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12 December 2021

Committee Secretary,
Parliamentary Joint Committee on Human Rights

Dear Secretary

Religious Discrimination Bill 2021 and Related Bills

Thank you for the opportunity to make a submission to this inquiry.

I am a lecturer at the University of Tasmania with expertise in constitutional, human rights and international law. The views expressed in this submission are my expert opinion. They do not necessarily represent the views of the University of Tasmania.

Since 2016 I have undertaken comprehensive research on Australian and comparative human rights law concerning the right to manifest religion and in particular the lawfulness of religious organisations' dismissal of employees because of a breach of a faith-based rule. I have published extensively on this subject, including through submissions to the Ruddock Review Panel and in relation to both earlier drafts of this Bill. I also provided written and oral testimony to the most recent Inquiry on Religious Freedom of the Joint Standing Committee on Foreign Affairs, Defence and Trade.

I am the co-author of a peer reviewed article published in a special edition of the *Australian Law Journal* edited by Professor Patrick Parkinson. That article demonstrates that broad exceptions from prohibitions on discrimination for religious organisations, such as those in the *Sex Discrimination Act* 1984 - and in this Bill - are inconsistent with Australia's international human rights obligations. The article is attached below.

The exemptions for religious organisations in this Bill are similar to those found in the previous drafts of this Bill. I will not repeat my earlier analysis of the multiple inconsistencies of those provisions with Australia's international human rights obligations. My submissions on the earlier versions of the Bill are attached below.

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International human rights jurisprudence shows that any exemptions from discrimination law must be narrowly tailored to ensure a careful balancing of all relevant rights. In particular, human rights jurisprudence shows that a balanced protection of human rights cannot support laws that allow religious organisations to dismiss employees on the basis of their sex or sexual orientation. This is because these attributes are held to be particularly vulnerable grounds of discrimination. Dismissal by religious organisations of employees on other grounds, such as divorce or extra-marital sexual relations, may only be permitted in a narrow set of circumstances where the religious organisation's right to maintain its institutional autonomy through enforcing religious rules is carefully balanced against the impact of any dismissal on the employee's rights to work, privacy and family life. While my research has focussed on the right of persons employed by religious organisations, similar arguments apply to discrimination by religious organisations against customers, students or other recipients of its services.

For this reason, provisions in the Bill providing wide exceptions for religious organisations are inconsistent with international human rights law. The references in the Bill to the provisions of the *Sex Discrimination Act 1984* do not 'save' these provisions, because - as shown in Australian Law Journal article mentioned above -the *Sex Discrimination Act* exceptions are themselves inconsistent with international law.

Identical arguments to mine have been made in the omnibus submissions of other Australian human rights experts, including the Australian Human Rights Commission, the Australian Discrimination Law Experts Group, the Public Interest Advocacy Centre and Equality Australia as well as by other constitutional and human rights academics.

The Government has apparently responded to these submissions by inserting section 66 into the current Bill. Section 66, through some cross referencing, has the effect of removing reliance on the external affairs power for the constitutional validity of the Bill's exemptions for religious organisations. Instead, reliance is placed on the corporations' power and some other legislative powers in section 51 of the Constitution.

While the corporations' power may provide sufficient constitutional support for these exceptions, that is not the end of the matter. Enacting the exceptions for religious organisations, as currently drafted, into law would involve Parliament knowingly and directly legislating for Australia to breach its international obligations.

Such a step by Parliament would be inconsistent with the fundamental constitutional principle of the rule of law, a principle with foundations deeply embedded in the Westminster system of government. A statute containing provisions directly in breach of Australia's international treaty obligations would seriously undermine respect for the legitimacy of Parliament as well as Australia's efforts to ensure that other nations abide by legal rules. It would also potentially expose Australia to international legal actions and criticism. The international jurisprudence has

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become clearer since the time of the enactment of the *Sex Discrimination Act* and so both the exemptions in that Act and in the Bill should be removed.

I urge this Committee to look closely at the freedom to manifest religion in its application to religious organisations, and to recommend that the Bill be amended to remove the wide exceptions from prohibitions on discrimination provided to these organisations.

Yours sincerely,

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Religious Schools and Discrimination against Staff on the Basis of Sexual Orientation: Lessons from European Human Rights Jurisprudence

Anja Hilkemeijer and Amy Maguire*

The Sex Discrimination Act 1984 (Cth) (SDA) allows religious schools to discriminate against staff and contractors on the basis of their sexual orientation, as well as a range of other grounds, in order to "avoid injury to religious susceptibilities". These provisions are inconsistent with international human rights law – as expressed in the jurisprudence of the European Court of Human Rights – for several reasons. First, the wording is impermissibly vague. Second, the provisions fail to take into account that the nature of the work is relevant in determining whether a staff member is subject to a heightened duty of loyalty. Finally, the provisions do not incorporate a balancing of staff and contractors' rights against those of the religious school. To bring federal law in to line with international human rights law the broad exemption in s 38 of the SDA needs to be replaced with one that allows for a careful balancing of all rights in each individual case. The article ends by highlighting some legislative models that provide a balance between religious schools' right to religious institutional autonomy and employees' rights to equality, privacy and family life.

INTRODUCTION

The leaking of the Ruddock Panel's *Religious Freedom Review* recommendations in October 2018[1] brought to national attention the issue of religious schools' ability – under s 38 of the *Sex Discrimination Act 1984* (Cth) (*SDA*) – to discriminate in "good faith" against staff, contractors and students on a range of grounds in order "to avoid injury to the religious susceptibilities of adherents to that religion or belief". The controversy that ensued led to proposals to remove these exemptions, including by Greens Senator Richard Di Natale, who almost immediately introduced into the Senate the *Discrimination Free Schools Bill 2018* (Cth).[2] Debate on the issue dominated the remaining sessions of the Federal Parliament and, after a brief public inquiry, the Senate Legal and Constitutional Affairs References Committee issued its report on *Legislative Exemptions That Allow Faith-based Educational Institutions to Discriminate against Students, Teachers and Staff* (November 2018 Report).[3] In this report, Senators on opposing sides of the debate each claimed that their position is supported by international human rights law. This article evaluates these claims in relation to just one aspect of the Di Natale's Bill, namely the proposed

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[1] Fairfax Media, "Read the Full 20 Recommendations from the Religious Freedom Review", *The Sydney Morning Herald*, 12 October 2018 <https://www.smh.com.au/politics/federal/read-the-full-20-recommendations-from-the-religious-freedom-review-20181011-p50918.html>.

[2] *Discrimination Free Schools Bill 2018* (Cth).

[3] Legal and Constitutional Affairs References Committee, Parliament of Australia, *Legislative Exemptions That Allow Faith-based Educational Institutions to Discriminate against Students, Teachers and Staff* (26 November 2018) (November 2018 Report).

removal of the ability of religious schools[4] to discriminate in relation to staff and contractors on the basis of their sexual orientation. Proposals to remove exemptions for religious schools in their entirety, including as they relate to students, are beyond the scope of this article.

The article has three parts. The first provides necessary background to the debate. The second shows that the exemptions in s 38(1) and (2) of the *SDA* are inconsistent with the jurisprudence of the European Court of Human Rights (ECtHR). An analysis of ECtHR jurisprudence is pertinent because Coalition Senators have sought to rely on it to justify retaining s 38.[5] Further, the protection of religious freedom provided by Art 9 of the *European Convention on Human Rights*[6] is similar to that of Art 18 of the *International Covenant on Civil and Political Rights* (*ICCPR*) to which Australia is a party.[7] The ECtHR is also widely regarded as the world's most sophisticated human rights court.[8] The third part of the article considers the impact of this analysis on the debate regarding religious schools' exemptions from the *SDA* and suggests ways to bring the *SDA* into line with international human rights law. We demonstrate that there are legislative models available in various jurisdictions that balance religious schools' right to religious institutional autonomy with the rights of staff and contractors to equality, privacy and family life.

I. Background

Discrimination law in Australia is extraordinarily complex, not only because statutory frameworks contain a wide range of prohibitions and exemptions, but also because State and Territory discrimination statutes operate – each with slight variations – in parallel with federal law. Sexual orientation, gender identity and intersex status were added as protected attributes to the *SDA* by amendment in 2013.[9] Section 37(1)(a), (b) and (c) of the *SDA* contains exemptions for religious bodies, including in relation to the training and appointment of priests, ministers of religion and members of a religious order. In addition, s 37(1)(d) provides a broad exemption in relation to any other 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 to that religion". Section 38 provides additional express exemptions for educational institutions established for religious purposes in relation to staff, contractors and students in order to avoid injury to "the religious susceptibilities of adherents of that religion or creed". Section 351(2)(c) of the *Fair Work Act 2009* (Cth) contains a similar exemption from anti-discrimination provisions in relation to staff members of religious institutions.

The issue of discrimination on the basis of sexual orientation has been politically contested at the federal level since 1997 when the Senate Legal and Constitutional Affairs Committee *Inquiry into Sexuality Discrimination* recommended expanding the protection of the *SDA* to prohibit discrimination on the basis of sexual orientation as well as other grounds.[10] Since that time there have been numerous inquiries in which conservative Christian church leaders, academics and lobby groups have opposed changes that might weaken or remove exemptions for religious organisations.[11] Such inquiries are increasing

[4] The exemptions in *Sex Discrimination Act 1984* (Cth) s 38 apply to any "educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed". The focus of this article is on religious schools but the exemptions apply equally to tertiary educational institutions conducted in this way.

[5] November 2018 Report, n 3, 64, 74–76.

[6] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5 <https://www refworld.org/docid/3ae6b3b04.html>.

[7] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 <https://www.refworld.org/docid/3ae6b3aa0.html>.

[8] See, eg, Justice Michael Kirby, *The Australian Debt to the European Court of Human Rights* <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_apr06.pdf>.

[9] *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth).

[10] Legal and Constitutional Affairs Committee, Parliament of Australia, *Inquiry into Sexuality Discrimination* (December 1997).

[11] Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Exceptions and Exemptions to the Equal Opportunity Act 1995* (November 2009); Legal and Constitutional Affairs Committee, Parliament of Australia, *Effectiveness of the Sex*

in frequency and duration. Ongoing at the time of writing, the Joint Standing Committee on Foreign Affairs, Trade and Defence *Inquiry into the Status of the Human Right to Freedom of Religion or Belief* commenced in November 2016, received 411 submissions, held seven days of public hearings and issued two interim reports.[12] The Ruddock Panel *Inquiry into Religious Freedom* established by (then) Prime Minister Turnbull in late 2017 received more than 15,500 submissions and held 19 days of hearings.[13] On 10 April 2019 the Commonwealth Attorney-General released the terms of reference for the Australian Law Reform Commission (ALRC) to inquire into the framework of religious exemptions in Commonwealth, State and Territory anti-discrimination legislation.[14] The ALRC is to report on this reference by 11 April 2020.

What is striking about the November 2018 Report in relation to Senator Di Natale's *Discrimination Free Schools Bill 2018* is that, even in the absence of a federal human rights charter, each side claims that international human rights law supports their position. While submissions to earlier inquiries made some reference to freedom of religion, the November 2018 Report – perhaps building on the emphasis placed on international human rights law in submissions to the Foreign Affairs, Defence and Trade committee inquiry and the Ruddock Panel inquiry – made extensive reference to religious freedom as part of the wider framework of human rights law.

The majority committee report of the November 2018 Report, supported by Australian Labor Party and Australian Greens Senators, notes that the "debate regarding legislative exemptions in the *SDA* … takes place within a broader human rights context"[15] and concludes that "existing exemptions do not strike the right balance between the right to religious freedom and other rights, such as the right to equality and non-discrimination".[16] Liberal National Coalition Senators, in their dissenting report, state that the Di Natale's Bill "must be considered with reference to the applicable international human rights"[17] and that removing s 38 of the *SDA* would "[limit] human rights in a way that is not permissible in international law".[18]

The majority committee report identifies a number of human rights – including equality, freedom from discrimination and privacy – that are limited by the religious schools' ability to discriminate against staff and contractors.[19] The majority report accepts that enabling religious schools to uphold their religious "ethos" is a legitimate aim but concludes that the evidence as to whether exemptions from anti-discrimination law are necessary to achieve that aim is "mixed".[20] In terms of the nature and extent of the impact of religious schools' ability to discriminate on the basis of rights to equality and privacy, the

Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality (12 December 2008); Legal and Constitutional Affairs Committee, Parliament of Australia, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (21 February 2013); South Australian Law Reform Institute, *"Lawful Discrimination": Exceptions under the Equal Opportunity Act 1984 (SA) to Unlawful Discrimination on the Grounds of Gender Identity, Sexual Orientation and Intersex Status* (June 2016); Foreign Affairs, Defence and Trade Committee, Parliament of Australia, *Inquiry into the Status of the Human Right to Freedom of Religion or Belief* (First Interim Report, November 2017); Expert Panel to Examine Religious Freedom Protection in Australia, *Religious Freedom Review* (18 May 2018).

[12] Foreign Affairs, Defence and Trade Committee, Parliament of Australia, n 11, Foreign Affairs, Defence and Trade Committee, Parliament of Australia, *Inquiry into the Status of the Human Right to Freedom of Religion or Belief* (Second Interim Report, April 2019).

[13] Department of the Prime Minister and Cabinet, *Religious Freedom Review* <https://www.pmc.gov.au/domestic-policy/religious-freedom-review>.

[14] Attorney-General for Australia, the Hon Chris Porter, "Review into the Framework of Religious Exemptions in Anti-discrimination Legislation" (Media Release, 10 April 2019) <https://www.attorneygeneral.gov.au/Media/Pages/Review-into-the-Framework-of-Religious-Exemptions-in-Anti-discrimination-Legislation-10-april-19.aspx>.

[15] November 2018 Report, n 3, 22.

[16] November 2018 Report, n 3, 52–53.

[17] November 2018 Report, n 3, 57.

[18] November 2018 Report, n 3, 57.

[19] November 2018 Report, n 3, 21, 25.

[20] November 2018 Report, n 3, 52.

majority report refers to the "stress and fear" experienced by employees as a result of the existence of the exemptions.[21] In making a number of recommendations in support of the enactment of the *Discrimination Free Schools Bill 2018*, the majority report concludes that "existing exemptions do not strike the right balance between the right to religious freedom and other rights, such as the right to equality and non-discrimination".[22] However, no detailed balancing of these competing rights is undertaken, nor does this report clearly identify and evaluate the purpose of the particular prohibitions and exemptions under the *SDA* or address the question of the proportional limitations of such rights.

Coalition members of the Senate Committee, in rejecting the majority committee report, argue that the Di Natale's Bill is inconsistent with relevant international law.[23] They make several claims by reference to international human rights law. One is that the Di Natale's Bill, by removing s 38 of the *SDA*, fails to comply with the international human rights requirement that the right to religious belief may only be limited to the extent necessary to protect "fundamental rights and freedoms of others".[24] Coalition senators argued that removing s 38 would "extinguish"[25] or lead to the "complete removal"[26] of religious freedom and the religious identity of private religious schools.[27] These effects, it is argued, outweigh the impact of discrimination on staff members who (quoting an Institute for Civil Society submission) "have many other options for employment".[28]

This article builds on the work of John Tobin in analysing the Attorney-General of Victoria's response to the 2009 Victorian Scrutiny of Acts and Regulations Committee's *Inquiry into Exceptions and Exemptions to the Equal Opportunity Act 1995*. Tobin considered the *Equal Opportunity Act 1995* (Vic) that provides a similar, but slightly more restrictive, exemption to that found in s 38 of the *SDA*.[29] Tobin applied the "balancing" test set out in s 7(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and demonstrated that the removal of the Victorian religious organisation exemption "would have constituted a relatively minimal interference with the religious belief of some parents and children".[30]

A similar exercise is undertaken in this article through the application of the human rights framework of the *European Convention on Human Rights* to s 38 of the *SDA*. Not only does the *European Convention on Human Rights* largely mirror Australia's obligations under the *ICCPR*[31] but supporters of the religious school exemptions rely on the jurisprudence of the ECtHR in their argumentation. In the November 2018 Report Coalition Senators stressed that:

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[21] November 2018 Report, n 3, 52.

[22] November 2018 Report, n 3, 52–53.

[23] November 2018 Report, n 3, 57.

[24] November 2018 Report, n 3, 60–61.

[25] November 2018 Report, n 3, 62.

[26] November 2018 Report, n 3, 64.

[27] November 2018 Report, n 3, 76.

[28] November 2018 Report, n 3, 63.

[29] *Equal Opportunity Act 2010* (Vic) s 83.

[30] John Tobin, "Should Discrimination in Victoria's Religious Schools Be Protected? Using the Victorian Charter of Human Rights and Responsibilities Act to Achieve the Right Balance" (2010) 36(2) Monash LR 16, 48.

[31] In line with the approach of the ECtHR, the UN Human Rights Committee, in *Delgado v Colombia*, 1990 held that a Catholic organisation could dismiss a teacher of religion who adhered to an aberrant doctrine. A comparative analysis of the approach of courts in countries that apply a human rights framework based on the *ICCPR* is beyond the scope of this article. Note, however, that courts in such countries employ a balancing exercise similar to that described in this article. For example, the South African Equality Court in *Johan Daniel Strydom v Nederduitse Gereformeerde Kerk Moreleta Park* 27 August 2008 (26926/05) [2008] ZAGPHC 269; (2009) 30 ILJ 868 (EqC) held that a religious organisation's dismissal of a gay music teacher in an adult education program was discriminatory. Similarly, the UK Employment Appeal Tribunal in *Gan Menachem Hendon Ltd v Ms Zelda De Groen* (UKEAT/0059/18/OO, 12 February 2019) held that a Jewish kindergarten's dismissal of a teacher in a de facto relationship discriminated on the basis of sex. The Canadian Supreme Court has not considered the validity of laws which permit religious schools to dismiss staff who breach religious precepts in their private lives in light of the equality provisions in the Canadian Chart of Rights and Freedoms: Bethany Hastie and Margot Young, "The Legal Conflict between Equality Rights and Freedom of Religion", *The Conversation*, 4 April 2019.

> [D]ecisions of the European Court of Human Rights are highly influential in the jurisprudence of the United Nations Human Rights Committee and the provisions of the *European Convention on Human Rights* bear strong analogy to the *ICCPR*, particularly article 9 concerning freedom of thought, conscience and religion.[32]

II. Section 38 of the SDA Is Inconsistent with ECtHR Jurisprudence

Dismissal or less-favourable treatment by a religious school of a member of staff or contractor on the basis of their sexual orientation, in accordance with s 38 of the *SDA*, may interfere with rights to privacy, family life and equality.[33]

In relation to interference with privacy and family life, the ECtHR's analysis involves three questions. First, whether the interference is "in accordance with the law", second whether it is in pursuit of a "legitimate aim" and third whether it is "necessary in a democratic society". The latter involves the "balancing of the right to enjoy private and family life with the state's duty to protect the autonomy of the church" and takes into account a range of factors.[34] Regarding claims of discrimination,[35] the ECtHR applies a similar methodology. Where there has been a difference in treatment of a person compared to another in a sufficiently analogous position, the Court inquires whether the different treatment has a reasonable and objective justification. The latter involves two sub-questions namely, whether the difference in treatment pursues a "legitimate aim" and whether there is a reasonable relationship of proportionality (ie balancing) between the means used and the aim pursued.[36]

Both methodologies require the Court to determine whether the law that permits such action pursues a legitimate aim. On this point the ECtHR is clear: protecting religious institutional authority is a legitimate goal. In a 2017 decision the Court held that "protecting the rights and freedom of others, namely those of the Catholic Church, and in particular its autonomy to choose persons accredited to teach religious doctrine" is a legitimate aim.[37] The ECtHR has also emphasised that religious institutional autonomy is "indispensable for pluralism in a democratic society and is at the heart of the protection afforded by Article 9 (right to freedom of thought, conscience and religion)".[38]

The next sections will examine whether s 38 of the *SDA* would satisfy the requirements that (1) the interference with the right to privacy and family life is in "accordance with the law"; and (2) "necessary in a democratic society". The final section in this part relates to the right to equality and will consider whether, in relation to the difference in treatment of staff on the basis of their sexual orientation, the ECtHR is likely to find that there is a "reasonable relationship of proportionality" between the aim of maintaining religious institutional autonomy and the means used to secure it.

A. Limitations on Rights Must Be in Accordance with the Law

As stated above, any interference with human rights must be "in accordance with the law". De Schutter explains that this condition of "legality" requires that laws limiting rights be sufficiently precise to avoid

[32] November 2018 Report, n 3, 74.

[33] The right to respect for private and family life includes "sexual life": *Dudgeon v the United Kingdom* (European Court of Human Rights, Application No 7525/76, 22 October 1981); *Smith and Grady v the United Kingdom* (European Court of Human Rights, Application Nos 33985/96 and 33986/9627 September 1999). For discriminatory treatment on the basis of sexual orientation see *L and V v Austria* (European Court of Human Rights, Application Nos 39392/98 and 39829/98, 9 January 2003).

[34] *Travas v Croatia* (European Court of Human Rights, Second Section, Application No 75581/13, 4 October 2017) [75]–[113].

[35] The ECtHR does not hear stand-alone claims of discrimination but only if raised in conjunction with a claim based on another substantive right. See discussion in P van Dijk et al (eds), *Theory and Practice of the European Convention on Human Rights* (Intersentia, 5th ed, 2018) 999–1001.

[36] Van Dijk et al, n 35, 1014.

[37] *Travas v Croatia* (European Court of Human Rights, Second Section, Application No 75581/13, 4 October 2017) [86]; See also United Nations Human Rights Committee, *Delgado v Colombia* (1990) <http://opil.ouplaw.com/view/10.1093/law:ihrl/1701unhrc90.case.1/law-ihrl-1701unhrc90>.

[38] *Siebenhaar v Germany* (European Court of Human Rights, Grand Chamber, Application No 18136/02, 3 February 2011) [41]; *Obst v Germany* (European Court of Human Rights, Fifth Section, Application No 425/03, 23 September 2010) [44].

a "chilling effect" and the risk of arbitrariness.[39] The *Siracusa Principles*, relied on by Coalition Senators in the November 2018 Report,[40] emphasise this requirement. Article 7, under the heading "General Interpretative Principles Relating to the Justification of Limitations", states that "no limitation shall be applied in an arbitrary manner".[41] Similarly, Art 16 provides that "laws imposing limitations on the exercise of human rights shall not be arbitrary or unreasonable" and Art 17 further requires that "legal rules limiting the exercise of human rights shall be clear and accessible to everyone".

Section 38(1) and (2) of the *SDA* can be invoked by a person who discriminates in good faith in order to "avoid injury to religious susceptibilities". This is an imprecise test. Evans notes that "the exceptions are drawn rather widely and include quite vague terms, such as 'religious susceptibilities', that are only loosely connected with religious freedom".[42] The Ruddock Panel recommendation that religious schools have a publicly available and transparent policy on discrimination[43] would, if adopted, improve clarity and transparency but may nevertheless leave uncertain the precise circumstances in which the power to discriminate can be legitimately exercised. If the publicly available policy merely refers to conduct that injures "religious susceptibilities" there is unlikely to be sufficient clarity introduced to remedy this situation.

For these reasons, s 38(1) and (2) of the *SDA* fall short of the "legality" requirement of international human rights law.

B. Scope of the Right to Religious Institutional Autonomy

The next step is to determine whether the limitations on the right to privacy and family life are necessary in a democratic society. In cases of conflicts of rights answering, a balancing of the respective rights is required to determine necessity. This requires an understanding of the nature and scope of the rights. While it is clear that "sexual life" and same-sex relationships are protected as part of the right to privacy and family life,[44] the scope of the right to religious institutional autonomy is less well known. This section explains the ECtHR's treatment of the nature of the right to religious institutional autonomy, which informs its analysis in balancing that right against other rights.

As pointed out by Coalition Senators in the November 2018 Report, international human rights jurisprudence requires states to permit the establishment of appropriate religious organisations[45] as well as to protect church autonomy over the appointment of religious leaders and rules governing monastic life.[46]

What else does the right to religious institutional autonomy encompass? In the leading case of *Fernandez v Spain* (*Fernandez*), the ECtHR drew a distinction between members of a religious community (including ministers or priests) and those individuals who are employees of that organisation.[47] In relation to members of a religious community adherence to the moral precepts of the religion may be expected. The ECtHR's position, consistent with the right to freely choose a religion, is that the remedy for a church member who objects to its rules is to leave that community.[48] In relation to *employees* of a religious

[39] Olivier De Schutter, *International Human Rights Law* (CUP, 2nd ed, 2014) 347.

[40] November 2018 Report, n 3, 62.

[41] UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4.

[42] C Evans, *Legal Protection of Religious Freedom in Australia* (The Federation Press, 2012), 169.

[43] Expert Panel to Examine Religious Freedom Protection in Australia, n 11, 2, Recommendation 7.

[44] See November 2018 Report, n 3, 74.

[45] *Sisters Immaculate Joseph v Sri Lanka*, *Communication No 1249/2004*, UN Doc CCPR/C/85/D/1249/2004 (2005), quoted by Coalition Senators in November 2018 Report, n 3, 58.

[46] UN General Assembly, Elimination of All Forms of Religious Intolerance, 7 August 2013, A/68/290 quoted by Coalition Senators in November 2018 Report, n 3, 59.

[47] *Fernandez v Spain* (European Court of Human Rights, Grand Chamber, Application No 56030/07, 12 June 2014) [127], [130].

[48] Van Dijk et al, n 35, 752.

organisation, the position is different. According to the ECtHR, as far as employees are concerned "religious communities can demand a certain degree of loyalty".[49] The "specific mission" assigned to the person is a "relevant consideration in determining whether they should be subject to a heightened duty of loyalty" and the nature of the post occupied is an "important element to be taken into account when assessing proportionality".[50] This confirms the Court's earlier decision in *Schüth v Germany* (*Schüth*) where it held that the Court must carefully identify the extent of the proximity between the nature of the position and the mission of the organisation.[51]

In its most recent decision on this issue in the case of *Travas v Croatia* (*Travas*), the ECtHR unanimously held that "lifestyle may be a particularly important issue when the nature of the applicant's professional activity [*lay teacher of Catholicism*] results from an ethos founded in the religious doctrine aimed at governing the private life and personal beliefs of its followers".[52] Thus, a "heightened duty of loyalty" may be expected from key employees. For example, employees who publicly represent the organisation such as the European Director of the Public Relations Department of the Church of Jesus Christ of Latter Day Saints could be dismissed on grounds of adultery.[53] Similarly, religious education teachers in high schools could be dismissed for failure to comply with church doctrine on celibacy or divorce,[54] and a physician in a Catholic hospital could be dismissed for speaking up in a public campaign to legalise abortion contrary to the doctrine of the Catholic Church.[55] On the other hand, a church organist and choirmaster "was not bound by heightened duties of loyalty" and, given it would be difficult for him to find employment elsewhere, the interests of the church did not justify interference with the organist's private life.[56]

According to the ECtHR, religious institutions can expect a high degree of loyalty from persons it employs to teach its religious doctrine. This can be explained in terms of the protected right to manifest religion in Art 9 of the *European Convention on Human Rights* and Art 18 of the *ICCPR*, which expressly includes a right to "teach" a religion or belief. This is consistent with the interpretation of Art 18 of the *ICCPR* by the UN Human Rights Committee. In its General Comment 22, the Committee explains the scope of the right to practice and teach religion as "acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications".[57]

Since the right to manifest religion expressly protects the right to teach religion, the ECtHR has held that religious organisations may expect a high level of loyalty from persons employed to teach religion. However, employees of religious organisations such as administrators, teachers of non-religious subjects, gardeners and bus drivers, are less likely to owe a heightened duty of loyalty that extends to living their private lives in accordance with religious precepts. This is consistent with the views of Evans and Gaze who conclude that while the "selection and training of clergy, the language and symbolism of ritual, and the determination of membership of the religious community" are core religious activities, the "hiring of staff in religiously run hospitals, schools and other institutions" is more peripheral.[58]

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[49] *Fernandez v Spain* (European Court of Human Rights, Grand Chamber, Application No 56030/07, 12 June 2014) [130].

[50] *Fernandez v Spain* (European Court of Human Rights, Grand Chamber, Application No 56030/07, 12 June 2014) [130].

[51] *Schüth v Germany* (European Court of Human Rights, Fifth Section, Application No 1620/03, 23 September 2010) [69].

[52] *Travas v Croatia* (European Court of Human Rights, Second Section, Application No 75581/13, 4 October 2017) [98].

[53] *Obst v Germany* (European Court of Human Rights, Fifth Section, Application No 425/03, 23 September 2010).

[54] See *Fernandez v Spain* (European Court of Human Rights, Grand Chamber, Application No 56030/07, 12 June 2014); *Travas v Croatia* (European Court of Human Rights, Second Section, Application No 75581/13, 4 October 2017).

[55] *Rommelfanger v Germany*, Application No 12242/86, 6 September 1989, Decisions and Reports, DR 62.

[56] *Schüth v Germany* (European Court of Human Rights, Fifth Section, Application No 1620/03, 23 September 2010) [71], [74].

[57] Human Rights Committee, *General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion)* 48th Sess, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993).

[58] Carolyn Evans and Beth Gaze, "Between Religious Freedom and Equality: Complexity and Context" (2008) 49 Harv Int LJ 40, 47.

The limited nature of the duty of loyalty of even senior employees whose work is not close to the religious mission of the organisation, was endorsed by the European Court of Justice in October 2018,[59] with the German Federal Labor Court following suit in February 2019.[60] These courts held that a chief physician employed by a Catholic hospital could not be dismissed for breach of the duty of loyalty on the ground that he had remarried without obtaining an annulment by the church of his first marriage. The work of the chief physician was confined to the provision of health care and involved no spiritual components. Similar health care was provided in the hospital by Protestant doctors who were not required to comply with the rules of the Catholic Church regarding marriage and divorce.

In the case of *Siebenhaar v Germany* the ECtHR permitted a Protestant congregation to dismiss a teacher employed in the management of a kindergarten[61] who was an active member of a minority religion (the Universal Church).[62] The applicant's earlier membership of the Catholic Church had not been problematic. The ECtHR held that by:

> declaring her intention to help build the foundation on which the "victorious" Universal Church would set itself to occupy the highest rank in a new and enduring era, the applicant clearly demonstrated her intention to support the efforts and mission of the Universal Church and to place it above other churches.[63]

What also weighed in the balance was the fact that Ms Siebenhaar was not "a passive member" of the Universal Church but "was advertising for it outside and even offered introductory courses"[64] and had pledged "unswerving obedience to the wishes of the leaders of the Universal Church".[65] The Court also referred to the "incompatibility of the teachings and objectives of the Universal Church with the basic principles and specific objectives of the Protestant Church (particularly on the subjects of reincarnation and recognition of spiritual teachers of other religions)".[66] Finally, the Court considered that Ms Siebenhaar had worked for the school for only a relatively short time (less than 20 months).[67]

The ECtHR held that in these circumstances the "bonds of loyalty" imposed on Ms Siebenhaar by the Protestant congregation were acceptable.[68] While this decision related to actions of an employee outside of work, it concerned dismissal on the basis of incompatible religious beliefs and activity (ie close to the core of the right to freedom of religion) by a teacher and manager of a kindergarten with general responsibility for all aspects of the education and welfare of young children. This case is therefore quite different from cases where a religious school dismisses an employee or contractor for failure to adhere to a particular sexual orientation or rules of sexual morality.

Section 38(1) and (2) of the *SDA*, by providing the ability to discriminate in relation to any employee or contractor on the basis of their sexual orientation where this is necessary to avoid injury to the religious susceptibilities of the adherents of the religion, reaches beyond what is permitted by ECtHR jurisprudence. It allows an employee or person working under a contract to be dismissed on the basis of their sexual orientation, no matter how far removed the nature of their work is from the mission of the religious organisation.

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[59] Judgment of the *IR v JQ* (European Court of Justice, Grand Chamber, Case C-68/17, 11 September 2018), following its earlier reasoning in *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung* (Case C-414/16, 17 April 2018).

[60] Bundesarbeitsgericht, [Federal Labour Court], 2 AZR746/14, 20 February 2019.

[61] See Press Release of the European Court of Human Rights 2 February 2011 <file:///Users/anjah1/Desktop/Chamber%20judgment%20Siebenhaar%20v.%20Germany%2003.02.11.pdf>.

[62] *Siebenhaar v Germany* (European Court of Human Rights, Grand Chamber, Application No 18136/02, 3 February 2011).

[63] *Siebenhaar v Germany* (European Court of Human Rights, Grand Chamber, Application No 18136/02, 3 February 2011) [14].

[64] *Siebenhaar v Germany* (European Court of Human Rights, Grand Chamber, Application No 18136/02, 3 February 2011) [14].

[65] *Siebenhaar v Germany* (European Court of Human Rights, Grand Chamber, Application No 18136/02, 3 February 2011) [14].

[66] *Siebenhaar v Germany* (European Court of Human Rights, Grand Chamber, Application No 18136/02, 3 February 2011) [15].

[67] *Siebenhaar v Germany* (European Court of Human Rights, Grand Chamber, Application No 18136/02, 3 February 2011) [14].

[68] *Siebenhaar v Germany* (European Court of Human Rights, Grand Chamber, Application No 18136/02, 3 February 2011) [46].

C. Balancing the Right to Religious Autonomy and the Right to Privacy and Family Life

Even if a particular employee is covered by a heightened duty of loyalty, the church cannot make "unreasonable demands of loyalty".[69] Reasonableness requires a balancing of the "applicant's right to his or her private and family life, on the one hand, and the right of religious organisations to autonomy, on the other".[70] The ECtHR requires that a range of factors be taken into account in determining whether the dismissal is reasonable in all the circumstances of the case. For example, in the case of *Travas* – involving the dismissal of a lay teacher of Catholicism for remarrying without first obtaining a church annulment – the ECtHR in concluding that the dismissal was reasonable took into account the status of the applicant, the public exposure of the applicant's situation and the severity of the sanction of dismissal.[71]

The exemptions in s 38(1) and (2) are not expressed to require any balancing of rights, but are qualified only by the requirement that the discrimination be undertaken in good faith in order to avoid injury to "religious susceptibilities". There are two key points in relation to this balancing exercise, and these are discussed below.

1. Risk to Church Autonomy Must Be "Probable and Substantial"

In terms of the interests of the religious body, the ECtHR in *Fernandez* held that the risk to the church's autonomy in the particular case must be "probable and substantial".[72] The ability to discriminate provided by s 38(1) and (2) of the *SDA* is broadly framed, and does not include a requirement for a religious school to demonstrate any risk to its institutional autonomy. In other words, these sections allow a religious school to dismiss a teacher on the ground of their sexual orientation where the sexual orientation of that teacher has no negative impact on the church's ability to teach its religious doctrine.

In the political debate on this issue – including in the November 2018 Report – those who supported retention of s 38(1) and (2) made general claims about the risk of harm to religious schools as a group. Not only is such a broad approach to evaluating harm not consistent with a human rights approach – including as applied by the ECtHR – but it cannot be sustained on the facts. No empirical evidence is provided in support of claims that the removal of s 38 would "extinguish"[73] or lead to the "complete removal" of religious freedom and the religious identity of private religious schools.[74] Nor is evidence provided for claims of harm to the human dignity of religious individuals, if religious schools cannot discriminate in employment decisions.[75]

In fact, the evidence points to the contrary. We know from research conducted by Evans and Gaze that religious schools have no single viewpoint when it comes to discriminating against teachers.[76] In relation to those religious schools wishing to discriminate against staff on the basis of their sexual orientation, Tobin demonstrated that there is no empirical evidence that LGBT staff members will "contaminate the religious identity of the school" because "there are many Catholic schools within Victoria where the employment of such individuals … had no impact on the religious identity of that school let alone the existence or functioning of the school".[77]

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[69] *Rommelfanger v Germany*, Application No 12242/86, 6 September 1989, Decisions and Reports, unpaginated and un-paragraphed decision, para 3.

[70] *Fernandez v Spain* (European Court of Human Rights, Grand Chamber, Application No 56030/07, 12 June 2014) [122].

[71] *Travas v Croatia* (European Court of Human Rights, Second Section, Application No 75581/13, 4 October 2017) [88].

[72] *Fernandez v Spain* (European Court of Human Rights, Grand Chamber, Application No 56030/07, 12 June 2014) [131]. See also *IR v JQ* (European Court of Justice, Grand Chamber, Case C-68/17, 11 September 2018) [53].

[73] November 2018 Report, n 3, 62.

[74] November 2018 Report, n 3, 64.

[75] See also Greg Walsh, "The Right to Equality and Employment Decisions of Religious Schools" (2014) 16 U Notre Dame Austl L Rev 107, 130–131, claiming resulting "harm to self-respect and self-worth, and an undermining of the religious person's physical and psychological wellbeing".

[76] Carolyn Evans and Beth Gaze, "Discrimination by Religious Schools: Views from the Coal Face" (2010) 34 Melb Univ L Rev 392, 404.

[77] Tobin, n 30, 43.

2. The Possibility of Finding Other Work Must Be Separately Considered in Each Case

Supporters of s 38(1) and (2) of the *SDA* claim that these sections allow only minimal harm to staff and contractors working at religious schools because they can find employment elsewhere.[78] Walsh argues that the potential gravity of the violation of the human dignity of religious persons who run religious schools but who cannot discriminate is much greater than for those who may be excluded by employment decisions of religious schools. According to Walsh persons excluded from employment at religious schools may be able to "secure employment elsewhere".[79] The Victorian Parliament's Scrutiny of Acts and Regulations Committee 2009 inquiry – in recommending that exceptions for religious schools be retained – also asserted that "there are many alternative employers and service providers, so that allowing the religious exceptions would not, in practice, substantially narrow opportunities for people in the affected groups".[80]

The Australian Labor Party and Australian Greens Senators in the November 2018 Report made no attempt to challenge the argument that the broad exemptions in s 38 (1) and (2) are justified because school staff can readily find other work. This reasoning could have been challenged on two grounds. First, there is evidence that many qualified teachers have difficulty finding work. Of the 15,000 people graduating with teaching qualifications nationally each year, less than half are likely to find a job.[81] Given that religious schools educate more than 30% of all primary and secondary students in Australia, possible exclusion from that sector has a significant impact on teachers' ability to secure employment.[82]

Second, the "you can leave and go elsewhere" argument for employees was abandoned by the ECtHR in its 2013 judgment in *Eweida v United Kingdom* (*Eweida*).[83] In an earlier line of cases the ECtHR had found against members of minority faiths whose religious requirements clashed with the requirements of employers. The Court in these earlier cases reasoned that the employee could "take steps to circumvent a limitation placed on his or her freedom to manifest religion or belief" by "resigning from the job and changing employment".[84] In *Eweida* the Court made it clear that this reasoning is no longer determinative. Instead, it explained that in all employment cases, applying a human rights framework requires weighing up all relevant factors in the particular circumstances of the case to determine whether the limitation on rights was proportionate.[85] While the ECtHR has not considered a case of an employee dismissed by a religious organisation on the basis of their sexual orientation, logically, the same particularised balancing approach would be required in such a case: the abstract possibility of making alternate provision for employment would not be determinative of the justifiability of such a dismissal or other unfavourable treatment.

Instead, even in relation to those employees with a heightened duty of loyalty to the religious organisation (eg teachers of religion) who may be dismissed because of a breach of the religious organisation's moral precepts, the ECtHR, in considering the reasonableness of the dismissal, takes into account, among other factors, the likelihood of that complainant finding alternative employment. This particularised approach to the possibility of finding alternative employment was evident in the case of *Schüth* where difficulties for a church organist in finding suitable employment outside of the church were key to the Court's finding that his dismissal by the church on the ground of adultery was unjustifiable.[86] In contrast,

[78] November 2018 Report, n 3, 63–64.

[79] Walsh, n 75, 131.

[80] Scrutiny of Acts and Regulations Committee, Parliament of Victoria, n 11, 61.

[81] Misty Adoniou, "Should I Stay or Should I Go? The Dilemma for Unemployed Teachers", *The Conversation*, 7 January 2016 <https://theconversation.com/should-i-stay-or-should-i-go-the-dilemma-for-unemployed-teachers-52860/>.

[82] Australian Bureau of Statistics, "Schools, Australia, 2017" (Catalogue No 4221.0, 2 February 2018).

[83] *Eweida v United Kingdom* (European Court of Human Rights, Chamber, Application Nos 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013).

[84] *Eweida v United Kingdom* (European Court of Human Rights, Chamber, Application Nos 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013) [83].

[85] *Eweida v United Kingdom* (European Court of Human Rights, Chamber, Application Nos 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013) [83].

[86] *Schüth v Germany* (European Court of Human Rights, Fifth Section, Application No 1620/03, 23 September 2010).

in the case of *Travas*, the fact that a teacher of Catholicism could find other work because he was also qualified to teach the secular subject of ethics contributed to the Court's finding that his dismissal was reasonable.[87]

D. Balancing the Right to Religious Institutional Autonomy and Equality

The analysis so far is based on ECtHR cases involving interference with the rights to privacy and family life in the form of a dismissal from employment on the basis of conduct by an employee, such as adultery or remarriage contrary to church doctrine. The ECtHR has not considered a case where a staff member is dismissed on the basis of their sexual orientation. To justify the dismissal of an employee by a religious school in these circumstances would require "very weighty reasons" because sexual orientation is considered a "suspect" ground of differential treatment and only highly persuasive evidence of the need to discriminate on this ground would be accepted. The ECtHR has treated sexual orientation as a suspect ground since the 2003 case of *L and V v Austria* in which it held that "just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification".[88] In addition, the ECtHR treats sexual orientation as a particularly "vulnerable" ground and therefore any difference in treatment on this basis receives special protection.[89] The only exception to this approach relates to the right of same-sex couples to marry where the ECtHR leaves states a margin of appreciation.[90]

As shown above, in relation to activities close to the core of the right to manifest religion, such as the teaching of religious doctrine or senior leadership positions in the church, the ECtHR attached significant weight to the right to religious institutional autonomy. In those cases, the Court finds a heightened degree of loyalty (extending to compliance with religious precepts in private life) based on the proximity between the "nature of the position" and the mission of the religious organisation. It follows that the ECtHR is likely to find that there is a lesser degree of loyalty in relation to positions that involve work that is not so closely connected to the ethos founded in the religious doctrine. In the case of a dismissal of an employee or contractor on the ground of sexual orientation it is even less likely that the balance will weigh in favour of the religious organisation than it would in cases where church actions limit a person's private conduct. This is because the ECtHR requires particularly "weighty reasons" to justify a difference of treatment based on sexual orientation.

Human rights law, as applied by the ECtHR, does not permit broad exemptions from anti-discrimination law in the way that is permitted by s 38(1) and (2) of the *SDA*. Instead, discrimination on the basis of sexual orientation by religious schools has to be justified in the particular circumstances of each case and its validity will depend on (1) the degree of loyalty that can be expected in relation to the particular position held by an employee or contractor; and (2) the careful identification and balancing of competing rights and interests in all the circumstances of each case.

The same conclusion, in relation to a Victorian exception similar to s 38, was reached by the Victorian Parliamentary inquiry in its 2009 *Final Report, Exceptions and Exemptions to the Equal Opportunity Act 1995*:

> The Committee observes that as currently drafted sections 75 to 77 are broad exceptions, which protect the right to religious freedom without providing any means to consider whether any other rights may be infringed. In essence these exceptions allow freedom of religion to automatically prevail over any other rights involved. As it would appear the dominance of one right over all others may be inconsistent with the reasonable limitations test in Charter s. 7(2) that requires a balancing of equality rights and freedom of religion.[91]

[87] *Travas v Croatia* (European Court of Human Rights, Second Section, Application No 75581/13, 4 October 2017) [105].

[88] *L and V v Austria* (European Court of Human Rights, Fourth Section, Application Nos 39392/98 and 39829/98, 9 January 2003) [45].

[89] Oddný Arnardóttir, "Vulnerability under Article 14 of the European Convention on Human Rights: Innovation or Business as Usual?" (2017) 4(3) *Oslo Law Review* 150.

[90] *Schalk and Kopf v Austria* (European Court of Human Rights, First Section, Application No 30141/04, 24 June 2010).

[91] Scrutiny of Acts and Regulations Committee, Parliament of Victoria, n 11, 60.

Evans and Gaze also conclude that under existing discrimination laws that allow religious bodies to discriminate in order to avoid injury to religious susceptibilities:

> [T]here 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.[92]

III. Options for Aligning s 38 of the SDA with Human Rights Law

In what way could the *SDA* be amended to align it more closely with international human rights law as reflected in the jurisprudence of the ECtHR? As has been shown above, the current exemptions in s 38(1) and (2) of the *SDA* fall short in terms of compliance with human rights law in a number of ways. Therefore the first step would be to remove the ability of religious educational institutions to discriminate against an employee or contractor in order to "avoid injury to the religious susceptibilities" of members of the religion by removing s 38(1) and (2) of the *SDA*. Amendments would also be required to s 37(d) of the *SDA* and s 351(2)(c) of the *Fair Work Act 2009* to clarify that the broad exemption for religious bodies found in those two provisions does not apply to religious educational institutions.

What could replace these provisions to ensure that religious educational institutions could dismiss or refuse to hire staff and contractors where this is reasonably necessary to maintain religious institutional autonomy? In the absence of an overarching human rights statute, this is a complex question. Two options already exist in federal law. First, religious educational institutions may apply to the Australian Human Rights Commission for a special exemption under s 44 of the *SDA* in relation to particular positions, for example that of a teacher of religion. Second, s 351 (2)(b) of the *Fair Work Act 2009* provides an exemption from prohibitions on discrimination where this is necessary to meet the "inherent" requirement of the position. In other words, an exemption already exists in federal law for employers where having a particular attribute is necessary to perform an essential task required by the particular work.[93] It could be argued, for example, that the principal of a religious school is required to be a member of that church.

A survey of other jurisdictions in Australia and overseas reveals three main options for further reform of the *SDA*. The first, and narrowest, option is for the law to make it clear that religious educational institutions may discriminate on the basis of religion or belief where this is necessary to enable the institution to be conducted in accordance with its religious ethos.[94] This approach allows religious schools to maintain their institutional autonomy and ethos by employing staff who adhere to the school's religious faith. This kind of provision has been in place in Tasmania since the enactment of its discrimination law in 1998.[95] It is also one of the recommendations of the South Australian Law Reform Institute in its 2016 report on the issue.[96] This approach also accords with the European Union approach. Council Directive 2000/78 provides that there is no unjustified difference of treatment where a "person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos".[97]

The second, and broader, option is to allow religious schools to discriminate in relation to all or a range of protected attributes but only if it can be demonstrated that this is a genuine occupational requirement of the relevant position and that the action satisfies a "reasonableness" test. The tests requiring

[92] Evans and Gaze, n 76, 423.

[93] N Rees, S Rice and D Allen, *Australian Anti-discrimination and Equal Opportunity Law* (The Federation Press, 2018) 576.

[94] Note that there is currently no express prohibition in federal law on discrimination on the basis of religious belief. One of the recommendations of the Ruddock Panel is for the Commonwealth Parliament to enact such a prohibition in order to align federal anti-discrimination law with the position in most States and Territories. See Expert Panel to Examine Religious Freedom Protection in Australia, n 11, 5, Recommendation 15.

[95] *Anti-Discrimination Act 1998* (Tas) s 51.

[96] South Australian Law Reform Institute, n 11, 12.

[97] *Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation*, Art 4(2). Note that membership of the European Union overlaps with, but is narrower than, the group of states parties to the European Convention on Human Rights, see <https://www.coe.int/en/web/portal/european-union>.

"reasonableness" of the action vary in their level of detail. One relevant model for this option can be found in the *Anti-Discrimination Act 1991* (Qld). This legislation employs a three-part test: dismissal of an employee for breaching a religious rule of the employer is permitted where: (1) acting consistently with the employer's religious beliefs is a genuine occupational requirement; and (2) the employee acts contrary to these beliefs during work or in connection with work; and (3) such discrimination is reasonable in all the circumstances.[98] By requiring some connection between the religiously prohibited activity and work, this legislation reflects ECtHR jurisprudence in concluding that there is no heightened duty of loyalty extending to the private life of rank and file employees. Equally, by requiring that the discrimination be reasonable in all the circumstances of the case, the Queensland legislation incorporates the necessary balancing exercise.

Interestingly, the South Australian Law Reform Institute's 2016 reform proposal includes a recommendation to preserve the existing "genuine occupational requirement" in s 34(2) of the *Equal Opportunity Act 1984* (SA).[99] Under this provision any employer, including a religious school, could discriminate against staff by showing that such discrimination related to a genuine occupational requirement of the position. No further conditions attach to this provision.

A United Kingdom case illustrates the way a "proportionate" and "genuine occupational requirement" exemption enables religious organisations to maintain their institutional integrity.[100] In *Muhammed v The Leprosy Mission International* it was held that being of the Christian faith was a proportionate and genuine occupational requirement for the position of finance administrator in the Leprosy Mission.[101] It was found that the object of the Leprosy Mission is to "minister to sufferers of leprosy throughout the world in the name of Jesus Christ".[102] All staff believed that they were "continuing the specific work that Jesus did, for the greater glory of God".[103] The Tribunal detailed the central role of prayer – involving all staff members – in daily work activities, including at the start of the day, as part of formal meetings, in resolving disputes and in responding to request for prayers from partner organisations throughout the world.[104] In these circumstances the Tribunal held that it was a reasonable and genuine requirement that each staff member adhere to the Christian faith.

The third option is a variation of the second (ie genuine occupational requirement) and is found in the law of the Republic of Ireland. In Ireland, where about 96% of elementary schooling is provided by religious organisations,[105] religious institutions that are wholly or in part supported by government funding may discriminate in order to prevent an employee from engaging in conduct that undermines the religious "ethos" of the school. The relevant law contains a complex test requiring that the preventative action be: (1) "rationally and strictly related to the religious ethos"; (2) the response must be to conduct rather than a protected attribute of the employee or potential employee; and (3) the action must be proportionate to that conduct. The latter requires consideration of the severity of the consequences of the action on the employee or prospective employee, that person's right to privacy, the actual damage to the religious ethos of the institution and a consideration of alternative steps that could be taken.[106]

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[98] *Anti-Discrimination Act 1991* (Qld) s 25(2)–(5).

[99] South Australian Law Reform Institute, n 11, 86.

[100] The Employment Tribunal applied *Employment Equality (Religion or Belief) Regulations 2003* (UK) reg 7(3). These regulations were replaced by the *Equality Act 2010* (UK).

[101] *Muhammed v The Leprosy Mission International* [2009] (United Kingdom Employment Tribunal Cases no 16 ET/2303459/09) (*Leprosy Mission*).

[102] *Muhammed v The Leprosy Mission International* [2009] (United Kingdom Employment Tribunal Cases no 16 ET/2303459/09) [5].

[103] *Muhammed v The Leprosy Mission International* [2009] (United Kingdom Employment Tribunal Cases no 16 ET/2303459/09) [5].

[104] *Muhammed v The Leprosy Mission International* [2009] (United Kingdom Employment Tribunal Cases no 16 ET/2303459/09) [9]–[11].

[105] Charles Collins, *Catholic Schools in Ireland Can No Longer Give Priority to Catholic Students* (3 October 2018) CRUX <https://cruxnow.com/church-in-uk-and-ireland/2018/10/03/catholic-schools-in-ireland-can-no-longer-give-priority-to-catholic-students/>.

[106] *Employment Equality Act 1998* (Ireland) s 37.

Further research would be required to provide a comprehensive overview and analysis of the many and various ways employed in other jurisdictions to ensure that religious schools can maintain their institutional integrity while balancing that right against the human rights of their staff. The United Kingdom for example, has a complex framework of provisions where the possibility and nature of an exemption varies depending on the type of educational institution. However, it is clear that each of the three options discussed above – so long as they incorporate a "reasonableness" test – would bring federal law much closer to the approach required by international human rights law (as reflected in ECtHR jurisprudence) than the current provisions in the *SDA*.

Conclusion

This article has evaluated the claims by Coalition Senators in the November 2018 Report that human rights law supports the continued existence of exemptions in the *SDA* that permit religious schools, among other things, to discriminate against staff and contractors on the basis of their sexual orientation.

The ECtHR has permitted religious organisations to dismiss employees on the basis of actions in their private life contrary to religious doctrine in a narrow set of circumstances: namely, in relation to staff such as teachers of religious doctrine or senior employees, whose work is close to the "mission" of the religious organisation. This aligns with the requirement that the risk of such private conduct to the autonomy of the religious organisation must be "probable and substantial". Furthermore, dismissal is permitted only where this is reasonable in all the circumstances of the case, including by considering the status of the employee, the nature and public exposure of their conduct, and the impact of dismissal on the person's capacity to find other work. The ECtHR has not considered a case of a religious organisation that dismissed an employee or contractor on the basis of their sexual orientation. It has been argued in this article that if such a case were to come before it, the Court is unlikely to find such differential treatment justifiable. This is because the ECtHR treats sexual orientation as a "suspect" ground of differential treatment of persons, requiring particularly weighty justification. While a close analysis of the ECtHR jurisprudence shows the shortcomings of the current exemptions in the *SDA* for religious educational institutions in relation to staff and contractors, it also points the way to remedying this problem through reforms that could satisfy the competing interests of avoiding harm to lesbian, gay and bisexual members of the community while allowing for religious institutional autonomy.

UNIVERSITY of TASMANIA

College of Arts, Law and Education

2 October 2019

Submission on draft Religious Discrimination Bill

Thank you for the opportunity to comment on the draft Religious Discrimination Bill. I make these comments in my capacity as a lecturer in constitutional and human rights law at the Faculty of Law of the University of Tasmania. The views expressed in this submission are my own and do not necessarily reflect those of the University of Tasmania.

Summary

It is my view that the Bill is not supported by the Constitution's external affairs power for two main reasons. First, vaguely worded 'op-out' provisions for religious bodies and individuals, without any balancing against the rights of others, is not consistent with the ICCPR. Section 10 allows religious bodies to discriminate against an employee or client on the basis of their religious belief or activity (or the lack of these) and s 8(6) allows religious health practitioners, including dentists, optometrists and psychologists, to refuse to provide health services if they have a conscientious objection to doing so. There is no requirement in the Bill to weigh up the impact of such refusals on the rights of women and LGBT persons.

Secondly, the Bill does not meet the requirement that laws limiting human rights be clear and accessible. The complexity and uncertainty of the Bill's operation is particularly evident in section 29. This section provides that the Bill does not apply to conduct in 'direct compliance' with a provision in another Commonwealth, State or Territory law. However, regulations made under the Bill may override such laws.[1] To rely for consistency with the ICCPR on a technical provision such as s 29 and for that provision to be able to be curtailed by delegated legislation is problematic. Delegated legislation is both poorly scrutinised by Parliament and difficult to discover by members of the public. Given the controversy around religious exemptions from the prohibitions in the *Sex Discrimination Act, 1984* (Cth) ('SDA"), the balancing of conflicting rights should be clear on the face of the statute. This is particularly so since exempting religious individuals from the *Sex Discrimination Act* (e.g. the health practitioner provisions) would constitute a major departure from existing law.

The Bill is unconstitutional because it fails to adequately balance rights

A law relying on the external affairs power for its constitutional validity 'must be capable of being reasonably considered to be appropriate and adapted to the object' of the treaty it is implementing.[2] While partial implementation of a treaty is possible, a 'law will be invalid if the deficiency is so substantial as to deny the law the character of a measure implementing the Convention or it is a deficiency which, when coupled with other provisions of the law, make it substantially inconsistent with the Convention'.[3] In my submission, the aspects of the Bill discussed below are substantially inconsistent with the ICCPR. As a result the Bill in its current form cannot be supported by the external affairs power and is thus likely to be held invalid.

[1] See s 29(1)(b) and s 29(3)(b) of the Bill.
[2] Dean J in *Commonwealth v Tasmania* (the Tasmanian Dam case) (1983) 158 CLR 1 at 259, accepted in *Victoria v Commonwealth* (the Industrial Relations Act case) (1996) 187 CLR 416 at 478 - 488.
[3] Industrial Relations Act case, 488-48.

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The ICCPR in providing a framework of human rights requires that the limitation of a human right (including when done to protect other rights) be subject to rigorous justification and careful balancing. The multiple steps involved in adhering to the careful balancing of limits on rights are reflected in the Attorney General's Department's *Flowchart for Assessing the Human Rights Compatibility of Bills and Legislative Instruments*.[4] The chart requires that any limits on human rights be identified and demonstrated to be reasonable, necessary and proportionate. This is consistent with international human rights jurisprudence. The flowchart cautions that:

> '… even if the limitation is aimed at a legitimate objective and has been designed to limit the right as little as possible, it may still not be proportionate if its impact on particular individuals or groups is too severe, or if it destroys the very essence of the right concerned. Consider whether the Bill includes appropriate safeguards to provide effective guarantees of human rights in practice.'

While the objects clause of the Religious Discrimination Bill provides that regard must be had to the indivisibility and universality of human rights, the opt-out provisions in the Bill fail to protect people with religious and non-religious beliefs equally and fail to balance the right to religious freedom with other relevant human rights such as the rights to work, privacy, family life and equality. The Bill allows religious bodies and religious health practitioners to discriminate without having to weigh up the dignitary and material harm done to persons resulting from such discrimination. Such statutory rights are not an appropriate and adapted means to the implement the holistic human rights framework of the ICCPR and cannot, therefore enliven the external affairs power.

The remainder of the submission demonstrates this in more detail.

Section 10 of the Bill exempts religious bodies (other than those engaged solely or primarily in commercial activities) from the entirety of the Religious Discrimination Bill if their conduct is undertaken in 'good faith' and 'in accordance' with their religious beliefs. This allows religious bodies to discriminate on the basis of another person's lack of religious belief, or refusal to engage in lawful religious activities, without any balancing against other rights.

The words of the exemption in s 10 are potentially wide in meaning. They could be read to allow dismissal of an employee who refuses to sign a code of conduct that states that sexual relations outside a heterosexual marriage are sinful. It would also allow schools to refuse to admit LGBT students or the children of unmarried mothers and for religious charities to refuse to provide foster children to same sex couples. These things may be done without requiring any weighing up of the impact of such conduct on the rights to work, family life, privacy or sexual orientation of the employee, student or parents. Associate Professor Amy Maguire and I have shown elsewhere that a similar exemption for religious bodies in the *Sex Discrimination Act* is inconsistent with international human rights law.[5]

Section 8(6) of the Bill permits religious health practitioners to refuse to provide a health service to which they conscientiously object. In doing so only the right to health needs to be taken into account and then only so as to avoid 'unjustifiable adverse impacts'.[6] The Explanatory Notes provide that 'death or serious injury' would meet this threshold.[7] Impacts on physical or mental health that fall short of this are not protected nor are impacts on the rights to privacy, family life and equality. Furthermore, the Bill's test of 'justifiability' is not consistent with the 'necessity' test in the ICCPR. As a result, established human rights jurisprudence for demonstrating that a limitation of a right is 'necessary' will not need to be applied.

[4] https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/Documents/, chart.pdf.
[5] A. Hilkemeijer and A. Maguire, 'Religious Schools and Discrimination against Staff on the Basis of Sexual Orientation: Lessons from European Human Rights Jurisprudence', *The Australian Law Journal*, 93/9, 2019.
[6] Section 8(6) of the draft Bill.
[7] At paragraph 147 of the Bill's Explanatory Notes.

In fact, when international human rights courts have balanced the right to manifest religious belief against the rights to health, work, privacy, family life and equality, the latter tend to outweigh the former except in cases that go to the heart of religious manifestation such as the teaching of religious doctrine or publicly representing a church at the highest levels. For example, in cases concerning a pharmacist who refused to sell contraceptives,[8] and a sex therapist who refused to provide therapy to same sex clients,[9] rights to equality, family life, privacy and health were found to outweigh the right to the manifest religious belief. Courts applying a human rights framework have also decided that the right of a surgeon at a Catholic hospital to engage in extra marital relations[10] outweighed the right to religious institutional autonomy, and the right of a woman to live in a *de facto* relationship outweighed the religious rights of a religious school.[11] Additionally it has been held that the rights to equality and to work of a gay piano teacher at an adult education course outweighed those of the religious school who employed him.[12]

Allowing religious bodies and individuals to engage in conduct that impacts on the rights of women and LGBT persons, without requiring that these limits be demonstrably 'reasonable, necessary and proportionate' and without safeguards to ensure that the essence of these rights is protected, is not consistent with the regime for the protection of rights established by the ICCPR. These provisions, therefore, cannot be supported by the external affairs power.

Opt-out provisions discriminate against non-religious beliefs

Provisions in the Bill enable religious individuals and organisations to depart from rules of general application (including the Bill itself) but do not provide similar exemptions for individuals or organisations with coherent and strongly held non-religious beliefs, such as humanists, pacifists or atheists. To discriminate against persons who hold protected non-religious beliefs is inconsistent with article 18 of the ICCPR because that article protects religious, conscientious and other coherent and sincerely held beliefs equally.

For example, section 10 of the Bill exempts a religious body from all of the requirements of the Religious Discrimination Bill if acting in 'good faith' in accordance with religious beliefs. Therefore, a religious school or charity may dismiss an employee who does believe that sexual relations must only take place in a heterosexual marriage or to refuse to provide services to someone who does not share that belief. Organisations established to further non-religious beliefs are not so protected. The Atheist Foundation or Humanists Australia, for example, would breach the Religious Discrimination Bill if they dismissed an employee because, contrary to the beliefs of those organisations, the employee had a religious belief.

Similarly, the Bill allows employees to opt-out of 'employer conduct rules' in relation to conduct or statements of religious belief or for statements about religion. However, an employee's statement of a secularist, atheist or humanist belief that is not 'about religion' but that is contrary to the code of conduct of a religious organisation would not be protected by the Bill.

The privileging of religious over non-religious belief systems is also evident in the provisions of the Bill dealing with what is described as the 'health practitioner rule'. The Bill provides that a health practitioner who, on the basis of their religious belief, conscientiously objects to providing a health service may refuse to do so unless this would cause death or serious injury. For example, a religious doctor may refuse to participate or

[8] *Pichon and Sajous v France*, ECtHR 2 October 2001(dec.), appl. no. 49853/99.
[9] *Eweida and Others v The United Kingdom*, ECtHR 15 January 2013, Appl. Nos. 48420/10, 59842/10, 51671/10 and 36516/10.
[10] *IR v JQ*, European Court of Justice, Grand Chamber, Case C-68/17, 11 September 2018.
[11] *Gan Menachem Hendon Ltd v Ms Zelda De Groen* (UKEAT/0059/18/OO, 12 February 2019).
[12] *Johan Daniel Strydom v Nederduitse Gereformeerde Kerk Moreleta Park* 27 August 2008 (26926/05) [2008] ZAGPHC 269; (2009) 30 ILJ 868 (EqC).

give advice on an abortion but a non-religious doctor who had a deeply held belief in the sanctity of human life would, under this Bill, not be permitted to do so.

The scope of conscientious objection is far wider than permitted by article 18 of the ICCPR

In relation to religious health practitioners the Bill expands the scope of the right to conscientious objection beyond that accepted in international human rights law. The Bill allows a wide range of health practitioners - including dentists, optometrists, occupational therapists, pharmacists, physiotherapist, podiatrists and psychologists - to refuse to provide any health service to which they conscientiously object on religious grounds.

Under international human rights law, accepted categories of conscientious objection are narrowly confined to conduct directly involving life and death (e.g. military service, participation in abortion and euthanasia). The right to conscientious objection does not extend to matters such as the sale of contraceptives.[13] There are other features of accepted conscientious objection that differentiate it from the service refusal permitted under the Bill. Accepted categories of conscientious objection do not involve prohibited discrimination (and therefore harm) against another person. The work of Professors Nejaime (UCLA) and Siegel (Yale) demonstrates that accommodating such 'complicity based conscientious objections' has the capacity to inflict material and dignitary harm on women and members of the LGBT community.[14] Furthermore, where permitted, conscientious objection only excuses an objector from directly engaging in the objectionable action (i.e. a pacifist may refuse to participate in active military service). The right to conscientious objection under international human rights law could never be relied on, for example, to refuse to provide general health services on the ground of a patient or patient's parents' sexual orientation.

The Ruddock Panel Report on Religious Freedom recognised that broad conscience-based refusals of service are inconsistent with international human rights law (see especially paragraphs 1.161 – 1.165 of that report). As referred to earlier, legislation relying on the external affairs power must be appropriate and adapted to the treaty obligation and, therefore, cannot stray outside the obligations in the treaty. Provisions that seek to protect rights that do not exist under article 18 of the ICCPR and cannot be said to be ancillary to ensuring compliance with that article are not supported by the external affairs power.

The health practitioner provision is inconsistent with the Sex Discrimination Act

Section 8(6) of the Bill allows health practitioners acting in accordance with their religious belief, to engage in conduct that would be prohibited under the *Sex Discrimination Act 1984* (Cth).

This provision is wide in scope. Religious health practitioners may opt out of any requirement imposed by any 'person' and the *Acts Interpretation Act 1901* (Cth) provides that 'a person' includes the 'body politic'. The body politic includes the executive arms of government (e.g. statutory bodies such as human rights and anti discrimination tribunals) as well as parliaments.[15] Therefore, the Bill could be read to permit a psychologist, on the basis of a religious belief, to refuse to provide therapy to same sex couples or a pharmacist to refuse to sell contraceptives to unmarried women despite the fact that such conduct might be prohibited by professional or legal bodies. Such refusals in the provision of services constitute prohibited discrimination under the *Sex Discrimination Act* and, as shown above, have been held to be impermissible by courts in other liberal democracies applying a human rights framework. The refusal of health services to unmarried women and LGBT persons on the basis of the religious belief of health practitioners is not a hypothetical concern. A Human Rights Watch report documents numerous cases in the United States of health practitioners who, on

[13] *Pichon and Sajous v France*, ECtHR 2 October 2001(dec.), appl. no. 49853/99.
[14] NeJaime and Siegel, *Conscience Wars: Complicity Based Conscience Claims in Religion and Politics*, The Yale Law Journal (2015) 124: 2516.
[15] McHugh J in *Mann v Carnell* 201 CLR 1 at 80 and 93.

the basis of their religious beliefs, refuse to treat the children of same sex couples or to provide treatments to LGBT persons.[16]

If the Act were to operate as the above interpretation suggests, the rights of women and members of the LGBT community provided for in the Sex Discrimination Act would be severely diminished. As a result, Australian law would no longer conform to the equality obligations in s 26 of the ICCPR.

The Bill is too uncertain in its meaning and operation

To conform to the regime of human rights protections established by the ICCPR, laws must be sufficiently precise to avoid the risk of arbitrariness.[17] The *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* emphasize this requirement. Article 16 provides that 'laws imposing limitations on the exercise of human rights shall not be arbitrary or unreasonable' and Article 17 further requires that 'legal rules limiting the exercise of human rights shall be clear and accessible to everyone'. The draft Bill is so complex that it falls well short of this requirement.

Section 29 is particularly confusing. It provides that nothing in the Bill prevents a person from 'acting in direct compliance' with other Commonwealth, State and Territory laws, other than those laws listed in regulations enacted under the Bill. This would mean that while section 8(6) of the Bill permits religious health practitioners, with a conscientious objection, to refuse to provide health services to LGBT persons, section 29 would prevent such discrimination through the application of the *Sex Discrimination Act* and similar provisions in State/Territory laws. This could mean, for example, that a medical clinic could require, in direct compliance with the *Sex Discrimination Act* that employees serve all clients regardless of their sexual orientation or gender identity. However, Commonwealth, State and Territory laws apply only in the absence of contrary regulations. In other words, at some future date (or even immediately on the entry into force of the Bill) regulations could be put in place to allow the health practitioner provision to operate to the full extent that the words of s 8(6) permit.

No existing Commonwealth discrimination laws allow for the removal of the operation of Commonwealth laws by the mere listing of such laws in a regulation. The *Age Discrimination Act* 2004 (Cth) (ADA) includes such a mechanism for State/Territory laws but Commonwealth laws overridden by the ADA are clearly listed in a schedule to that Act. At the heart of the debate driving the enactment of Religious Discrimination Bill are claims by people of religious faith to be permitted to discriminate contrary to prohibitions in the *Sex Discrimination Act*. Such complex and controversial public issues should not be resolved by delegated legislation, particularly given that the making of such legislation is notoriously lacking in transparency and parliamentary scrutiny.

A further problem is that the exemption for religious bodies in s. 10 of the Bill applies regardless of any other provision in the Bill. As noted above, s. 10 allows religious bodies to discriminate on the basis of 'religious belief or activity' (or lack thereof). The fact that s. 29 does not apply to s 10 may lead to a number of complications. For example, under the Bill religious schools could dismiss a teacher who was in a same sex relationship because, in accordance with the school's tenets of faith, the teacher was 'not engaging in or refusing to engage in lawful religious activity'. Under the *Sex Discrimination Act*, the school would also be permitted to discriminate in these circumstances but only if doing so met a higher threshold, i.e. such discrimination would need to be shown to be 'necessary' to 'avoid injury' to 'religious susceptibilities'(s 38). Therefore, as a result of the Bill, it would be easier for religious bodies to discriminate against employees,

[16] https://www.hrw.org/report/2018/07/23/you-dont-want-second-best/anti-lgbt-discrimination-us-health-care

[17] Olivier de Schutter, *International Human Rights Law* (CUP, 2nd ed, 2014) 347.

students and clients on the basis of their sex, sexual orientation or gender identity than is currently permitted under the SDA.

A further complication arises from the fact that the Bill excludes religious bodies who 'engage solely or primarily in commercial activities' from the general exemption in s 10. The SDA imposes no such limit on religious bodies whose actions are exempt from the provisions of the SDA. Therefore, dismissal of an employee by a religious hospital on the basis that the employee does not adhere to a proscribed religious 'activity'[18] may constitute prohibited religious discrimination under the Bill but could be lawful under s 37(1)(d) of the SDA. All these matters add layers of complexity and uncertainty to the operation of the Bill.

Amending the Bill to ensure consistency with the ICCPR

The following amendments should be made to ensure consistency with the ICCPR:

1. Section 10, if retained, should provide that religious bodies may discriminate in accordance with their religious beliefs only when this is 'reasonable' based on a careful balancing of all relevant rights including the rights to work, privacy, family life and equality.
2. Rights and exemptions provided to individuals and organizations that hold religious beliefs should be provided equally to individuals and organizations that hold protected non-religious beliefs (e.g. pacifists, humanists, atheists).
3. The provisions that deem employer conduct rules (s 8(3)) and health practitioner rules (s 8(6)) to be indirect discrimination should be removed from the Bill. These provisions permit conduct that unreasonably limits rights to family life, privacy and equality in breach of international human rights law.
4. Section 29 should be amended to make it clear on the face of the statute which Commonwealth laws (if any) override the Bill.

Yours sincerely

Anja Hilkemeijer

Lecturer in Law

[18] See Explanatory Notes at paragraph 174.

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31 January 2020

Submission on second exposure draft of the Religious Discrimination Bill

Thank you for the opportunity to comment on the second exposure draft of the Religious Discrimination Bill. Please find attached my submission. I offer these comments in my capacity as a legal academic. The views expressed are my own and do not represent those of the University of Tasmania.

While I support the protection of freedom from religious discrimination, those parts of the Bill that seek to implement the human right to 'manifest' religion, are inconsistent with the holistic human rights framework established by the *International Covenant on Civil and Political Rights* and other international human rights instruments to which Australia is a party.

Because of constraints of time this submission addresses only the human rights compatibility of the Bill's exemptions for religious bodies. It is particularly important to get these 'right', because the Government - in instructions to the Australian Law Reform Commission - has indicated that the exemptions for religious bodies in this Bill are to become the template for such exemptions in all Commonwealth discrimination laws.

In an earlier publication, Dr Amy Maguire and I[1] demonstrated that existing exemptions for religious bodies in the *Commonwealth Sex Discrimination Act 1984* are inconsistent with international human rights law because of their failure to fairly balance the relevant rights. **If enacted into law, the RDB exemptions would entail an even more pronounced violation by Australia of its international treaty obligations.**

I urge the government to redraft this Bill along the lines suggested in this submission to ensure that it is consistent with Australia's international obligations.

Yours sincerely

Anja Hilkemeijer

Lecturer in Law

Attachment: submission on second exposure draft of Religious Discrimination Bill

[1] Hilkemeijer A. Maguire A, 'Religious Schools and Discrimination against Staff on the basis of Sexual Orientation: Lessons from European Human Rights Jurisprudence, (2019) 93 *Australian Law Journal*, 752.

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SUBMISSION ON SECOND DRAFT OF THE RELIGIOUS DISCRIMINATION BILL

Executive Summary

The enactment of the Religious Discrimination Bill (RDB) in its current form would place Australia in breach of its obligations under a number of international treaties to which it is a party, by permitting discrimination in employment on the basis of religion, sex, marital status, gender identity and sexual orientation where this accords with the organisations' religious belief. These proposed exemptions for religious bodies in the RDB are inconsistent with international human rights law because their scope is unclear, they may be applied arbitrarily, and they do not require that the limitations on those rights be necessary and reasonable in each case. [1]

The RDB exemptions for religious bodies should be re-drafted in line with the model found in European Union (EU) law. Unlike proposed and existing exemptions for religious bodies in Commonwealth law, the EU model closely implements international human rights obligations by requiring the careful balancing of human rights.

1. Exemptions for religious bodies are inconsistent with Australia's treaty obligations

The RDB exemptions interfere with human rights by allowing:

1. Discrimination on the basis of:
    a. protected non-religious beliefs;
    b. religion;
    c. sexual orientation and gender identity; and
2. interference with the right to:
    a. a private life, and
    b. to work.

This submission takes as its starting point Australia's international human rights obligations, such as those in the *International Covenant on Civil and Political Rights* (ICCPR). It looks to how those obligations are interpreted and applied by the UN Human Rights Committee as well as regional and national courts that apply similar holistic human rights frameworks

1.1 Discrimination on the basis of protected, non-religious beliefs

The exemptions for religious organisations in sections 11, 32 and 33 of the RDB (the 'RDB exemptions') do not comply with the international obligation to respect and protect religious and non-religious beliefs equally. The United Nations' Human Rights Committee, in its General Comment 22, emphasized that 'Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief.'[2] The obligation on governments to treat

[2] The United Nations' Human Rights Committee, General Comment 22.

people of religious faiths and those with non-religious beliefs equally is consistent with the overarching obligation found in article 2 of the ICCPR (as well all other human rights instruments) that rights be respected without discrimination of any kind. The importance of the application of the principle of non-discrimination in the context of protected beliefs was affirmed in a preliminary ruling of the Court of Justice of the European Union in January 2019, in which the Court held that Austrian law could not provide a Good Friday public holiday (and public holiday pay) only to employees who were formal members of four listed churches and not to other employees.[3] Doing so would discriminate against those employees not members of a listed church group.

The RDB exemptions treat organisations established to advance protected non-religious beliefs less favourably than those established to advance protected religious beliefs: i.e. only the latter can avail themselves of the exemption. For example, the exemptions give religious organisations broad powers to discriminate in the selection of any of its employees - regardless of the nature of the employee's work - whereas organisations set up to advance protected non-religious beliefs, such as Humanists Australia or the Rationalist Society, cannot require any staff to share their beliefs unless they are able to satisfy the 'inherent requirement' test for a specific position in accordance with section 32(2) of the draft RDB.

1.2 Discrimination on the basis of religion

The RDB winds back existing protections against religious discrimination in state and territory laws by providing religious organisations with a broad and discretionary right to discriminate on the basis of religion. For example, under the *Anti-Discrimination Act (Tas)* 1998, the religious beliefs of an employee are relevant to employment only if this is a genuine occupational qualification or requirement.[4] Whereas if the RDB exemptions are enacted into law, religious organisations in Tasmania would be able to dismiss an employee on the basis of religion, regardless of whether holding those religious beliefs is a genuine occupational requirement.

1.3 Discrimination on the basis of sex, sexual orientation and gender identity

Religious discrimination under the RDB is based on someone 'holding or not holding a religious belief'.[5] Relevant religious beliefs may include, for example, the belief that sexual relations outside a heterosexual marriage is sinful. The RDB exemptions would, therefore, permit religious organisations, based on their religious beliefs, to refuse to employ a whole range of people: a single mother because she does not share the religious belief that sex outside a heterosexual marriage is sinful; a woman who applied for a senior management role because she does not share the religious belief that women should not be in leadership roles over men; and a woman married to her female partner because she does not share the religious belief that homosexuality is sinful.

The RDB exemptions would also permit the dismissal of teachers such as Mrs Colvin at the Ballarat Christian College who opposed the position in the school's Statement of Faith that '[a] marriage

[3] Case C-193/17 *Cresco International GmbH v Markus Achatzi*, Grand Chamber judgment, 22 January 2019, ECLI:EU:C:2019:43.
[4] Note that a separate test applies to employment by religious educational institutions.
[5] Note that this approach to the definition of discrimination on the basis of religion is not new. Similar wording is found *Equal Opportunity Act 1995* (Vic) s 6 and *Anti-Discrimination Act 1998* (Tas) s 16 and definitions in s 5.

can only be between a male and a female, and upon this foundation alone should children be conceived and families formed.[6]

1.4 Interference with the right to private life

Religious organisations that fall within s 11 (including schools and welfare organisations) may ask prospective employees what their religious beliefs are[7], thus opening the possibility of discrimination on the basis of religion, sex, sexual orientation or gender identity. This also negatively impact on the human right to be free from arbitrary interference with private life (article 17 of the ICCPR). As well as interfering with the right to privacy, asking prospective employees about their beliefs constitutes an interference with the right to religious freedom itself. The European Court of Human Rights in a 2019 decision stressed that 'religious convictions are a matter of individual conscience'[8] and that:

> '…the freedom to manifest one's beliefs also contained a negative aspect, namely the individual's right not to manifest his or her religion or religious beliefs and not to be obliged to act in such a way as to enable conclusions to be drawn as to whether he or she held – or did not hold – such beliefs'.[9]

1.5 Interference with the right to work

The RDB exemptions permit religious organisations to dismiss or to refuse to employ persons regardless of the impact of such conduct on that person's right to work (article 6 of the International Covenant on Economic, Social and Cultural Rights). This interference could range from a relatively minor impact (for example, where a person readily finds a job elsewhere) to a severe impact (where a person has specialised skills or lives in a remote area and it is difficult or even impossible for them to find other work). International human rights law requires that the impact on all relevant rights is taken into account when balancing rights. For example, in the case of *Schuth v Germany*, the European Court of Human Rights took into account that it would be difficult for an organist to find employment outside of the church, when deciding that his dismissal for leaving his marriage and commencing a new relationship was not justified.[10]

[6] Geoff Chambers, Teacher Sues School In Faith Test Case, *The Australian*, September 13 2019, https://www.theaustralian.com.au/nation/politics/teacher-sues-school-in-faith-test-case/news-story/c1fe927596ab3db1662349debb7c2497

[7] Religious organisations covered by section 11 are exempt from the entire RDB, including s 26 which prohibits asking prospective employees about their religious beliefs. Perhaps as a result of a drafting oversight, the RDB does not permit those organisations exempt under s 32 (religious hospitals, aged care, accommodation) to ask prospective employees this question.

[8] *Papageorgiou and others v. Greece October 2019*, [84].

[9] Ibid at [89].

[10] Schuth v Germany, App NO 1610/03, ECtHR, 2010.

2. The limitations of human rights are not justifiable

The wording of the tests applied to determine whether an interference with human rights is justified, differs slightly across jurisdictions. For the purpose of this paper the test as set out on the website of the Attorney-General's department is used. [11]

The RDB exemptions unjustifiably limit human rights because they are:

1. unclear;
2. may be applied in an arbitrary manner;
3. do not necessarily achieve a legitimate aim;
4. lack a rational connection between the means and the aim; and
5. allow disproportionate limitations on the rights of others.

2.1 The RDB exemptions are unclear

The exemptions are unclear in terms of:

1. which types of religious organisations are entitled to use the exemptions,
2. conflict between the RDB and the SDA exemptions.

2.1.1 Unclear which types of religious organisations are entitled to use the exemptions

It takes close reading of the RDB to determine which religious organisations are entitled to an exemption. Section 11 is entitled 'Religious bodies may act in accordance with their faith etc.'. It contains a complete exemption from the entire RDB for bodies conducted 'in accordance with the doctrines, tenets, beliefs or teachings of a particular religion' (including schools and welfare organisations) but excludes bodies engaged 'solely or primarily in commercial activities'. Religious hospitals, aged care and accommodation services are expressly excluded from s 11.

However, section 32 provides religious hospitals, aged care and accommodation providers with an exemption from the prohibition on religious discrimination in relation to employment.[12] Section 33 provides an exemption for religious camps and conferences centres, which can discriminate both in employment and the provision of accommodation.

[11] In relation to UN HCR jurisprudence, see De Schutter, International Human Rights Law, 2nd ed, Cambridge University Press, 2014, 339-347. For ECtHR jurisprudence regarding these requirements see Lavrysen, System of Restrictions, Chapter 4, *Theory and Practice of the European Convention on Human Rights*, Intersentia, 2018, 307 – 330.

[12] Religious camps and conference providers may also discriminate in relation to the delivery of accommodation (s 33).

2.1.2 Conflict between the RDB and the SDA exemptions

The prohibitions in the draft RDB and the *Sex Discrimination Act, 1984* (SDA) overlap. This leads to a conflict because it is much easier for a religious organisation to satisfy the pre-conditions for the use of the RDB exemptions than those in the SDA.

The draft RDB partly addresses this conflict. The exemption in section 11 contains a 'note' that, in the case of a conflict, the SDA will prevail. However, the exemption in s 32 of the RDB for religious hospitals, aged care and accommodation providers does not contain an equivalent 'note'. For these organisations it would be easier to discriminate (on the basis of sex, sexual orientation etc) if the RDB is enacted into law than under the current SDA.

There is an area of overlap between the prohibitions in the RDB and the SDA. The RDB prohibits discrimination on the basis that a person does not share a certain religious belief, i.e. that sexual relations outside heterosexual marriage are sinful. For example, dismissing an employee who is married to their same sex partner constitutes both (RDB) discrimination on the basis that the person does not hold a religious belief (ie that homosexuality is sinful) and (SDA) discrimination on the basis of sexual orientation.

The test in the RDB[13] is easier to satisfy than the test for the existing exemption in the SDA[14] because:

1. the RDB test requires mere 'accordance' and not 'conformity' with religious beliefs;
2. the RDB test has a 'margin of appreciation' in favour of the view of members of the religion;
3. the RDB test can be satisfied without, or perhaps even in contradiction of, official church documents;
4. the RDB test can be satisfied, based on the 'word' of other members of the same denomination, sect etc of religion even if this does not accord with the views of the official beliefs of the religion.

The fact that the test in the RDB exemptions is much 'softer' than the exemption in the SDA leads to a conflict between those two laws. The draft RDB partly addresses this conflict. The exemption in section 11 contains a drafting 'note' that provides that, in the case of a conflict, the SDA prevails.

[13] To use the RDB exemption, a religious organisation must show that:
1. 'a person of the same religion as the religious body could reasonably consider [the discriminatory conduct] to be in accordance with the doctrines, tenets, beliefs or teachings of that religion' or
2. the discriminatory conduct is undertaken 'to avoid injury to the religious susceptibilities of adherents of the same religion as the religious body.'

[14] Under s 37(1) of the SDA the religious body must show that:
1. an '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
2. 'is necessary to avoid injury to the religious susceptibilities of adherents of that religion'.

However, the exemption for religious hospitals, aged care and accommodation providers in s 32 does not. So, in relation to the latter group of organisations, the 'softer' exemption in the RDB will prevail over the narrower exemption in the SDA.

Perhaps the absence of such a 'note' in s32 is the result of a drafting oversight. However, even if this were remedied by adding in the 'note', there are three points of concern:

First, the existing exemptions for religious organisations in the SDA are also extremely broad and, as shown elsewhere, are themselves inconsistent with the requirements of international human rights law.[15] To that extent, a note that provides that the SDA prevails, does not 'save' the exemptions from human rights incompatibility.

Second, the whole structure of the RDB exemptions and their relationship with the SDA is unclear. On its face, the RDB exemption is easily satisfied, but when you read the 'fine print' in the 'note' and the subtle differences in the wording of the SDA exemption the test may be slightly stricter. Those people likely to be affected by the RDB may struggle to understand these complexities. It is unlikely, for example, that a cleaner at a religious hospital who is dismissed on the basis of their sexual orientation would understand the subtle legal differences between the RDB and the SDA exemption.

Third, the Government's intention appears to be for the RDB exemptions to become the yardstick for religious exemptions across federal legalisation. The Australian Law Reform Commissions' (ALRC) *Review into the Framework of Religious Exemptions in Anti-discrimination Legislation* has been delayed until the enactment of the RDB. The revised terms of reference require: 'the ALRC [to] confine its inquiry to issues not resolved by that Bill, and should confine any amendment recommendations to legislation other than the Religious Discrimination Bill.'[16] The President of the ALRC has already indicated that 'what we've been asked to do is restrict ourselves to a drafting exercise which would ensure that the Sex Discrimination Act and the Fair Work Act were consistent with the government's bill.'[17] Once the exemptions for religious bodies in other Commonwealth laws have been aligned with the RDB exemptions, the 'note' to section 11 will have no further role to play.

If the RDB exemptions for religious organisations are enacted in their current form and Parliament amends the exemptions for religious organisations in other Commonwealth laws to bring them into line with those in the RDB, the overall effect would be a considerably expanded exemption from discrimination laws for religious organisations. This would make their inconsistency with human rights standards even more egregious than they are currently.

[15] Hilkemeijer A. and Maguire A, 'Religious Schools and Discrimination against Staff on the basis of Sexual Orientation: Lessons from European Human Rights Jurisprudence, (2019) 93 *Australian Law Journal*, 752.

[16] https://www.alrc.gov.au/inquiry/review-into-the-framework-of-religious-exemptions-in-anti-discrimination-legislation/altered-terms-of-reference-29-august-2019/

[17] Hansard, Legal and Constitutional Affairs Legislation Committee, Estimates, 22 October 2019, at 32.

The impact of such broad exemptions on employees is further exacerbated by the fact that there is no statutory requirement for religious organisations to make their religious beliefs public.[18] There is, therefore, no way for those potentially affected by the exemption to know the scope of the potential operation of the exemptions.

3. The RDB exemptions are capable of arbitrary application

The second of the two possible tests in the RDB exemptions relates to conduct undertaken 'in good faith … to avoid injury to the religious susceptibilities of adherents of the same religion as the religious body.'

> The 'avoid injury to religious believers' test is capable of arbitrary application as shown by the judgement of the Federal Court of Australia in the case of *Hozack*. Applying a similarly worded test to that in the RDB, the Court found that it allowed the religious organisation to enforce religious rules against:
>
> 1. religious but not non-religious employees, and
> 2. one religious employee but not another.

A religious body that employs a mixture of religious and non-religious staff may, consistently with the 'good faith' requirement, allow non-religious employees to breach religious rules but discipline or dismiss religious employees for breach of those rules. Ms Hozack, was a member of the Church of Jesus Christ of Latter-Day Saints and employed by that church in a junior role. She was dismissed for breach of a religious rule prohibiting sexual relations outside marriage (she was separated but not divorced). Other employees who were not members of the church were not dismissed in the same circumstances. The Court held that 'the fact that the respondent employs some non-members, from whom the Church could hardly exact its religious stipulations, does not demonstrate that … the Church failed to act in <u>good faith</u> to avoid injury to religious susceptibilities'.[19]

This case also established that, consistently with the good faith requirement, a religious body could treat one religious employee differently from other religious employees. Ms Hozack also argued that her employer had not acted in good faith because her supervisor, who was also a member of the church, had broken the same religious rule but was not dismissed. The Court held that it was enough to show good faith of the organisation in the way it acted in this case and that it did not have to show perfection in the enforcement of its religious rules. According to the Court, the situation may have been different if there was evidence of a 'general disregard for or being

[18] Note the only requirement to have a publicly available policy regarding discriminatory practices relates to the provision of accommodation services (not employment) by religious camps and conference sites: s 33(4) ©. It is not clear whether available means it needs to be provided at the request of a potential customer or whether it needs to be publicly displayed.

[19] *Kerry Anne Hozack v The Church of Jesus Christ of Latter-Day Saints* [1997] FCA 1300, page 6 of a 15-page judgment with unnumbered pages and paragraphs.

haphazard in the enforcement of its own doctrines'.[20] This imposes some narrowing of a religious organisation's discretion to discriminate but in practice it is a high standard to establish in a court.

4 The RDB exemptions overreach in terms of a legitimate aim

Protecting the right to manifest religious belief, including the right of religious organisations to 'maintain their religious autonomy', is a legitimate aim that may justify the limitation of other human rights. The RDB exemptions permit discriminatory conduct beyond the legitimate aim of protecting the right to manifest religious belief by failing to require:

1. a sufficient nexus between the religious belief and the discriminatory conduct or
2. compliance with substantive limits on right to manifest religion.

4.1 Insufficient nexus between the religious belief and the discriminatory conduct

The RDB exemptions give religious organisations the right to discriminate even though not every action in accordance with religious belief falls within the scope of the protected right to manifest religion and belief.

The European Court of Human Rights in the case of *Eweida* made it clear that there must be 'a sufficiently close and direct nexus between the act and the underlying belief'.[21] Furthermore, the Court held that 'it cannot be said that every act which is in some way inspired, motivated or influenced by it constitutes a "manifestation" of the belief. Thus, for example, 'acts or omissions which do not directly express the belief' or which are only 'remotely connected' to a precept of faith fall outside the protection of human rights law.[22] An example of religious beliefs that were not sufficiently connected to an action to attract the protection of the right to manifest religion include the refusal by Quakers, on the basis of their pacifists beliefs, to pay taxes which would be spent on the state's military capabilities.[23]

There is nothing in the RDB exemptions that ensures that only conduct that meets the threshold set out in *Eweida* is permitted. In fact, quite the opposite. Conduct that satisfies the 'in accordance with the religious belief' test is not necessarily a 'direct expression of that belief' and may be only 'remotely' connected to a precept of the faith.

It has been recognized that the right to manifest religion extends to 'acts integral to the conduct by religious groups of their basic affairs'.[24] In some cases, the nature of the religious organization is such that each employee requires a religious commitment. In these circumstances, international human rights law allows religious organisations to exclusively recruit persons sharing particular

[20] Ibid at 5.
[21] *Eweida v United Kingdom* (European Court of Human Rights, Chamber, Application Nos 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013) paragraph 82.
[22] Ibid.
[23] Boughton, R (on the application of) v Her Majesty's Treasury [2005] EWHC 1914 (Admin) (25 July 2005)
[24] The UN Human Rights Committee, General Comment on Article 18.

religious faith (e.g. Leprosy Mission[25] and the Dutch Salvation Army[26]). However, large religious organisations such as hospitals, schools, welfare organisations and aged care facilities employ staff in a range of functions unrelated to the practice or teaching of religion doing work that is not 'integral' to the 'conduct of their basic affairs'. The cases of *Sheridan*, *Heinz* and *Strydom* show that religious organisations may not discriminate against staff who carry out purely non-religious duties. The RDB exemption makes no distinction between staff that undertake work that is 'integral to the 'conduct of basic affairs' and all other staff.

4.2 No compliance with substantive limits on right to manifest religion

The RDB exemptions do not incorporate the substantive limits on the right to manifest religion that exist in human rights law. Courts applying human rights law have made it clear that the right to freedom of religion and belief does not include a right to manifest beliefs that are 'incompatible with human dignity and contrary to the fundamental rights of others.'[27]

The RDB exemptions place no limits on the kinds of religious beliefs that may form the basis of discriminatory conduct by religious organisations. Therefore, under the RDB, religious beliefs that are 'incompatible with human dignity' or 'contrary to the fundamental rights of others' may be the basis of discriminatory conduct by a religious organisation against employees and prospective employees. For example, the RDB exemptions would allow a religious organisation to dismiss a trans-gender person if they had a religious belief rejecting trans-genderism. Such a view is incompatible with human dignity at the heart of human rights.[28]

5 RDB exemptions do not require a rational connection between means and aim

Human rights law requires that limitations of rights must be objectively necessary. The RDB exemptions do not meet this requirement. First, by merely requiring that the discriminatory conduct 'accords' with the beliefs etc of the religious organisation, the exemption falls short of ensuring that the discrimination is 'necessary' to protect the right to manifest belief in. This is compounded by the fact that the RDB merely requires the satisfaction of a largely subjective test. It cannot therefore be said that the discriminatory conduct permitted by the RDB meets the human rights law requirement of being objectively necessary.

Secondly, limitations of rights in the name of religious freedom are not necessary because it is known from the recent and comprehensive Ruddock Panel Inquiry that religious freedom is already adequately protected under Australian law.[29] Conservative Christian lobby groups have expressed concern about some successful legal challenges in Australia involving religious organisations, for

[25] *Muhammed v The Leprosy Mission International*, The Employment Tribunal, no 2303459/2009, 15 December 2009.
[26] *Stichting Leger des Heils Welzijns- en Gezondheidszorg*, Oordeel, College voor de Rechten van de Mens, no 2015-68, 9 June 2015.
[27] For the development of this jurisprudence see *Campbell and Cosans v United Kingdom*, Merits, App No 7511/76, A/48, [1982] ECHR 1; *Williamson v Secretary of State for Education and Employment* [2005] 2 AC 246; *Grainger plc v Nicholson* [2010] ICR 360, *Raabe v Secretary of State for the Home Department*, [2013] EWHC 1736 (Admin); *Dr David Mackereth v The Department for Work and Pensions & Anor* [2019] ET 1304602/2018; and *Maya Forstater v CGD Europe and ors*, Employment Tribunals, case no 2200909/2019, unreported, decided 18 December 2019.
[28] *Dr David Mackereth v The Department for Work and Pensions & Anor* [2019] ET 1304602/2018.
[29] Religious Freedom Review, https://www.pmc.gov.au/domestic-policy/religious-freedom-review.

example, in Christian Youth Camps Ltd v Cobaw Community Health Services Ltd[30] and *Walsh v St Vincent de Paul Queensland*.[31] However, dissatisfaction on the part of religious groups with the decisions in these cases does not necessarily mean that in those cases the right to manifest religion was unreasonably limited.

6. The RDB exemptions apply even if, in all the circumstances, it is unreasonable to do so

The approach in the RDB which permits religious organisations to discriminate against employees and prospective employees in all circumstances, regardless of the severity of the impact of that discrimination on the human rights of the employee, is not consistent with human rights jurisprudence.

Judgments of courts applying a human rights framework to conflicts between the rights of religious organisations and those of employees show that:

1. discrimination against groups that are particularly vulnerable, including women and LGBT community, is unlikely to be justifiable;
2. dismissal of an employee for breaching a religious rule regarding extra-marital sexual relationships or re-marriage may be justifiable in some limited circumstances;
3. religious organisation driven by deeply spiritual commitments may require all staff to adhere to the religion
4. religious organisations essentially secular in operation, would need to demonstrate that religious faith is a genuine occupational requirement for a particular position; and
5. religious organisations may dismiss employees if they publicly undermine the organisation's core beliefs.

First, human rights courts have held that discrimination against groups that are particularly vulnerable, including women and LGBT community, is 'suspect' and requires weighty reasons to be justified. This strict approach reflects the fundamental moral value of equality that underpins all human rights instruments.[32] In practice, the 'very weighty reasons' test 'hardly even sustained'. [33]

Courts applying human rights law have consistently held that religious organisations are not permitted to dismiss, or otherwise discriminate against people, on the ground of sex or sexual orientation. The was the conclusion of the:

- French *Cour de Cassation* it its 1991 decision in *Painsecq*[34] where it held that a Catholic order could not dismiss a lay person employed in the role of sacristan on discovering that he was homosexual.

[30] (2014) 308 ALR 615.

[31] *Walsh v St Vincent de Paul Queensland* (no 2) [2008] QADT 32.

[32] Janneke Gerards, Prohibition of Discrimination, in Van Dijk, et.al. *Theory and Practice of the European Convention on Human Rights* Intersentia, 2018, 997.

[33] Ibid., 1014.

[34] *Painsecq v Association Fraternite Saint-Pie X*, 17 April 1991.

- The European Court of Human Rights in S*taatkundige Gereformeerde Partij* held that a religiously-based political party who adhered to the biblical belief that women should not be in leadership positions over men, could not deny female members of the party the right to stand as candidates for election.[35]
- The Equality Court of South Africa in *Strydom*[36] held that a religious organisation could not dismiss a gay music teacher from an adult education course.
- The Ontario Superior Court of Justice in *Heinz*[37] held that a Christian charity for disabled people, employing more than 1400 staff could not dismiss a Christian support worker who was in a same sex relationship.
- The courts of Finland decided that the refusal of a Lutheran Church to employ a woman living in a same sex relationship as a chaplain was unlawful as was the refusal of a male Lutheran priest to deliver a service together with a female priest.[38]
- In the United Kingdom the dismissal of school teachers in *O'Neill*[39] and *De Groen*[40] for, respectively, being pregnant to a priest and living in a *de facto* relationship also constituted prohibited discrimination.

While no case concerning religious bodies discriminating against employees has come before the United Nations Human Rights Committee,[41] that Committee has made it clear that the right to religious freedom cannot justify discrimination on other grounds. In *General Comment 28 on the Equality of Rights between Men and Women*, the Committee emphasised that 'Article 18 may not be relied on to justify discrimination against women by reference to freedom of thought, conscience and religion'.[42]

Secondly, religious organisations have been able to justify discrimination on the basis of the private conduct of persons employed in particular roles, such as breaches of rules regarding extra-marital sexual relationships or re-marriage absent the annulment of first marriage. For example, courts have held that religious organisations may dismiss employees for breach of religious rules of personal conduct where that person is employed to teach the religion in schools, or has a senior and public leadership position in the religious organisation.

Significant weight attaches to the rights of religious organisations in relation to teachers of the religion who depart from theological principles or breach religious rules of conduct. This was the

[35] S*taatkundige Gereformeerde Partij v The Netherlands*, App No 58369/10.
[36] Johan Daniel Strydom v Nederduitse Gereformeerde Gemeente, Equality Court of South Africa (Transvaal Division), case no 26926/05.
[37] Ontario Human Rights Commission v Christian Horizons, 2010 ONSC 2105.
[38] Quoted in Heikkonen, J., & Slotte, P. (2012). Religion and Discrimination Law in the European Union: Finland. In M. Hill (Ed.), Religion and Discrimination Law in the European Union: Proceedings of the Conference, Oxford, 29 September–2 October 2011, (pp. 125-144). Trier: European Consortium of Church and State Research.

[39] O'Neill v Governors of St Thomas More R.C. School, Employment Appeal Tribunal, 24 May 1996.
[40] Gan Menachem Hendon Ltd v De Groen, Employment Appeal Tribunal, NO UKEAT/0059/18/OO, 12 February 2019.
[41] reference to mandate of committee and what int law it applies plus weight of its decisions
[42] UN Human Rights Committee *General Comment 28 on the Equality of Rights between Men and Women*

approach of UN Human Rights Committee in *Delgado* v *Colombia*[43] and, recently, of the ECtHR in *Travas v Croatia*[44]. The dismissal of a kindergarten teacher in the case of *Siebenhaar* was also justified because she commenced proselytising for a minority religion that rejected other religions, including that of her employer. Similarly, persons who hold senior and high-profile positions in a church may be dismissed for breach of religious rules. For example, the dismissal of the head of public relations for Europe of the Church of Jesus Christ of Latter-Day Saints on the ground of adultery, despite the impact on the employee's rights to privacy and work, was held to be justified.

However, the dismissal of employees by religious organisations on the basis of private conduct contrary to church rules is not amenable to a one-rule-fits all approach: all of these cases involved the careful analysis of the facts to determine whether the dismissal was reasonable in the particular circumstances.[45] Sometimes, where the impact on the rights of the employee is serious, this is not the case. For example, the dismissal of an employee who breached church rules regarding marriage was, on balance, not justified because as a church organist he would struggle to find alternative work.[46]

Thirdly, human rights law has recognised the right of religious organisations to discriminate on the basis of an employee's religion in cases where adhering to a particular religious faith is a genuine requirement of the position and where it is also reasonable to do so taking into account all the circumstances of a case. In a religious organisation driven by deeply spiritual commitments that may mean that all staff may be required to adhere to the religion.

For example, the 2009 case of the *Leprosy Mission*, an UK Employment Tribunal held that it was justifiable to insist that all employees, including a finance administrator, shared the Christian faith because the work of the Mission was infused, in every aspect, with a spiritual commitment to continuing the work of Jesus in assisting people suffering from leprosy. Similarly, because the nature of its spiritual mission, a Dutch court held that the Salvation Army could require that employees share its Christian faith. On the other hand, a large religious charity in the case of *Sheridan v Prospects for People with Disability,*[47] which provided accommodation to disabled

[43] Communication non 195/1985 W. Delgado Paes v Columbia (views adopted on 12 July 1990).
[44] Travas v Croatia App no 75581/13, ECtHR, decided 4 October 2016
[45]W. Cole Durham Jr., Brett G. Scharffs Law and Religion: National, International, and Comparative Perspectives, Wolters Kluwer, 2019 at 466 summarises the types of factors that human rights courts have taken into account in these cases, namely:
(1) voluntary assumption of obligations of loyalty by the employee to the hiring institution;
(2) what range, if any, of alternative employment is available to the dismissed employee;
(3) the importance attached to the conduct in question by the religious community (or other belief, ideological or ethos society);
(4) the nature of the employment and its place in carrying out the mission of the organization;
(5) the effect of continued employment on the credibility of the religious community in affirming and living by its teaching;
(6) whether less drastic measures might suffice to protect the institutional autonomy of the ethos-based community;
(7) the right of a religious community to independence in its internal affairs;
(8) the family and privacy rights of the employee.
[46] *Schuth v Germany*, App NO 1610/03, ECtHR, 2010.
[47] *Sheridan v Prospects for People with Learning Disabilities*, Employment Tribunals, case no 2901366/06, 13 May 2008.

people, could not apply a requirement for a belief in Christianity to almost all its employees[48] but had to demonstrate that this was necessary for the particular job that was being performed. The Court held that being a Christian was not necessary for the role of carer.

Fourthly, and finally, religions organisations may dismiss employees who engage in high profile public campaigns challenging religious doctrine. Note that here we are talking about a limit on the employee's right to freedom of expression and not discrimination. Examples of these include priests who participated in public campaigns to end the Catholic Church's celibacy requirements,[49] and a doctor in a Catholic hospital who had a leading role in a public campaign in support of decriminalising abortion.[50]

This overview of human rights jurisprudence shows that the capacity of a religious organisation to dismiss employees on discriminatory grounds (outside of the 'suspect' grounds) is context-specific, and in each case the facts as they pertain to the rights of the religious organisation are balanced against the rights of the employee to equality, work, privacy and family life.

In comparison, the RDB exemptions permit discrimination against employees and prospective employees regardless of whether this is reasonable in light of the severity of the impact of the discrimination, including on the basis of suspect grounds of sex, sexual orientation and gender identity. These exemptions permit objectively 'unreasonable' outcomes because no matter how serious the limitation of the rights of employees, the religious body will always be able to proceed with refusal to employ/to dismiss in accordance with their beliefs.

7. Recommendations

The following amendments would to bring Australian law into line with international human rights law. In terms of the draft RDB, one approach - building on the model in EU Directive 2000/78[51] - would be for the religious exemptions to be re-designed as follows:

- to apply only to discrimination in the context of employment;
- to apply to religious as well as other belief-based (or 'ethos' based) organisations;
- to permit discrimination on the basis of 'religion and belief' only, not on the basis of holding a particular belief or engaging in a particular belief-based activity;
- to include a genuine occupational requirement and an objective 'reasonableness' test; and
- to provide that the section does not permit conduct that would constitute discrimination on any other ground.

[48] The employer exempted cooks, gardeners, cleaners and maintenance assistants from the requirement.
[49] *Fernandez Martinez v Spain*, ECtHR, App No. 56030/07, 12 June 2014.
[50] *Rommelfanger v Germany*, [1989] ECHR 27 (6 September 1989).
[51] The EU Employment Equality Directive 2000/78 Section 4(2) provides that ethos-based organisations may discriminate on the basis of religious belief where (1) this is a genuine occupational requirement and (2) its reasonable in all the circumstances of the case and (3) it does not constitute discrimination on another ground.

Furthermore, the SDA should be amended to retain s 37 (1) (a) – (c) but remove all other parts of s 37 and all of s 38. Consequential amendments would need to be made to the exemptions for religious organisations in the *Fair Work Act*, 2009 and the *Age Discrimination Act*, 2004.

Any alternative approach to the drafting of exemptions for religious organisations in Australia needs careful thought. What is clear, however, is that the current approach, by allowing religious organisations to discriminate in circumstance of its own choosing, regardless of the severity of the impact of such discrimination on the human rights of employees and prospective employees, is inconsistent with a carefully defined and balanced human rights approach.