, Free Reformed, Greek Orthodox, Hare Krishna, Islamic, Jewish, Lutheran, Pentecostal, Presbyterian, Seventh Day Adventist and Uniting Church.
- 1.9 Thus Bielefeldt notes that when States are designing policies against harmful religious practices, it should be borne in mind that such practices "are usually contested between and within religious communities". "Awareness of such internal diversity" he notes, "is important, to avoid stigmatizing overgeneralizations and [to] muster support from within religious communities."⁸⁷
- 1.10 Shaheed notes that legislation may be required to protect against discrimination and vilification which is purportedly justified on the basis of religion, in order to allow all groups a 'free' space in which to practice their own religion, or to not practice any religion at all.⁸⁸

2. International Instruments

- 2.1 The right to freedom of religion or belief is reflected in:
- Article 18 of the *Universal Declaration of Human Rights* 1948 (UDHR),
 - Article 18 (1) of the *International Covenant on Civil and Political Rights* 1966 (ICCPR),
 - Article 1.1 of the International Labour Organisation *Discrimination (Employment and Occupation) Convention* 1958, and
 - Article 1 of the United Nations *Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief* of 1981 (the 1981 Declaration).
- 2.2 The *Convention on the Rights of the Child* also prescribes that States parties shall "respect the right of the child to freedom of thought, conscience and religion", (article 14.1) and that the

⁸⁵ See Dieter Grimm, 'Conflicts between General Laws and Religious Norms', (2009) 30(6) *Cardozo Law Review* 2369, at 2374, <http://cardozolawreview.com/Joomla1.5/content/30-6/GRIMM.30-6.pdf>

⁸⁶ Bielefeldt (2016), op cit, par 11.

⁸⁷ Bielefeldt (2015), op cit., par 14.

⁸⁸ Shaheed, op cit, par 34.

State shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child (article 14.2). Australia's obligations under the Convention and other international instruments to protect the rights of children are discussed in more detail in Section 9.

- 2.3 It is provided in article 2 (1) of the 1981 Declaration that “no one shall be subject to discrimination by any State, institution, group of persons or person on the grounds of religion or belief”, and article 3 of the 1981 Declaration states that: “Discrimination between human beings on the grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations.”
- 2.4 Article 2(1) of the ICCPR sets out the principal of non-discrimination as follows:
- Each State Party to the present Covenant undertakes to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind such as race, colour, sex, language, religious, political or other opinion, national or social origin, property, birth or other status.*
- 2.5 Also relevant is Article 26 of the ICCPR under which “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law”. Article 26 similarly states that “the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Article 26 is a ‘stand-alone’ right which forbids discrimination in *any law* and in *any field regulated by public authorities*, even if those laws do not relate to a right specifically mentioned in the ICCPR.⁸⁹
- 2.6 In *Toonen v Australia*, the Human Rights Committee held that the reference to ‘sex’ in Articles 2 and 26 of the ICCPR includes sexual orientation.⁹⁰ Whilst the ICCPR does not reference gender identity specifically, it is the opinion of many (including the Law Council of Australia) that the ICCPR would encompass gender identity under its ‘other status’ grounds.⁹¹
- 2.7 Within the EU, the right to freedom of religion or belief is reflected in:
- Article 9(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* 1950 (ECHR), and
 - Article 10 of the *Charter of Fundamental Rights of the European Union* (EUCFR).
- 2.8 The *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981)* prohibits unintentional and intentional acts of discrimination and defines discrimination in article 3 as:
- Any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.*
- 2.9 Article 6 of the 1981 Declaration stipulates that the religious community's joint or shared expression of its beliefs is protected equally with the individual's right and protects manifestation of religion or belief including, but not limited to:

⁸⁹ Australian Human Rights Commission (AHRC), Position Paper on Marriage Equality: Marriage equality in a changing World, September 2012, available at: <<https://www.humanrights.gov.au/lesbian-gay-bisexual-trans-and-intersex-equality-0>> .

⁹⁰ *Toonen v Australia*, Communication No. 488/1992, UN Doc CCPR/C/50/D/488/92

⁹¹ Law Council of Australia, Comment 132 (being a submission to the Australian Human Rights Commission Consultation on the Protection from Discrimination on the Basis of Sexual Orientation and Sex and/or Gender Identity, 2010), available at: <<https://www.humanrights.gov.au/publications/comments-consultation-protection-discrimination-basis-sexual-orientation-sex-andor>>

- worshipping and assembling, and maintaining places for this purpose
- establishing and maintaining charitable or humanitarian institutions
- practising religious rites and customs
- writing and disseminating religious publications
- teaching of religion and belief
- soliciting voluntary financial support
- training and appointment of religious leaders in accordance with the requirements and standards of the religion or belief
- observing religious holidays and ceremonies
- communicating with individuals and communities on matters of religion and belief.

3. Is religious freedom possible without human rights?

- 3.1 In discussing the intersections of religious freedom with other human rights, it is important to distinguish between personal belief and religious community membership, in that “an individual has a personal sphere of religious liberty, whereas the very existence of religious communities is a public matter and has an external dimension, which means that some sort of relationship with the State is needed.”⁹²
- 3.2 Religious freedom for everyone in every religious community is effectively impossible without the support of a human rights framework, because without the existence of a standard provided by human rights, society would be likely to support only the dominant religion and would suppress other religions and secularism, as has historically occurred in societies not based on human rights.⁹³
- 3.3 Religious freedom for everyone, whether part of a religious community or of a non-religious community, is similarly impossible without the existence of a secular constitutional state or government, as Professor Grimm notes, saying that:

*The more multireligious a society, the more important it is that the state remain neutral in religious matters. A state that would take sides in religious matters would lose its capability to guarantee liberty for all religious faiths.*⁹⁴

4 Freedom of/from religion supports other human rights

- 4.1 Freedom of/from religion has been termed a “gateway” to other freedoms, including freedom of expression and freedom of peaceful assembly and association. That is, there can be no free religious community life without respect for those other freedoms, which are closely intertwined with the right to freedom of religion or belief itself. To quote the current UN Special Rapporteur on Freedom of Religion and Belief:

*Freedom of religion or belief is interwoven with the core principles of equality, non-discrimination and non-coercion and overlaps with other rights, including the rights to freedom of opinion and expression, peaceful assembly and association, and education. It must, therefore, be understood in the context of articles 18 to 20 and be read together with core principles enunciated by articles 2 and 5 of the International Covenant on Civil and Political Rights. An abuse of one right can be an obstacle to the enjoyment of all the others.*⁹⁵

⁹² Sylvie Langlaude, “Indoctrination, Secularism, Religious Liberty and the ECHR” (2006) *International and Comparative Law Quarterly*, 55(4), 929 at 941-942.

<https://pure.qub.ac.uk/portal/files/675413/Article%20ICLQ%20by%20Sylvie%20Langlaude.pdf>

⁹³ Bielefeldt (2016), op cit, pars 28 to 30 and Shaheed, op cit, par 46.

⁹⁴ Grimm, op cit, at 2371 and 2373.

⁹⁵ Shaheed, op cit, par 46.

- 4.2 There are also many parallels between the treatment of free speech and the treatment of religion which in many cases support and reinforce each other (and are not in opposition, contrary to popular misconceptions), including in terms of protection of a person's inner realm of thinking and believing (see par 5.2.1 (c)).
- 4.3 Freedom of religion also supports theological reform. While it might be argued that believers 'sign up' to all the restrictions of a religion and willingly accept religiously-based restrictions on their human rights, such an argument ignores the possibility and importance of theological and practical reforms. Most major religions are aware of the need for theological reform, which may in some cases even be essential for the religion's survival. Theological reform affects power structures within religions, sometimes with progressive outcomes, sometimes with retrogressive outcomes.
- 4.4 ALHR believes that viewing religiously-based restrictions both upon believers and non-believers through a human rights lens, and restricting faith-based exemptions from discrimination law, will assist theological reform and reform of religious practices and procedures in a positive way.

5. The balancing of indivisible and interdependent human rights

- 5.1 What happens where manifestations of different religions conflict and parties wish to exercise competing 'religious' rights or to be free from the religious practices of others? Human rights law has developed a process or set of principles by which such conflicts can be managed.

Rights must be balanced where they conflict

- 5.2 In general terms, no human right 'trumps' any other right – all are equally valuable (the principle of indivisibility) and should be protected together (the principle of interdependence).
- 5.3 Some rights are expressed as absolutes: the right to be free from slavery, torture, cruel or inhuman or degrading punishment or treatment, or arbitrary deprivation of life, and the right to recognition as a person in law. The protection of one's internal beliefs is also expressed to be an absolute right as an aspect of both freedom of speech and freedom of religion (see par 5.2.1 (c)).
- 5.4 Subject to those absolutes, all rights must be **balanced** where they conflict so as to maximise the practice of other rights to the greatest possible extent, in 'an atmosphere of mutual consideration'⁹⁶ and so as to 'ensure that none is inappropriately sacrificed'.⁹⁷ This is sometimes described as a process of providing **reasonable accommodation** to other rights and other persons: 'a fair balance needs to be struck between the rights of the individual and the rights of others.'⁹⁸ This is similar to the test of proportionate response to the harm in question which is generally used to assess whether or not legislation is too wide in its scope.

Taking account of context and other values

- 5.5 The balancing and reasonable accommodation tests are very much dependent upon context and cannot be used in the abstract. They may also need to call upon other rights and other values.
- 5.6 For example, where manifestations of different religions conflict – where both parties involved wish to exercise competing 'religious' rights - a balance must also be sought by reference to other rights such as the right to freedom of speech or the right not to be discriminated against, and to other values and considerations (such as reasonableness or proportionality).
- 5.7 The right to manifest one's religion or belief can validly be restricted, according to Articles 9(2) of the ECHR and 18(3) of the ICCPR, if the restriction is prescribed by law and is necessary for the protection of public safety, public health or morals or for the protection of the rights and freedoms of others.

⁹⁶ Grimm, *op cit*, 2382.

⁹⁷ Donald and Howard, *op cit*, p i.

⁹⁸ Donald and Howard, *op cit*, p i.

The good faith of those seeking State protection

- 5.8 Human rights entail **both rights and obligations**. Hence in so far as we wish the State to protect our own human rights, we must also act with *good faith* and respect the human rights of others. **Where protection is desired for particular behaviour it will be relevant to what extent that behaviour reflects respect for the rights of others** Generally, behaviour should not be protected by Australian law where that behaviour itself infringes other human rights.
- 5.9 In balancing the competing claims of human rights against each other, it is important to minimise any negative impact; to impinge as little as possible upon other rights. As the Special Rapporteur on Freedom of Religion or Belief has said, ‘the purpose of reasonable accommodation is not to ‘privilege’ religious or belief-related minorities, at the expense of the principle of equality.’⁹⁹ Therefore it will be very important to consider whether a particular expression of a human right by one person or group respects the rights of others or, conversely, causes harm or unreasonably impacts upon others.
- 5.10 That is, where there is a conflict between different human rights it may be necessary to limit or constrain one ‘freedom’ or right if it is misused or abused in a way that limits the free exercise of any human rights by other people. Where harm or unreasonable impact results from any behaviour claiming to involve ‘religious freedom’, it is generally undesirable for the State to protect such behaviour by law. As Shaheed says:

*It is also clear that the right to freedom of religion or belief does not give the individual — as a rights holder — the power to marginalize, suppress or carry out violent acts against other individuals.*¹⁰⁰

- 5.11 This brings us again to the distinction between the right to hold or change a belief or have no belief (which is unlimited, having no impact on others), and the right to manifest one’s beliefs (which, because of potential impact upon others, must be balanced against other rights). Thus it has been held that although public and private teaching of the particular faith is seen as a primary duty for members of many religions, there are many contexts in which that teaching would not be appropriate and can validly be restricted. One such valid restriction is where the recipient is in a vulnerable position, for example due to poor health, or the teaching involves violence or brainwashing.¹⁰¹ The right to manifest one’s ‘religion’ or belief must be balanced with the right of others to be free from interference with one’s own ‘religion’ or belief or to be free from any ‘religion’ or belief.

6. Protecting and respecting the believer not the belief

- 6.1 Following from the principles above, proponents of intolerant religions which in practice restrict human rights cannot, therefore, expect tolerance for the expression of their beliefs nor State protection for their actions. Their right to hold whatever belief system they wish to hold in private can be respected. Their ‘right’ to act on that belief system depends, however, upon the impact it has on others. Donald and Howard describe this principle as ‘**respecting the believer rather than the belief**.’¹⁰²
- 6.2 Freedom of/ from religion should not involve State protection of the various truth claims, teachings, rituals and practices of all religions or belief systems (or no belief systems), both because of the distinction that needs to be made between personal belief (which can be respected) and ‘religious’ practices (which must be subject to the ‘harms’ or ‘impact’ test) but also

⁹⁹ Interim Report of the Special Rapporteur on Freedom of Religion or Belief A/69/261 (2014) cited in Donald and Howard, op cit, pp 15-16, at <<http://www.ohchr.org/Documents/Issues/Religion/A.69.261.pdf>>.

¹⁰⁰ Shaheed, op cit, par 46.

¹⁰¹ Donald and Howard, op cit, pp 8-9.

¹⁰² Donald and Howard, op cit, p 17.

because to do so would be impossible in practice. Even amongst traditional religions, the messages and behavioural requirements can be irreconcilable.¹⁰³

- 6.3 Similarly, it is important to note that freedom of/from religion does not restrict the free speech rights of people to criticise the tenets of a religion. “[C]riticism of religion, religious leaders or doctrine is not a violation of the right to freedom of religion or belief” notes Shaheed.¹⁰⁴ This is one of the reasons that the offence of blasphemy is inconsistent with the human right of freedom of/from religion.
- 6.4 **Lastly, freedom of/ from religion does not give any person or organisation the right to be exempt from anti-discrimination law. Rather, freedom from discrimination and freedom of/from religion (as fully understood in a human rights framework) support each other.**

7. Religious practices which discriminate

- 7.1 Many religions restrict and/or attempt to compel the behaviour of persons by not extending tolerance to, or actively discriminating or inciting violence against, adherents of other religions (or of no religion) and against other categories of people chosen on a discriminatory basis (such as women and LGBTIQ persons) ‘under the guise of manifesting their religion or protecting the “moral high ground.”’¹⁰⁵
- 7.2 Indeed, as one writer says, *“some of the most spectacular expressions of religious fervor come from groups that promote violence, intolerance, misogyny and homophobia ... Whether it is the American religious right that demonizes LGBT and other people, the Buddhist groups in Burma who kill Muslims, or the Muslim Brotherhood in Egypt that used state power to attack democracy, the harm done by organizations in the name of religion is often horrific.”*¹⁰⁶
- 7.3 Exclusionary behaviour on the part of religious organisations is legislatively protected throughout many countries by inclusion of exemptions for religious organisations in anti-discrimination legislation. The International Labour Organisation *Discrimination (Employment and Occupation) Convention 1958* recognises two exemptions from its religious anti-discrimination provisions in the employment context: the first where a particular religion is an inherent requirement of the job, and the second where having a particular religion for a particular job is required by the tenets and doctrines of the religion, and the requirement is not arbitrary and is consistently applied (article 1.2).
- 7.4 Another common employment exemption is where having a particular religion is not an inherent requirement of the job (for example, an administrative role within a church rather than a religious role) but is regarded as necessary so as to avoid injury to the religious susceptibilities of members of that religion.
- 7.5 **ALHR believes that exclusionary behaviour would be discouraged and theological reform encouraged if religiously-based exemptions were removed from anti-discrimination legislation. That the law permits ‘religious’ individuals to discriminate against others (for example on the basis of sexual orientation or gender identity) is an affront to the victims and perpetuates negative stereotyping.**¹⁰⁷

¹⁰³ Bielefeldt (2016), op cit, par 11.

¹⁰⁴ Shaheed, op cit, par 46.

¹⁰⁵ Shaheed, op cit, par 46.

¹⁰⁶ Larry Cox, “Human rights must get religion,” 14 April 2014, <<https://www.opendemocracy.net/openglobalrights/larry-cox/human-rights-must-get-religion>> accessed 10 February 2018.

¹⁰⁷ See Donald and Howard, op cit, p 13, citing R. Wintemute, ‘Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to serve others,’ (2014) 77 (2) *Modern Law Review*, 223 and M. Malik, ‘Religious Freedom in the 21st Century,’ *Westminster Faith Debates*, 18 April 2012: <http://faithdebates.org.uk/debates/2012-debates/religion-and-public-life/what-limits-to-religious->

- 7.6 ALHR rejects the suggestions that were made in the context of the Marriage Equality ‘debate’ that anti-discrimination law conflicts directly with the right to freedom of/from religion or that anti-discrimination law itself involves religious persecution (the argument being that anti-discrimination law is somehow unfair in that it restricts persons holding religious views from discriminating against others in the name of manifesting their own religion).¹⁰⁸
- 7.7 There is no ‘right of conscientious objection’ under human rights law for persons holding discriminatory ‘religious’ beliefs. In particular, adherence to a discriminatory religion should not give one the legal right to refuse to interact with others because of those persons’ sexual orientation or gender identity, nor to vilify persons because of those persons’ sexual orientation or gender identity.
- 7.8 Legislation should not privilege the followers of one religion or belief against another, or discriminate between ‘religions’ or beliefs. And a secular democratic government should not privilege the right to act on ‘religious’ views above other human rights. As Professor Grimm explains:

“... self-determination of religious communities as to the content and requirements of their religion does not mean that the state has to tolerate every behavior that is religiously motivated. Freedom of religion is not an absolute right, and religious communities are not extraterritorial. Like all fundamental rights, religious freedom may be limited by the state. The need for limitations follows, firstly, from the fact that freedom of religion is equal freedom for all individuals and all religious groups. Since the transcendent truths or divine revelations that religious groups claim to practice mutually exclude each other, the state must respect a group’s creed, but prevent the group from making it binding for society as a whole.

This requires a distinction between the internal and the external sphere. Claims based on an allegedly absolute truth may be raised within the religious group only. They may not be imposed on the external world.”¹⁰⁹

8. Children, discrimination and religious education

- 8.1 All children, irrespective of their actual or perceived sexual orientation or gender identity, have a right to a safe and healthy childhood that is free from discrimination.¹¹⁰ Each exposure of a child to discrimination by faith-based educational institutions inter-relates with and reinforces each other incident. Children are taught through observation, and perhaps also through classroom education, that it is legal and socially acceptable to discriminate against others if your religion so allows, even if the discrimination is on the basis of an inherent personal characteristic over which the victim has no control. They may see teachers and other children being harmed through discrimination, and they may experience harm themselves.
- 8.2 In the context of children’s rights to freedom of/from religion, Bielefeldt recommends that:

Religious communities should discuss the issue of how to better ensure respect for the freedom of religion or belief of children within their teaching and community practices, bearing in mind the status of the child as a rights holder and the need to respect the evolving capacities of each child; [and]

[freedom/](#) accessed 10 February 2018.

¹⁰⁸ Donald and Howard, op cit, p 1.

¹⁰⁹ Grimm, op cit, p 2374.

¹¹⁰ Eliminating Discrimination Against Children and Parents Based on Sexual Orientation and/or Gender Identity, UNICEF Current Issues Vol 9 November 2014 p.1

*... Religious community leaders should support the elimination of harmful practices inflicted on children, including by publicly challenging problematic religious justifications for such practices whenever they occur.*¹¹¹

8.3 The situation of minor children in relation to religious discrimination needs to be considered as an important human rights issue, not least because children are not usually free to pick their own religion (or non-religion) but are subject to the religious choices that their parents make for them and are thus particularly vulnerable where a faith-based educational organisation is permitted to discriminate against its own students.

8.4 Protection for children is particularly important in that, as the former Special Rapporteur on Religious Freedom has pointed out, “attitudes, customs, norms and practices ... are unfortunately still widespread, whereby children are treated as if they were the property of their parents, families or communities, without having rights in their own capacity.”¹¹²

8.5 “Given the child’s dependency on an enabling family environment, albeit with recognition of the variety of family forms,” says Bielefeldt, “parents have the primary responsibility for supporting the child in the exercise of his or her human rights” and should provide “appropriate guidance and direction.”¹¹³ He continues:

23. ... the need of the child for an enabling environment must not lead to the wrong conclusion that parents or other family members can simply override, ignore or marginalize the rights of the child. The status of the child as rights holder must always be respected and should, inter alia, be reflected in the manner in which parents provide guidance and direction to the child. The decisive term employed in the Convention on the Rights of the Child is “the evolving capacities of the child” ...

*25. Adequate consideration of “the evolving capacities of the child” presupposes that the child, once capable of forming personal views, can express such views freely, with a chance of being heard and taken seriously. Article 12, paragraph 1, of the Convention confirms that right, while furthermore requiring that the views of the child be “given due weight in accordance with the age and maturity of the child”. Thus, the child should in the course of time assume a more and more active position in the exercise of his or her rights.*¹¹⁴

8.6 Bielefeldt concludes that “parents cannot be obliged by the State to remain religiously “neutral” when raising their children” because that would be an unjustifiable infringement of parental rights.¹¹⁵ However in the area of education, he notes that pressure should not be exerted on children to conform to the socially dominant religion;¹¹⁶ identifying a number of appropriate restrictions which would avoid violations of children’s freedom of/from religion and are particularly relevant to Australian public schools:

48. When religious ceremonies, such as public prayers, are performed in school, specific safeguards are needed to ensure that no child is forced to participate against his or her will, or the will of his or her parents. The same principle applies to religious instruction in schools, ... given on the tenets of a particular religion or belief. Such instruction must not be a mandatory requirement and it should always be connected with the option of receiving a low-threshold exemption (see, for example, [CCPR/C/82/D/1155/2003](#)). Requests for an

¹¹¹ Bielefeldt (2015), op cit., p22.

¹¹² Bielefeldt (2015), op cit, par 16.

¹¹³ Bielefeldt (2015), op cit, par 22, discussing the *Convention on the Rights of the Child*.

¹¹⁴ Bielefeldt (2015), op cit, pars 23 and 25,

¹¹⁵ Bielefeldt (2015), op cit, pars 36 and 37.

¹¹⁶ Bielefeldt (2015), op cit, par 13. This is relevant to the school chaplaincy programme referred to below at 8.7.3.

exemption must not lead to any punitive consequences and must not influence the assessment of the general performance of students in school. ...

49. "Religious instruction" given in school differs conceptually from "information about religions and beliefs". While religious instruction aims to familiarize students with a particular faith, information about religions and beliefs serves the purpose of broadening children's knowledge and understanding of the diversity of faith systems and practices. Unlike religious instruction, which should never be given against the will of the child or his or her parents, information about religions and beliefs can become part of the mandatory curriculum, provided it is taught in a spirit of fairness and neutrality.¹¹⁷

- 8.7 These principles are very similar to those espoused by the Victorian and NSW *Religions in School* organisation.¹¹⁸ Bielefeldt adds, following the *Toledo Principles*, that education about religions and beliefs should be of high quality, based on solid research, and take into account internal diversity within various religions.¹¹⁹ As the first of the *Principles* states: "students should learn about religions and beliefs in an environment respectful of human rights, fundamental freedoms and civic values."¹²⁰

9. Australia's international obligations in relation to the rights of children

- 9.1 Australia is a party to the *UN Convention on the Rights of the Child (CRC)* and will appear before the United Nations Committee on the Rights of the Child in August 2019. The four core principles which guide the interpretation and implementation of all CRC rights are the principles of:

- non-discrimination,
- devotion to the best interests of the child;
- the right to life, survival and development; and
- respect for the views of the child.

- 9.2 The principle of non-discrimination has been identified by the UN Committee on the Rights of the Child (UNCRC) as a general principle of fundamental importance to the implementation of the whole CRC. The UNCRC, when considering the right to health has also stated:

"In order to fully realize the right to health for all children, States parties have an obligation to ensure that children's health is not undermined as a result of discrimination, which is a significant factor contributing to vulnerability. A number of grounds on which discrimination is proscribed are outlined in article 2 of the Convention, including the child's, parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. These also include sexual orientation, gender identity and health status."¹²¹

- 9.3 Any law which heightens the risk of harm to children is therefore clearly counter to the principles established in the CRC¹²² and consequently inconsistent with Australia's international legal obligations.

¹¹⁷ Bielefeldt (2015), op cit, pars 48 and 49, recommending the Toledo Guiding Principles on Teaching about Religions and Beliefs in Public Schools (<http://www.osce.org/odihr/29154>) as a useful instrument for assessing and improving the quality of religious education teaching.

¹¹⁸ <http://religionsinschool.com>

¹¹⁹ Bielefeldt (2015), op cit, par (i), page 21.

¹²⁰ First Key Principle, Toledo Guiding Principles on Teaching about Religions and Beliefs in Public Schools (<http://www.osce.org/odihr/29154>, p 16.

¹²¹ UN Committee on the Rights of the Child (CRC), General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), 17 April 2013, CRC/C/GC/15, available at: <http://www.refworld.org/docid/51ef9e134.html>.

¹²² UNICEF op cit.

- 9.4 Further, as mentioned in Section 2, Australia's international obligations under the *Universal Declaration of Human Rights* (UDHR), the *International Covenant on Civil and Political Rights* (ICCPR), the *International Covenant on Economic, Social, and Cultural Rights* (ICESCR), and the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) apply to Australia's children. These instruments establish that all students have:
- the right to protection from mental or physical harm;
 - the right to freedom from discrimination based on their sexual orientation or gender identity;
 - the right to an education; and
 - the right to freedom of expression.
- 9.5 Article 29 of the CRC firmly establishes Australia's obligation to ensure that Australian schools promote, support and protect the core value of the CRC: the human dignity innate in every child and his or her equal and inalienable rights, taking into account the child's special developmental needs and diverse evolving capacities.
- 9.6 The ICCPR and the CRC guarantee children and adolescents the right to freedom of expression - a right which encompasses the "freedom to seek, receive, and impart information and ideas of all kinds."¹²³ The United Nations Human Rights Committee (**UNHRC**) has confirmed that States may not show less respect for this right on the basis of a person's status as a child or adolescent.¹²⁴
- 9.7 Australia has therefore committed to taking all appropriate measures to ensure children are protected against all forms of discrimination, irrespective of their gender or sexuality. In ALHR's submission, laws which allow faith-based educational institutions to discriminate against staff or students are counter to the human rights framework established by the rules based international legal order.
- 9.8 Australia has also agreed to be bound by the *International Labour Organization Convention No. 111* (ILO 111). This international agreement prohibits discrimination in employment on the grounds of race, colour, sex, religion, political opinion, national extraction and social origin. Parties to this convention can include additional grounds for domestic purposes, and in 1989 Australia added several grounds including 'sexual preference'.¹²⁵
- 9.9 LGBTI youth remain amongst some of our most vulnerable to abuse, harassment and violence. A La Trobe University study of 3,134 same-sex-attracted and gender questioning young people, *Writing Themselves In 3*, found that:
- 10% of young people reported that their school did not provide any form of Sexuality Education at all;
 - 40% attended a school with no social or structural support features for sexual difference;
 - only 19% of young people attended a school that was supportive of their sexuality; and
 - over a third described their school as homophobic.¹²⁶

¹²³ ICCPR, art. 19(2); Convention on the Rights of the Child, art. 13(1).

¹²⁴ General Comment 17, Rights of the Child (Article 24), para. 2, Human Rights Committee, 35th sess., 1989, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1, p. 23 (1994).

¹²⁵ Australian Human Rights Commission Act 1986 (Cth), Schedule 1 and see <https://www.humanrights.gov.au/publications/section-4-human-rights-and-discrimination-basis-sexual-orientation-or-gender-identity>

¹²⁶ Hillier, L., Jones, T., Monagle, M., Overton, N., Gahan, L., Blackman, J., & Mitchell, A. 2010. *Writing themselves in 3: The third national study on the sexual health and wellbeing of same sex attracted and gender questioning young people*, 79.

- 9.10 A survey of 564 LGBTI individuals in 2015 by the Bully Zero Australia Foundation reported that:
- over 50% of same-sex-attracted or gender diverse young people in Australia have experienced verbal abuse;
 - over 15% of same-sex-attracted or gender diverse young people in Australia have experienced physical abuse; and
 - over 70% of these homophobic and transphobic incidents take place in schools.¹²⁷
- 9.11 In ALHR's submission, laws which allow faith-based educational institutions to discriminate against staff or students will only serve to perpetuate these kind of statistics.

10. Conclusion

We submit that there is no practical justification for faith-based exemptions to Australian anti-discrimination legislation, but much practical justification for the removal of all existing exemptions.

Similarly there is no convincing theoretical justification for faith-based discrimination, but persuasive theoretical justification for the Australian government to remain neutral in this debate and adopt a human-rights-based framework for analysing and assessing competing 'freedoms' claims with a view to minimising potential harm.

In accordance with that framework, in relation to children, no faith-based exemptions should be permitted to anti-discrimination legislation and in relation to adults, only the narrowest of employment exemptions from anti-discrimination legislation should be permitted in cases where adherence to a particular faith is essential to the performance of the relevant duties, and not merely desirable.

If you would like to discuss any aspect of this submission, please email me at: president@alhr.org.au.

Yours faithfully



Kerry Weste
President
Australian Lawyers for Human Rights

¹²⁷ Bully Zero Australia Foundation. 2017. "What is Homophobic Bullying?" <http://bzaf.org.au/homophobic-bullying/>