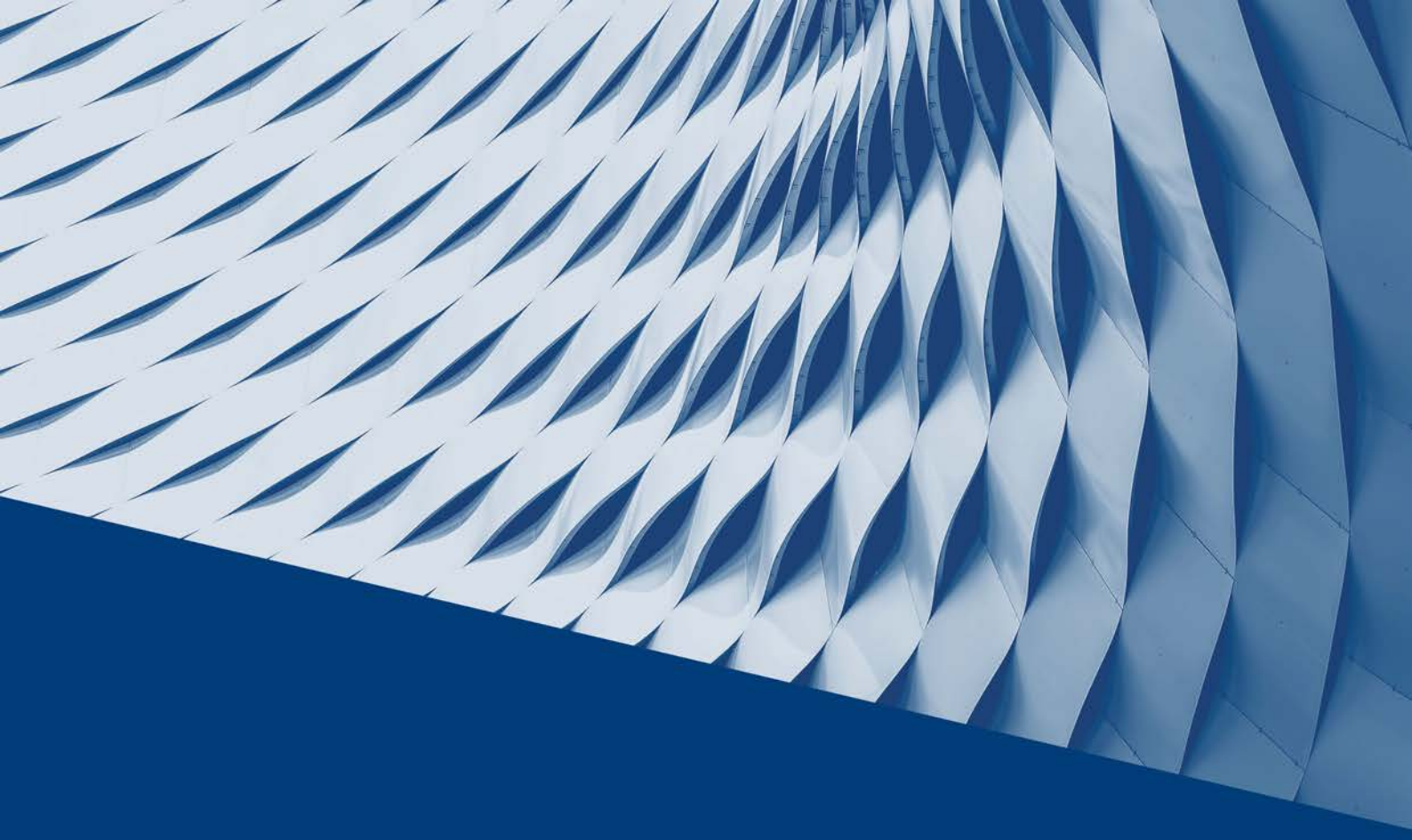

Religious Educational Institutions and Anti-Discrimination Laws

Submission by the Australian Council of Trade Unions to the Australian Law Reform Commission Inquiry on Religious Educational Institutions and Anti-Discrimination Laws

ACTU Submission, 3 March 2023
ACTU D. No 11/2023

ACTU
australian council of trade unions

Contents

Introduction

About the ACTU

Since its formation in 1927, the ACTU has been the peak trade union body in Australia. It has played the leading role in advocating for, and winning the improvement of working conditions, including on almost every Commonwealth legislative measure concerning employment conditions and trade union regulation. The ACTU has also appeared regularly before the Fair Work Commission and its statutory predecessors, in numerous high-profile test cases, as well as annual national minimum and award wage reviews.

The ACTU is Australia's sole peak body of trade unions, consisting of affiliated unions and State and regional trades and labour councils. There are currently 43 ACTU affiliates who together have over 1.7 million members who are engaged across a broad spectrum of industries and occupations in the public and private sector.

Reflecting the diversity of the Australian workforce, the union movement includes people from all backgrounds and walks of life, including young people, members of the LGBTIQ+ community, First Nations workers, people with disability, and workers from religiously, culturally and linguistically diverse backgrounds. Over 50% of Australian union members are women. Australian unions have a long and proud history of fighting for workplaces free from racism, sexism and all forms of discrimination and prejudice, and standing up for justice, safety, respect and equality for all workers.

The Australian union movement has a significant interest in the effectiveness of Australia's anti-discrimination and human rights framework. Since the commencement of anti-discrimination laws, the majority of complaints have related to employment.[1] This is because work is absolutely central to human dignity and our ability to live a decent life. The significant power imbalance between employers and workers means that workers are particularly vulnerable to exploitation, discrimination and other human rights abuses.

The ACTU welcomes the opportunity to make a submission to the Australian Law Reform Commission on the Inquiry into Religious Educational Institutions and Anti-Discrimination Laws (**ALRC Inquiry**). This Inquiry is the first step in delivering on important promises made by the

[1] Australian Human Rights Commission 2021-22 Complaint statistics show that in 2021-22, employment made up 22% of complaints under the Disability Discrimination Act; 73% of complaints under the Sex Discrimination Act; 38% of complaints under the Racial Discrimination Act and 41% of complaints under the Age Discrimination Act.

Australian Labor Party prior to the May 2022 Federal Election, which saw it elected to Government. The ACTU fully supports the delivery of the commitments to ensure that religious educational institutions must not discriminate against students and staff on the basis of sex, sexual orientation, gender identity, marital or relationship status, or pregnancy. This is a long overdue reform that is necessary to protect the safety, dignity and fundamental rights and freedoms of students and staff at religious educational institutions.

In relation to the preferencing of staff on the basis of religion, as a general principle the ACTU does not support this, except in relation to a small number of roles where there is a genuine occupational requirement, and subject to certain guiding principles. The ACTU has set out these guiding principles in the section on Proposal 10 below.

Guiding Principles

The ACTU's submission is guided by the following principles:

- Every worker has the right to a safe, healthy and respectful workplace, regardless of race, religion, sexual orientation, sex, gender identity, disability, age or other personal attribute.
- No worker should be unlawfully discriminated against by their employer because of their religion, unless religion is essential to the role, and the discrimination is reasonable and proportionate in the circumstances.
- The ACTU supports the extension of the federal anti-discrimination law framework to protect workers from unlawful discrimination because of their religious beliefs or activities.
- Religious organisations have the right to act in accordance with the doctrines, beliefs or teachings of their faith, subject to limitations necessary to protect public health, safety or the fundamental rights and freedoms of others.
- No changes to the federal anti-discrimination framework should leave any worker worse off, or override or remove existing protections from any form of unlawful discrimination.
- There should be no double standards when it comes to consequences for misconduct in a profession, trade or occupation – religious and non-religious workers should be treated equally.
- Human rights belong to people, not bodies corporate.

Summary of Recommendations

Recommendation 1: Proposal 1 should be implemented, meaning s38(3) of the SD Act would be repealed.

Recommendation 2: Proposal 2 should be implemented, meaning s38(1) and (2) of the SD Act would be repealed.

Recommendation 3: Proposal 3 should be implemented, meaning that the general religious bodies exceptions in s37(1)(d) of the SD Act would be narrowed so that they do not apply to educational institutions.

Recommendation 4: Proposal 4 should be implemented, meaning that the exception for religious bodies in s23(3)(b) would not apply to accommodation provided by an educational institution.

Recommendation 5:

(a) Proposal 5 should be implemented, meaning that the FW Act would be amended to specify that exceptions for religious bodies in in the FW Act do not apply to educational institutions, except as otherwise provided in the SD Act and AD Act.
(b) Proposal 5 should also remove the inherent requirement exceptions in the FW Act except as otherwise provided for under Commonwealth anti-discrimination law.

Recommendation 6:

a) Proposition A.1 should be amended to include discrimination against students on the basis of protected attributes of their family members, carers and associates (as defined in the DD Act).
b) Proposition B.1 should be amended to include discrimination against staff members on the basis of protected attributes of their family members, carers and associates (as defined in the DD Act).
c) Proposal 6 should be implemented in line with the amended Propositions A.1 and B.1 – meaning that both students and staff would be protected from discrimination on the basis of protected attributes of their family members, carers and associates (as defined in the DD Act).

Recommendation 7: Delete Proposal 7 as it is unnecessary and creates more problems than it solves.

Recommendation 8: Delete Proposal 8 as it is unnecessary and should be dealt with pursuant to Proposal 10. Preferencing should not be dealt with in the FW Act prior to the creation of a Religious Discrimination Act.

Recommendation 9:

a) Delete Proposal 9 as it is unnecessary, would result in workers' rights being undermined, and goes beyond the Terms of Reference.
b) Delete Proposition D as it is unnecessary and goes beyond the Terms of Reference.

Recommendation 10:

a) The second dot point of Proposal 10 should be deleted, as it is unnecessary and goes beyond the Terms of Reference.
b) The first dot point of Proposal 10 that would give religious educational institutions the ability to preference staff based on religion should only be implemented in a future religious discrimination Act in line with the principles put forward by the ACTU.
c) Proposition C should be amended to read as follows:
   In relation to selection of staff, religious educational institutions should be able to preference staff based on the staff member's religious belief or activity, where this is justified because:
   - *It is necessary for the participation of the person in the teaching of the religion or to perform duties or functions for the purposes of or in connection with any religious observance or practice, and is a genuine requirement of the role;*
   - *the differential treatment is in pursuit of a legitimate goal, is necessary to achieve that goal, and is proportionate in all of the circumstances; and*
   - *the criteria for preferencing in relation to religion or belief would not amount to discrimination on another prohibited ground (such as sex, sexual orientation, gender identity, marital or relationship status, or pregnancy), if applied to a person with the relevant attribute.*

Recommendation 11: Proposal 11 should be implemented, meaning that religious educational institutions would be subject to the inquiry powers of the Australian Human Rights Commission.

Recommendation 12: Proposal 12 should be implemented, although there may be other ways of assisting particularly vulnerable minority groups to comply that do not involve the granting of temporary exemptions.

Recommendation 13: Proposal 13 should be implemented, and guidance should be developed in consultation with relevant stakeholders, including unions and workers.

Recommendation 14: Proposal 14 should be implemented, and further staged reforms should be consulted on and made to simplify and strengthen Commonwealth anti-discrimination law. The first priority should be the alignment of the FW Act with anti-discrimination laws, followed by the enactment of a religious discrimination Act, the harmonisation of anti-discrimination laws, and the enactment of a Human Rights Act.

Propositions in the ALRC Consultation Paper

The ALRC Consultation Paper contains four broad Propositions, which are the broad principles informing the first 11 Technical Proposals. The ACTU's position in relation to Propositions A-D Is outlined below.

Proposition A – Discrimination against students

Proposition A relates to achieving the policy commitment set out in the Terms of Reference that religious educational institutions must not discriminate against a student on the basis of sexual orientation, gender identity, marital or relationship status, or pregnancy.

Proposition A has three elements:

A1. *Religious educational institutions should not be allowed to discriminate against students (current or prospective) on the grounds of their sexual orientation, gender identity, marital or relationship status, or pregnancy, or on the grounds that a family member or carer has one of those attributes.*

A2. *Religious educational institutions should be permitted to train religious ministers and members of religious orders, and regulate participation in religious observances or practices, unfettered by sex discrimination laws. Where applicable, religious educational institutions should also continue to benefit from the exception available to charities in relation to the provision of accommodation.*

A3. *Religious educational institutions should be permitted to teach religious doctrines or beliefs on sex or sexual orientation in a way that accords with their duty of care to students and requirements of the curriculum.*

The ACTU is supportive of Proposition A.1 but the protection should extend further. Religious educational institutions should never be allowed to discriminate (whether direct and indirect) against current or prospective students because they have any of the protected attributes listed, or on the grounds that a family member, carer or any personal associate has one of those attributes. Proposition A.1 (and Proposal 6) as currently worded only extend this protection to a family member or carer, but it should extend to all personal associates. The ACTU does not object

to Proposition A.2 and the ability of religious educational institutions to train religious ministers and members of religious orders, and regulate participation in religious observances or practices unfettered by sex discrimination laws.

The ACTU has concerns regarding a broad right to teach religious doctrines or beliefs on sex or sexual orientation, even where it is done in a way that accords with the duty of care to students and curriculum requirements as contemplated in Proposition A.3. The ACTU's position is that religious educational institutions should be able to teach religious doctrine, as long as in doing so they do not discriminate on the basis of any protected attribute.

Proposition B – Discrimination against staff

Proposition B relates to achieving the policy commitment set out in the Terms of Reference that religious educational institutions must not discriminate against a member of staff on the basis of sex, sexual orientation, gender identity, marital or relationship status, or pregnancy.

Proposition B has three elements:

B1. *Religious educational institutions should not be allowed to discriminate against any staff (current or prospective) on the grounds of sex, sexual orientation, gender identity, marital or relationship status, or pregnancy.*

B2. *Religious educational institutions should be able to select staff involved in the training of religious ministers and members of religious orders, and regulate participation in religious observances or practices, unfettered by sex discrimination laws. Where applicable, religious educational institutions should also continue to benefit from the exception available to charities in relation to the provision of accommodation.*

B3. *Religious educational institutions should be able to require staff involved in the teaching of religious doctrine or belief to teach religious doctrine or belief on sex or sexuality as set out by that institution and in accordance with their duty of care to students and staff, and requirements of the curriculum.*

The ACTU is supportive of Proposition B.1 but the protection should extend further. Religious educational institutions should never be allowed to discriminate (whether direct and indirect) against current or prospective staff members because they have any of the protected attributes listed, or on the grounds that a family member, carer or any personal associate has one of those attributes. Proposition B (and Proposal 6) as currently worded do not extend this protection to a personal associates of staff members.

The ACTU does not object to Proposition B.2 and the ability of religious educational institutions to select staff involved in the training of religious ministers and members of religious orders, and regulate participation in religious observances or practices unfettered by sex discrimination laws. Nor does the ACTU object to religious educational institutions being able to use the exception available to charities in relation to the provision of accommodation.

The ACTU has concerns regarding a broad right to require staff to teach religious doctrines or beliefs on sex, sexuality or sexual orientation, even where it is done in a way that accords with the duty of care to students and curriculum requirements as contemplated in Proposition B3. The ability for a staff member to be able to "provide objective information about alternative viewpoints if they wished"[2], whilst necessary, is not sufficient – it does not do enough to protect either students or staff. The ACTU's position is that religious educational institutions should be able to teach religious doctrine, as long as in doing so they do not discriminate on the basis of any protected attribute.

Proposition C – Preferencing staff on religious grounds

Proposition C relates to achieving the policy commitment set out in the Terms of Reference that religious educational institutions can continue to build a community of faith by giving preference, in good faith, to persons of the same religion as the educational institution in the selection, appointment and promotion of staff.

Proposition C has two elements:

C1. *In relation to selection, appointment, and promotion, religious educational institutions should be able to preference staff based on the staff member's religious belief or activity, where this is justified because:*

- *participation of the person in the teaching, observance, or practice of the religion is a genuine requirement of the role;*
- *the differential treatment is proportionate to the objective of upholding the religious ethos of the institution; and*
- *the criteria for preferencing in relation to religion or belief would not amount to discrimination on another prohibited ground (such as sex,*

[2] Australian Law Reform Commission (2023) Consultation Paper: Religious educational institutions and anti-discrimination laws, at [54], page 21.

sexual orientation, gender identity, marital or relationship status, or pregnancy), if applied to a person with the relevant attribute.

C2. *The nature and religious ethos of the educational institution should be taken into account in determining whether participation of the person in the teaching, observance, or practice of the religion is a genuine requirement of the role.*

In relation to the preferencing of staff on the basis of religion, as a general principle the ACTU does not support this, except in relation to a small number of roles where there is a genuine occupational requirement, and subject to certain guiding principles. The ACTU has set out these guiding principles in the section on Proposal 10 below.

Proposition D – Ongoing requirements on all staff to respect the religious ethos

Proposition D has three elements:

D1. *Religious educational institutions should be able to expect all staff to respect their institutional ethos. A religious educational institution should be able to take action to prevent any staff member from actively undermining the institutional ethos of their employer.*

D2. *Religious educational institutions should be able to impose reasonable and proportionate codes of staff conduct and behaviour relating to respect for the institution's ethos, subject to ordinary principles of employment law and prohibitions of discrimination on other grounds.*

D3. *Respect for an educational institution's ethos and codes of conduct or behaviour should not require employees to hide their own sex, sexual orientation, gender identity, marital or relationship status, or pregnancy in connection with work or in private life, or to refrain from supporting another person with these attributes.*

The ALRC Consultation paper states that Proposition D relates to the policy commitments set out in the Terms of Reference.[3] Whilst it doesn't specify which commitment that is, we assume that the assertion is that Proposition D relates to the policy commitment that a religious educational institution can continue to build a community of faith by giving preference, in good faith, to persons of the same religion as the educational institution in the selection of staff.

[3]Australian Law Reform Commission (2023) Consultation Paper: Religious educational institutions and anti-discrimination laws, at [50], pages 19-20.

We note that that Terms of Reference refer to ensuring that a religious educational institution can "continue to build a community of faith by giving preference, in good faith, to persons of the same religion as the educational institution in the selection of staff" (**the preferencing policy commitment**).

Proposition D goes well beyond the Terms of Reference. Proposition C is directly related to the preferencing policy commitment, and is sufficient to achieve it. Proposition D is not also needed to achieve the policy commitment, and indeed goes far beyond it to create new rights for religious educational institutions to require staff to respect the religious ethos, and to terminate them if they don't. Nothing in the Terms of Reference refers to or supports the idea that there be ongoing requirements on all staff to respect the religious ethos of the educational institution. Proposition D seems to be based on an idea that if religious educational institutions are to be limited in the extent to which they can preference members of the same religion on anti-discrimination grounds (in that they cannot apply preferencing to all staff members, only those involved in the teaching, observance or practice of religion), then "they would benefit from assurance that anti-discrimination law will not prevent them from ensuring that all staff members appropriately respect the religious ethos of the educational institution."[4]

However religious educational institutions do not need such assurance, nor should new requirements for employees or rights to terminate employees be created. Religious educational institutions already have the benefit of ordinary principles of employment law, such as the common law duties of loyalty and fidelity to an employer, the requirement to comply with lawful and reasonable directions, and the general requirement to comply with codes of conducts and policies of the employer. Religious educational institutions also have the ability to terminate an employee for serious misconduct, which includes conduct that causes serious and imminent risk to the reputation, viability or profitability of the employer's business, wilful and deliberate behaviour that is inconsistent with the continuation of the contract of employment, and the refusal to carry out lawful and reasonable instructions consistent with the contract of employment.[5]

The ALRC Consultation paper acknowledges that taken together, Propositions C and D adopt a different approach to current state and territory laws, however that the ALRC "considers that

[4] Australian Law Reform Commission (2023) Consultation Paper: Religious educational institutions and anti-discrimination laws, at [62], page 25.
[5] Reg 1.07, Fair Work Regulations 2009 (Cth)

there is merit in maintaining a distinction between preferencing in respect of certain staff, and action that can be taken in relation to all staff to maintain the ethos of the institution."[6]

Proposition D is beyond the Terms of Reference. It should be deleted, along with the Proposals that flow from it (Proposal 9, and the second part of Proposal 10).

Proposals in the ALRC Consultation Paper

The ALRC Consultation Paper contains 14 Technical Proposals which implement Propositions A-D and further proposals in relation to consequential reforms. The ACTU's position in relation to these 14 Proposals is outlined below.

Proposal 1 – Repeal subsection 38(3) of the *Sex Discrimination Act*

Proposal 1 implements Proposition A, by removing the specific exception in section 38(3) of the *Sex Discrimination Act 1984* (Cth) (**SD Act**) currently available to religious educational institutions that allows them to discriminate against students and prospective students on the grounds of sexual orientation, gender identity, marital or relationship status, and pregnancy.

If Proposal 1 were implemented, educational institutions (including non-religious educational institutions) would still be able to discriminate against prospective students on the grounds of sex in relation to enrolment at single sex schools, and to discriminate in relation to the provision of accommodation where it is solely provided for students of one sex.[7]

The exception in s38 (3) of the SD Act which permits religious organisations to discriminate against students on the grounds of their sexual orientation, gender identity, marital or relationship status or pregnancy has been the subject of significant criticism over many years.[8] Concerns have been raised by many, including unions, that these exceptions have limited the rights and freedoms of students in a way which is not reasonable, proportionate, justified or necessary. These exceptions have caused significant harm to students. Every student has the right to a safe, healthy and respectful educational environment, regardless of race, religion, sexual orientation, sex, gender identity, disability, age or other personal attribute. Removing this

[6] Australian Law Reform Commission (2023) Consultation Paper: Religious educational institutions and anti-discrimination laws, at [66], page 26.
[7] Australian Law Reform Commission (2023) Consultation Paper: Religious educational institutions and anti-discrimination laws, [74]-[75], page 29
[8] A number of inquiries have recommended their review and/or removal, for example: Australian Law Reform Commission, 'Equality Before the Law: Justice for Women', Report No. 69 (1994); Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the effectiveness of the Sex Discrimination Act, 2008; Senate Standing Committee on Legal and Constitutional Affairs, Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff, November 2018.

exception is a long overdue reform that is critical to ensuring the safety and wellbeing of students, and which upholds their fundamental rights and freedoms. The ACTU wholeheartedly supports and welcomes this Proposal.

Recommendation 1: Proposal 1 should be implemented, meaning s38(3) of the SD Act would be repealed.

Proposal 2 – Repeal subsections 38(1) and (2) of the *Sex Discrimination Act*

Proposal 2 implements Proposition B, by removing specific exceptions applicable to religious educational institutions that allow discrimination against current and prospective employees and contract workers on the grounds of sex, sexual orientation, gender identity, marital or relationship status, and pregnancy.

The exceptions in subsection 38 (1) and (2) of the SD Act which permit religious organisations to discriminate against workers on the grounds of their sex, sexual orientation, gender identity, marital or relationship status or pregnancy have been the subject of significant criticism over many years.[9] Concerns have been raised by many, including unions, that these exceptions have limited the rights and freedoms of workers in a way which is not reasonable, proportionate, justified or necessary. These exceptions have caused significant harm to workers. Every worker has the right to a safe, healthy and respectful workplace, regardless of race, religion, sexual orientation, sex, gender identity, disability, age or other personal attribute. Removing these exceptions is a long overdue reform that is critical to ensuring the safety and wellbeing of employees, and which upholds their fundamental rights and freedoms. The ACTU wholeheartedly supports and welcomes this Proposal.

Recommendation 2: Proposal 2 should be implemented, meaning s38(1) and (2) of the SD Act would be repealed.

Proposal 3 – Amend the *Sex Discrimination Act* to specify the exception for religious bodies in s37(1)(d) does not apply to educational institutions

Proposal 3 implements Propositions A and B by ensuring that the exception in section 37(1)(d) of the SD Act would not, in the absence of section 38, be read to apply to religious educational

[9] A number of inquiries have recommended their review and/or removal, for example: Australian Law Reform Commission, 'Equality Before the Law: Justice for Women', Report No. 69 (1994); Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the effectiveness of the Sex Discrimination Act, 2008; Senate Standing Committee on Legal and Constitutional Affairs, Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff, November 2018.

institutions (which would effectively make the proposed reforms in Proposals 1 and 2 redundant).[10]

The exceptions in subsection 37(1) (a)-(c) of the SD Act are preserved, and have the effect that it is not unlawful for students and staff to be discriminated against on any of the prohibited grounds under the SD Act (even in educational contexts), where the differential treatment is in relation to:

- the ordination or appointment of priests, ministers of religion, or members of any religious order;
- the training or education of persons seeking ordination or appointment as priests, ministers of religion, or members of a religious order; and
- the selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice.

The ACTU supports this Proposal as it is necessary to give full effect to Propositions A and B, and thereby ensure the safety, wellbeing and fundamental rights and freedoms of workers and students in religious educational institutions.

Recommendation 3: Proposal 3 should be implemented, meaning that the general religious bodies exceptions in s37(1)(d) of the SD Act would be narrowed so that they do not apply to educational institutions.

Proposal 4 – Amend the *Sex Discrimination Act* to specify the exception for religious bodies in s23(3)(b) does not apply to accommodation provided by educational institutions

Proposal 4 implements Propositions A and B, by excluding educational institutions from the broad religious bodies exception in s 23(3)(b) that allows discrimination in the provision of accommodation on SD Act grounds. Educational institutions with charitable status would still be able to rely on a general exception for charities contained in s 23(3)(c) of the Act in relation to sex or marital status. This allows charities to provide accommodation solely for persons of one sex or solely for persons of one or more particular marital or relationship statuses. A boarding

[10] Australian Law Reform Commission (2023) Consultation Paper: Religious educational institutions and anti-discrimination laws, [78], page 30.

school administered by a charity could therefore restrict the provision of accommodation, for example, to only staff members who are single.

The ACTU supports this Proposal as it is necessary to give full effect to Propositions A and B, and thereby ensure the safety, wellbeing and fundamental rights and freedoms of workers and students in religious educational institutions.

Recommendation 4: Proposal 4 should be implemented, meaning that the exception for religious bodies in s23(3)(b) would not apply to accommodation provided by an educational institution.

Proposal 5 – Amend the *Fair Work Act* to specify that the exceptions for religious bodies in ss152(2)(b), 195(2)(b), 351(2)(c) and 772(1)(f) do not apply to educational institutions (except as otherwise provided in the *Sex Discrimination Act* and *Age Discrimination Act*

Proposal 5 implements Proposition B by clarifying that the general religious bodies exceptions to the prohibitions of discrimination contained in the FW Act do not apply to religious educational institutions – except as otherwise specified in Commonwealth anti-discrimination laws. This would mean religious educational institutions would be subject to the non-discrimination requirements in relation to modern awards, enterprise agreements, adverse action and unlawful termination. The exceptions applying in section 37(1)(a)-(c) of the SD Act would still apply.

Proposal 5 would also remove exceptions for religious educational institutions to the prohibition of discrimination on grounds not covered by the SD Act, such as race, colour, age, physical or mental disability, political opinion, national extraction or social origin. This is a desirable change which the ACTU supports, and is also of limited practical effect as age is the only other attribute affected by a religious bodies exception under Commonwealth anti-discrimination law. The ACTU does not think it is necessary to maintain an exception in relation to age under the FW Act. It is appropriate that the exceptions contained in the SD Act and the *Age Discrimination Act 2004* (Cth) (**AD Act**) apply and that the FW Act be consistent with those exceptions. The FW Act should not create exceptions that do not exist under applicable anti-discrimination law.

The exceptions in the FW Act which permit religious organisations to discriminate against workers with protected attributes where action is taken in good faith and to avoid injury to the religious susceptibilities of adherents of the have been the subject of significant criticism. Concerns have been raised by many, including unions, that these exceptions have limited the rights and freedoms of workers in a way which is not reasonable, proportionate, justified or necessary. These exceptions have caused significant harm to workers. Every worker has the right to a safe, healthy and respectful workplace, regardless of race, religion, sexual orientation, sex, gender identity, disability, age or other personal attribute. Removing these exceptions is a long overdue reform that is critical to ensuring the safety and wellbeing of employees, and which upholds their

fundamental rights and freedoms. The ACTU wholeheartedly supports and welcomes this Proposal.

However, amendments are also needed to the provisions of the FW Act that provide exceptions to discrimination on the basis of inherent requirements. These exceptions can be found at s153(2)(a), s195(2)(a), s351(2)(b) and s772(2)(a). These sections provide variously that a term of an award or an enterprise agreement do not discriminate against an employee if the reason for the discrimination is the inherent requirements of the employee's position, that action taken against an employee is not adverse action if it is taken because of the inherent requirements of the employee's position, and that termination of an employee's employment on a prohibited ground is not unlawful if the reason is based on the inherent requirements of their position.

Unless the inherent requirement exceptions in these provisions are also amended, it is likely they will be used to discriminate against employees with protected attributes in place of the religious exceptions that used to exist. For example, an employer could argue that it is an inherent requirement that all teachers at a religious school are of a certain religious belief or engage in a certain religious activity. There are existing inherent requirement exceptions on the grounds of disability and age in anti-discrimination law, and these could still be relied upon by employers. The FW Act should not create exceptions that do not exist under applicable anti-discrimination law.

We note that Proposals 8 to 10 propose to apply narrower exceptions for religious educational institutions in relation to discrimination on the grounds of religion in the FW Act and in any future Religious Discrimination Act. Our position on these proposals is set out below.

Recommendation 5:

(c) Proposal 5 should be implemented, meaning that the FW Act would be amended to specify that exceptions for religious bodies in in the FW Act do not apply to educational institutions, except as otherwise provided in the SD Act and AD Act.
(d) Proposal 5 should also remove the inherent requirement exceptions in the FW Act except as otherwise provided for under Commonwealth anti-discrimination law.

Proposal 6 –Prohibit discrimination against students and prospective students on the grounds that a family member or carer has a protected attribute

Currently, the SD Act does not clearly protect a student in relation to discrimination on the basis of their family member's or carer's protected attributes. Proposal 6 would implement Proposition A by amending the SD Act to extend anti-discrimination protections to prohibit discrimination

against students and prospective students on the grounds that a family member or carer of the student has a protected attribute.[11]

The ALRC Consultation paper also states that "there is merit in considering broader reform to extend protection to any discriminated against because of their association with another person having protected attributes (such provisions already exist in a number of other anti-discrimination laws)." However the paper concludes that "given the complexity of introducing such a change more broadly within the existing architecture of the Sex Discrimination Act, this is an issue that should be considered as part of reforms put forward in Proposal 14."[12]

The ACTU does not believe this change presents any great complexity. The ALRC has already proposed amending the SD Act to protect a student in relation to discrimination on the basis of their family member's or carer's protected attributes. If it is already making such a change, there is no additional complexity that arises from extending the protection to all personal associates with a protected attribute. Other anti-discrimination laws, such as section 7 of the *Disability Discrimination Act 1992* (Cth) (**DD Act**), provide protection from discrimination on the grounds that a personal associate of the person has a protected attribute. As an example, it is unlawful for an employer to discriminate against an employee on the ground of a disability of any of the employee's associates. 'Associate' of a person is defined broadly to include a spouse, relative or carer of that person, someone that person is living with, or another person who is in a business, sporting or recreational relationship with that person.[13]

There is no rational basis to limit this protection to family members and carers of students, or to provide a lesser protection in this circumstance than is provided under the DD Act. Discrimination against a student on the basis of protected attributes of their friends, or other people they know, is just as pervasive as discrimination on the basis of protected attributes of their family members and carers. Proposition A.1 should be amended accordingly to include discrimination against students on the basis of protected attributes of their family members, carers and associates (as defined in the DD Act).

One way of implementing this change would be to add a separate section to the SD Act that has the equivalent effect of section 7 of the DD Act. For example, a new section of the SD Act could state that "this Act applies in relation to a person who has an associate with an attribute that is

[11] Australian Law Reform Commission (2023) Consultation Paper: Religious educational institutions and anti-discrimination laws, at [88], page 31.
[12] Australian Law Reform Commission (2023) Consultation Paper: Religious educational institutions and anti-discrimination laws, at [89], pages 31-32.
[13] Section 4, Disability Discrimination Act 1992 (Cth).

protected by this Act." The new section could give examples in the same way that section 7 of the DD Act does.

Furthermore, this protection should also be extended to staff members and prospective staff members. This is essential to ensure that non-LGBTQI+ staff who love and support LGBTQI+ family, friends and networks, are not discriminated against for doing so. The proposal outlined above would also apply to staff. Proposition B.1 should be amended accordingly to include discrimination against staff members on the basis of protected attributes of their family members, carers and associates (as defined in the DD Act).

One example of why this protection is needed for both staff and students is the events at Citipointe Christian College, where many staff and students spoke out to protect and support LGBTIQ+ students and suffered adverse consequences as a result.[14]

Recommendation 6:

d) Proposition A.1 should be amended to include discrimination against students on the basis of protected attributes of their family members, carers and associates (as defined in the DD Act).
e) Proposition B.1 should be amended to include discrimination against staff members on the basis of protected attributes of their family members, carers and associates (as defined in the DD Act).
f) Proposal 6 should be implemented in line with the amended Propositions A.1 and B.1 – meaning that both students and staff would be protected from discrimination on the basis of protected attributes of their family members, carers and associates (as defined in the DD Act).

Proposal 7 – Amend the *Sex Discrimination Act* to clarify that the content of the curriculum is not subject to the Act

Proposal 7 implements Propositions A.3 and B.3. Proposal 7 has been put forward in response to concerns that have been raised by some stakeholders about the potential consequences Proposal 1 could have on the ability of religious schools to teach their religious beliefs. Some stakeholders are concerned that teaching of their doctrine or beliefs on human sexuality and relationships could be held to be discriminatory to, for example, LGBTQ+ students. Therefore the

[14] Australian Story (31 October 2022), Susan Chenery and Kristin Murray, 'How Citipointe Christian College's 'sexuality contract' brought queer students out of the shadows and onto the national stage'

Proposal is designed to confirm a school's ability to teach religious doctrine by clarifying that the content of the curriculum is not subject to the SD Act.

The ALRC consultation paper concedes that this does not appear to have been an issue in states and territories that have long-standing protection on SD Act grounds for students and staff, such as Queensland and Tasmania. However the paper goes on to say that "given the importance of the right to manifest religious belief, and the potential for uncertainty, there may be benefit in an explicit provision in the SD Act that the content of the curriculum (as opposed to the way it is delivered) is not affected."[15] The ALRC Consultation paper also states "the content of the curriculum will still be subject to requirements of state and territory educational authorities, which may include requirements around how curriculum in relation to sexuality or protected attributes is taught. Schools will also remain bound by their duty of care to students and staff, and other accreditation requirements."[16] However, as detailed below, the ACTU has concerns about the potential impact of this Proposal on anti-discrimination obligations of such authorities.

As a matter of principle, the ACTU is opposed to this Proposal and has concerns regarding a broad right to teach religious doctrines or beliefs on sex or sexual orientation, even where it is done in a way that accords with the duty of care to students and curriculum requirements. The ACTU's position is that religious educational institutions should be able to teach religious doctrine, as long as in doing so they do not discriminate on the basis of any protected attribute.

As a matter of practicality, the ACTU does not believe this Proposal is necessary. Religious schools that teach religious doctrine in a way that conforms with their duty of care to students and the requirements of the curriculum are unlikely to offend the SD Act. If curriculum content regarding protected attributes under the SD Act is in breach of a school's duty of care to students or in breach of relevant curriculum requirements, it is also likely to be harmful because it is discriminatory. Therefore, removing the curriculum from anti-discrimination laws undermines the rationale of the other proposed reforms (being to protect students and staff from discrimination) and removes an important protection.

Further, the distinction drawn between the content of the curriculum and the way in which it is taught is an artificial one. These two things are often inextricably intertwined. The way in which

[15] Australian Law Reform Commission (2023) Consultation Paper: Religious educational institutions and anti-discrimination laws, at [91], page 32.
[16] Australian Law Reform Commission (2023) Consultation Paper: Religious educational institutions and anti-discrimination laws, at [92], page 32.

certain religious beliefs were taught at Tangara School for Girls and Redfield College as alleged in a recent ABC article and Four Corners program[17] demonstrates this point. For example:

- Lessons at Tangara regarding 'purity' and virginity involving a piece of sticky tape being passed from girl to girl around the classroom, and the teacher saying at the end that the sticky tape was now "grotty and not sticky anymore… that's what happens to you when you have sex before marriage, when you have multiple partners. You're not useful anymore, you're not valuable anymore, you're not worthwhile anymore because you're dirty and unusable."
- Girls at Tangara being discouraged from getting the HPV cervical cancer vaccine as they were told it would "promote promiscuity and they were expected to marry as virgins." Whilst the school sent parents correspondence that they were obligated to inform parents that the HPV vaccine was available for their children, they advised parents that as a school body they felt "it was unnecessary." Many were discouraged from getting the vaccine as a result, and girls who did get it spoke of having to do "a walk of shame" and being told to not come back to class afterwards.
- Lessons at Tangara where students were shown a picture of a brain scan and told the dark sections they could see were "holes" that had been caused by watching pornography – and being told that "truth and fact is secondary to your ethos."
- Boys at Redfield College were told that "homosexuality has a grave mortal sin that would damn them to hell."

Finally, the ACTU is concerned about the impact of this Proposal on the obligations of authorities that set the curriculum. These authorities, such as the Australian Curriculum, Assessment and Reporting Authority (**ACARA**), have obligations under the SD Act - as service providers under section 22 and administrators of Commonwealth laws and programs under section 26. One of ACARA's functions is to develop and administer a national school curriculum.[18] The implementation of Proposal 7 could potentially mean that ACARA would be exempt from its non-discrimination obligations under the SD Act.

Recommendation 7: Delete Proposal 7 as it is unnecessary and creates more problems than it solves.

[17] Four Corners (30 January 2023) Louise Milligan, Mary Fallon and Stephanie Zillman, 'Power and Purity'
[18] S6(a) Australian Curriculum, Assessment and Reporting Authority Act 2008 (Cth).

Proposal 8 – Allow for preferencing on religious grounds in the selection of employees in the *Fair Work Act*

Proposal 8 calls for the FW Act to be amended to provide that a term of a modern award or enterprise agreement does not discriminate merely because it gives more favourable treatment on the ground of religion to an employee of an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed where:

- the treatment relates to the selection of employees;
- participation of the employee in the teaching, observance or practice of religion is a genuine occupational requirement, having regard to the nature and ethos of the institution;
- the treatment does not constitute discrimination on any other ground prohibited by ss 153(1) or 195(1), respectively; and
- the treatment is proportionate in all the circumstances.

Proposal 8 implements Proposition C. This would apply a narrower exception for religious educational institutions to the prohibition on discrimination on religious grounds in the terms of a modern award or enterprise agreement to allow for preferential treatment of a candidate for appointment or promotion at a religious educational institution. The ALRC Consultation Paper makes clear that the phrase 'selection of employees' is intended to cover selection criteria for employment or promotion, and the criteria for determining who should be offered employment or promotion.[19]

In relation to the preferencing of staff on the basis of religion, as a general principle the ACTU does not support this, except in relation to a small number of roles where there is a genuine occupational requirement, and subject to certain guiding principles. The ACTU has set out these guiding principles in the section on Proposal 10 below, and these principles should guide the implementation of this proposal under a future religious discrimination Act.

However, Proposal 8 is unnecessary, and is putting the cart before the horse, in that it is trying to create exceptions in the FW Act **prior** to a Religious Discrimination Act being created. This Proposal therefore pre-empts any future Religious Discrimination Act. The issue of preferencing is best dealt with in a future Religious Discrimination Act, rather than in the FW Act, for a few reasons:

[19] Australian Law Reform Commission (2023) Consultation Paper: Religious educational institutions and anti-discrimination laws, at [95], page 33.

- in reality, any preferencing that does occur will likely occur without the inclusion of specific provisions in awards or enterprise agreements;
- dealing with preferencing in the FW Act is inherently risky because whatever provisions are inserted now could potentially be inconsistent with a future Religious Discrimination Act. As stated throughout this submission, the ACTU's position is that the FW Act should be consistent with anti-discrimination law, rather than create less favourable rules.

Dealing with the preferencing issue in the FW Act prior to the creation of a Religious Discrimination Act creates complex issues and problems, including:

- workers are potentially losing the benefit of protections they have under current anti-discrimination laws. The FW Act should not contain more ways for people to be discriminated against which are not already provided for in anti-discrimination law.
- Discrimination law circumscribes the power to contract, meaning that the duty of fidelity cannot be framed as requiring the employee to accept a discriminatory term. This Proposal will enlarge the ability of an employer to impose discriminatory terms on an employee.
- The FW Act should conform to the highest standard set by anti-discrimination laws in Australia to ensure workers have the same protections regardless of which jurisdiction they choose. Having two separate 'streams' of anti-discrimination law is both undesirable and impractical. Unfortunately, this is already the case to some degree, as the FW Act does not contain definitions like anti-discrimination laws do, meaning the concept of discrimination means something different in the Fair Work jurisdiction.
- For example, the FW Act provides that terms of an award or enterprise agreement cannot be discriminatory, but decisions of the Fair Work Commission have found that this protection only extends to direct discrimination, meaning terms that indirectly discriminate are permissible.[20] This Proposal builds on these inferior discrimination protections in the FW Act. Discrimination on the grounds of a 'religious ethos' will often amount to indirect discrimination on the basis of attributes protected under the SD Act like sexuality or gender identity. The position should be that terms of an award or enterprise agreement should not offend any applicable anti-discrimination laws (including both direct and indirect discrimination).

[20] Application by Metropolitan Fire and Emergency Services Board [2019] FWC 106 (Gostencnik DP, 15 January 2019) at [176]; Shop, Distributive and Allied Employees' Association v National Retail Association (No 2) [2012] FCA 480

- The ALRC should not seek to pre-empt a future Religious Discrimination Act by including carve outs in the FW Act now, before proper consultation and public debate has been had regarding these matters.

Therefore, the ACTU's position is this Proposal should be deleted and the issue of preferencing should be dealt with under Proposal 10. We have proposed principles that should guide the implementation of this proposal under a future Religious Discrimination Act and these principles are set out under Proposal 10 below.

Recommendation 8: Delete Proposal 8 as it is unnecessary and should be dealt with pursuant to Proposal 10. Preferencing should not be dealt with in the FW Act prior to the creation of a Religious Discrimination Act.

Proposal 9 – Allow termination related to religion in some circumstances under the *Fair Work Act*

This Proposal calls for the FW Act to be amended such that a term of a modern award or enterprise agreement (as applicable) does not discriminate merely because it allows an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed to terminate an employee's employment where:

- the termination is necessary to prevent an employee from actively undermining the ethos of the institution;
- the treatment does not constitute discrimination on any other ground prohibited by ss 153(1) or 195(1), respectively; and
- the termination is proportionate to the conduct of the employee — including by reference to:
    - the damage caused to the ethos of the educational institution;
    - the genuine occupational requirements of the role, having regard to the nature and ethos of the educational institution;
    - alternative action the employer could instead reasonably take in the circumstances;
    - the consequences of termination for the employee; and
    - the employee's right to privacy.

Proposal 9 also calls for the FW Act to be amended such that religion is a permissible ground of termination, despite s 772(1)(f), in the circumstances set out above.

Proposal 9 implements Proposition D by allowing religious educational institutions to terminate employees on religious grounds pursuant to terms in awards or enterprise agreements, or pursuant to section 772, to prevent an employee from actively undermining the ethos of the

educational institution. The ALRC does not propose inserting a similar exception on religious grounds in relation to the adverse action provisions of section 351. This is because, unlike section 772, section 351 is specifically limited to discrimination that is already unlawful in the relevant jurisdiction.

As outlined above, Proposition D and Proposal 9 go well beyond the Terms of Reference. They are not required to achieve the policy commitment in relation to preferencing and building a community of faith and they go far beyond that commitment to create new rights for religious educational institutions to require staff to respect the religious ethos, and to terminate them if they don't. Nothing in the Terms of Reference refers to or supports the idea that there be ongoing requirements on all staff to respect the religious ethos of the educational institution.

Furthermore, new rights to terminate employees should not be created for the following reasons:

- They are unnecessary. Religious educational institutions already have the benefit of ordinary principles of employment law, such as the common law duties of loyalty and fidelity to an employer, the requirement to comply with lawful and reasonable directions, and the general requirement to comply with codes of conducts and policies of the employer. Therefore, if an employee acts in a manner which undermines the reasonable conduct rules of the organisation which are applied consistently, it would not be unlawful discrimination to take appropriate action against them,
- Religious educational institutions also have the ability to terminate an employee for serious misconduct, which includes conduct that causes serious and imminent risk to the reputation, viability or profitability of the employer's business, wilful and deliberate behaviour that is inconsistent with the continuation of the contract of employment, and the refusal to carry out lawful and reasonable instructions consistent with the contract of employment.[21]
- This Proposal essentially creates a new right to terminate, and turns what has been a shield into a sword. It replaces a current defence for an employer under the SD Act (in respect of which the employer bears the burden of proof), with a positive right to terminate. It bypasses key anti-discrimination protections by default.
- Under current anti-discrimination law, the employer bears the burden of showing the termination is either subject to a conduct or policy requirement which was reasonable for the purpose of indirect discrimination, or is subject to an exception. The exceptions mostly require conformity with religious doctrine or injury to religious susceptibilities, or

[21] Reg 1.07, Fair Work Regulations 2009 (Cth)

both. A right to terminate may bypass many of these protections by either enlivening different legal exemptions regarding compliance with an award[22] or because a federal right to terminate renders inconsistent (and thereby inoperative under section 109 of the Constitution) a state or territory prohibition on discriminatory terminations. Either way, the proposal may effectively override protections in state and territory laws.

- Discrimination law circumscribes the power to contract, meaning that the duty of fidelity cannot be framed as requiring the employee to accept a discriminatory term. This right enlarges the ability of an employer to impose discriminatory contracts on an employee.
- It is unclear what "actively undermining" means and who decides what actively undermining the ethos entails. It is also unclear what "religious ethos" means and who decides what the religious ethos is. Is it set by the leadership of the educational institution or the leadership of the religion? Is it the local, regional, national or global leaders that determine religious ethos. This raises all sorts of complex questions, such as differing views within religious and school communities, governing authorities not necessarily reflecting the views of the school community, and whose definition prevails. Does religious ethos prevail in all circumstances? What if it is so out of step with community values, or the views of parents, children, staff and religious adherents in that community?
- The rights and freedoms of employees are not properly taken into account in this Proposal – it only mentions the employee's right to privacy, with the implication that as long as the employee doesn't talk about certain things, then they will be protected. This is a regressive step back into a "don't ask, don't tell" kind of policy. Other rights and freedoms of employees are not given equal consideration to preserving the religious ethos, and there is no proportionality test.
- There is no reference to procedural fairness.
- Such a right to terminate is liable to misuse – a religious ethos is often code for discriminatory beliefs regarding gender, sexuality and marriage. Allowing only discrimination based on religious beliefs does not provide proper protection, because this will often mean de facto discrimination based on discriminatory beliefs regarding these matters, regardless of a person's own attributes.
- It potentially provides a perverse incentive to religious institutions to terminate an employee rather than take less severe steps first (such as warnings, mediation,

[22] For example s 53 Anti-Discrimination Act 1992 (NT); s106 Anti-Discrimination Act 1991 (Qld)

counselling and so on), in order to take advantage of the protection offered by this new provision, and to avoid their anti-discrimination obligations.

To summarise, this proposed positive right to terminate is potentially worse than the existing exemptions in section 38 of the SD Act. In place of current protections, this right gives inferior protections to employees. This is because it reasserts the primacy of an ethos above all other considerations, in circumstances where that ethos is undefined and there are no requirements for it to either confirm with religious doctrine or cause injury to the religious susceptibilities of religious adherents.

There are some examples given in the ALRC Consultation paper of circumstances where the ALRC envisages termination on the grounds of undermining the religious ethos would not be justified.[23] For example, it states a school could not terminate the employment of a lesbian teacher merely because she enters into a marriage with a woman. What if that teacher talked about her marriage in the staffroom, or the classroom? What if that teacher lived on the same street as the school, or a few streets away? Would these activities constitute "undermining the ethos"?

Anther example given in the ALRC Consultation Paper is that a religious school could not take action against a staff member for supporting a LGBTQI+ student, or attending a Pride rally. What if that staff member put up a Pride poster on the school notice board, or mentioned that there was a Pride rally to other staff or students. Would these activities constitute "undermining the ethos"?

In light of the issues and concerns raised above, the ACTU is strongly opposed to Proposal 9. It is also beyond the Terms of Reference as outlined above. The Proposal should be deleted.

<u>Recommendation 9:</u>

c) Delete Proposal 9 as it is unnecessary, would result in workers' rights being undermined, and goes beyond the Terms of Reference.
d) Delete Proposition D as it is unnecessary and goes beyond the Terms of Reference.

Proposal 10 – Exceptions for religious educational institutions in future legislation

Proposal 10 provides that the government should ensure that any future legislation to prohibit discrimination on the basis of religious belief or activity contains exceptions in relation to

[23] Australian Law Reform Commission (2023) Consultation Paper: Religious educational institutions and anti-discrimination laws, pages 26-27.

employment and engagement of contract workers that allow an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed to:

- give more favourable treatment to an employee or prospective employee (and contract worker or prospective contract worker) on the ground of religion in relation to selection; and
- take action that is reasonably necessary to prevent an employee or contract worker from actively undermining the ethos of the institution

consistent with the limitations on such exceptions contained in Proposals 8 and 9.

Proposal 10 would implement Propositions C and D in a future religious anti-discrimination Act.

In relation to the second dot point of Proposal 10, the ACTU's position is it should be deleted, for the reasons outlined in relation to Proposal 9 above.

In relation to the first dot point of Proposal 10 regarding the preferencing of staff on the basis of religion, as a general principle the ACTU does not support this, except in relation to a small number of roles where there is a genuine occupational requirement, and subject to certain guiding principles. The following principles that should guide the implementation of this Proposal under a future religious discrimination Act.

- Workers should not lose any protections they currently have the benefit of.
- The FW Act should conform to the highest standard set by anti-discrimination laws in Australia and should not create rights to discriminate or exceptions that do not exist under anti-discrimination laws. Workers should have the same protections regardless of which jurisdiction they choose.
- Terms of awards and enterprise agreements should not offend any applicable Commonwealth anti-discrimination laws (including terms that indirectly discriminate).
- The ability to preference should be linked to genuine occupational requirements, should not amount to discrimination on grounds other than religious belief or activity, and must include a proper proportionality test.
- Preferencing must be limited to the selection of staff at the point of engagement, and should not extend to promotion and appointment of staff more generally. This would have the effect of religious educational institutions being able to preference when first hiring staff; but once staff were in the door, no more preferencing would be allowed.
- Preferencing on the basis of religion should be limited to where the teaching of religion is a genuine requirement of the role, or where the performance of duties or functions in connection with religious observance or practice is a genuine requirement of the role.

There needs to be a rational connection between the role, its requirements and the ability to preference on the basis of religion. This would have the effect that preferencing on the basis of religion could be done when hiring religious education teachers, but not when hiring geography, science, maths or PDHPE teachers for example.

- The proportionality test needs to be broadly framed, and more broadly framed than it is in Proposition C.1, which frames the test as whether it is "proportionate" to "the objective of upholding the religious ethos of the institution." It should not just be about protecting a religious ethos but a genuine consideration of all of the circumstances (as contemplated in the wording of Proposal 8). This should mean considering the impacts of the treatment on the staff member and others, as well as the institution, and consideration of the least restrictive means necessary to achieve legitimate aims. The prioritising of the ethos in the test as it is currently framed is especially concerning as there is no longer any reference to whether any ethos conforms to religious doctrine and/or injures the susceptibilities of religious adherents. This means this proposal takes at face value that the stated ethos conforms with religious doctrine, and that failures to maintain that ethos would injure the religious susceptibilities of adherents of the religion. Not included in this consideration is what the ethos is, whose rights it infringes upon or who it discriminates against, whether it is worthy of protection when weighed up against other considerations such as an employee's right to work and found a family, and their freedom of thought, expression, conscience and religion. As outlined above, communities of faith may also disagree as to what the ethos is. Therefore, it is imperative that the proportionality test is a true proportionately test that is broadly framed and recognises that employees have their own fundamental freedoms and rights which must be balanced with those of the community of faith in which they work. The Siracusa Principles offer important guidance here – any limitation on a right must pursue a legitimate goal, be necessary, and be proportionate to the specific need it is aimed at addressing.[24]

In light of the above, the first two dot points of Proposition C should be amended to reflect the above principles, and any ability to preference staff based on their religious belief or activity under a future religious discrimination Act should conform to the above principles.

[24] UN Commission on Human Rights, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4 (28 September 1984). See also Australian Law Reform Commission (2023) *Consultation Paper: Religious educational institutions and anti-discrimination laws,* pages 11-12.

Recommendation 10:

d) The second dot point of Proposal 10 should be deleted, as it is unnecessary and goes beyond the Terms of Reference.

e) The first dot point of Proposal 10 that would give religious educational institutions the ability to preference staff based on religion should only be implemented in a future religious discrimination Act in line with the principles put forward by the ACTU.

f) Proposition C should be amended to read as follows:

In relation to selection of staff, religious educational institutions should be able to preference staff based on the staff member's religious belief or activity, where this is justified because:

- *It is necessary for the participation of the person in the teaching of the religion or to perform duties or functions for the purposes of or in connection with any religious observance or practice, and is a genuine requirement of the role;*
- *the differential treatment is in pursuit of a legitimate goal, is necessary to achieve that goal, and is proportionate in all of the circumstances; and*
- *the criteria for preferencing in relation to religion or belief would not amount to discrimination on another prohibited ground (such as sex, sexual orientation, gender identity, marital or relationship status, or pregnancy), if applied to a person with the relevant attribute.*

Proposal 11 – Amend the *Australian Human Rights Commission Act* to cover religious educational institutions

The Australian Human Rights Commission (**AHRC**) has certain powers under the *Australian Human Rights Commission Act* 1986 (Cth) (**AHRC Act)** in relation to discrimination. For example, under section 31(b), the AHRC has the power, in the context of employment, to inquire into any act or practice that may constitute discrimination and attempt to settle the inquiry by conciliation. Under section 35L the AHRC has the power to inquire into systemic unlawful discrimination. Religious institutions are currently carved out from the definition of discrimination in section 3 and thus not subject to the powers of the AHRC in relation to discrimination. This proposal would remove the carve-out for religious educational institutions, making them subject to the AHRC's inquiry powers.[25]

[25] Australian Law Reform Commission (2023) *Consultation Paper: Religious educational institutions and anti-discrimination laws*, at [101], page 35.

The ACTU supports this Proposal as it creates more transparency and accountability for religious educational institutions. The need for such transparency and accountability has been demonstrated by numerous stories in the media, including recent stories regarding Tangara School for Girls, Redfield College and Citipointe Christian College.

Recommendation 11: Proposal 11 should be implemented, meaning that religious educational institutions would be subject to the inquiry powers of the Australian Human Rights Commission.

Proposal 12 – The AHRC should review its Guidelines for temporary exemptions under the *Sex Discrimination Act*

Under section 44 of the SD Act, the AHRC may temporarily exempt an individual or organisation from the application of obligations under the SD Act. The AHRC has published Guidelines that explain how the AHRC will exercise its powers to provide individual exemptions. Those Guidelines do not contemplate religious educational institutions because those institutions currently benefit from the very broad exceptions under section 38.

The ALRC Consultation Paper states that "individual exemption may be an important safety net to assist particularly vulnerable minority groups by providing additional time to comply with the proposed Sex Discrimination Act reforms. Accordingly, the AHRC should review the current guidelines to ensure that they can be appropriately applied in this context if necessary."[26]

Whilst the ACTU is not opposed to this Proposal, we also note that the roll out of new laws can often include measures to assist particular groups to comply. For example, there may be a delayed commencement date for certain types of employers or institutions,[27] grace periods, or other transitional arrangements to accommodate the kinds of situations contemplated by the ALRC. Such measures should be subject to safeguards to ensure that large numbers of workers are not terminated before new provisions come into effect.

Recommendation 12: Proposal 12 should be implemented, although there may be other ways of assisting particularly vulnerable minority groups to comply that do not involve the granting of temporary exemptions.

---

[26] Australian Law Reform Commission (2023) *Consultation Paper: Religious educational institutions and anti-discrimination laws*, at [103], page 36

[27] For example, small businesses were given an extra 6 months before being required to comply with the new NES entitlement to 10 days paid family and domestic violence leave: *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (Cth).

Proposal 13 – The AHRC should develop detailed guidance to assist educational institution administrators to understand and comply with their obligations under anti-discrimination laws

The ALRC states that "a wide range of stakeholders have raised concerns around the difficulty of understanding and complying with discrimination and employment law, and have noted the useful purpose served by concrete examples. Guidance would assist schools and their communities to understand the implications of any reforms implemented as a result of this Inquiry. Helpful examples of similar guidance produced by departmental bodies exist in relation to obligations on schools under the Equality Act 2010 (UK)."[28]

The ACTU agrees that guidance is helpful and desirable, and has been widely supported as a good thing for other legislative reform such as the positive duty under the SD Act. Any guidance should be developed in consultation with relevant stakeholders, including unions and workers.

Recommendation 13: Proposal 13 should be implemented, and guidance should be developed in consultation with relevant stakeholders, including unions and workers.

Proposal 14 – The Government should consider and consult on further reforms to simplify and strengthen Commonwealth anti-discrimination law

The ALRC Consultation paper states that this Proposal is intended to address two broad areas:

- reforms that are beyond the scope of this Inquiry but relevant to the effectiveness of anti-discrimination law, the interactions between anti-discrimination laws and the FW Act, and the interaction of religious freedom and anti-discrimination in a broader context; and
- concerns that the targeted reforms proposed by the ALRC, while necessary to enact without delay, would add to existing complexity, inconsistency and incoherence within and between the SD Act and the FW Act.

The ALRC Consultation paper flags the following as potential areas for further reform relevant to this Inquiry:

Stage 1

- enactment of a religious discrimination Act; and

[28] Australian Law Reform Commission (2023) *Consultation Paper: Religious educational institutions and anti-discrimination laws*, at [104], page 36

- a wider review of the protections and exceptions in the SD Act and anti-discrimination provisions in the FW Act, including in relation to associates.

Stage 2

- a review of the Age Discrimination Act 2004 (Cth), Disability Discrimination Act 1992 (Cth), Racial Discrimination Act 1975 (Cth) and Sex Discrimination Act for consistency in application, terminology, burdens of proof, and scope with a view to potential consolidation in a single Act;
- a review of the interactions between the Fair Work Act and the Anti-Discrimination Acts above; and
- options for the enactment of a Human Rights Act that comprehensively implements the seven core human rights treaties to which Australia has agreed, to protect human rights and provide a more comprehensive and effective way of managing the interactions between individual human rights.

The ACTU strongly agrees that there is a need for further reforms to deal with the issues that have been raised by the ALRC Some of these reforms are more urgent than others, and we believe that some can and should be dealt with as part of this current Inquiry.

The first priority should be aligning the FW Act with Commonwealth anti-discrimination laws where protections under the FW Act are not as beneficial. This is an urgent reform that is required to ensure that workers are not worse off under the FW Act than they are under anti-discrimination laws and the FW Act does not provide rights to discriminate or exceptions to unlawful discrimination that do not exist under anti-discrimination laws. For example, the question of indirect discrimination in the FW Act is a significant issue, as outlined above, and needs to be remedied urgently. So too is the application of the inherent requirement exceptions which apply across all attributes in various provisions of the FW Act and is inconsistent with anti-discrimination laws. As per Recommendation 5(b) above, the inherent requirement exceptions in the FW Act should be amended, except as otherwise provided for under Commonwealth anti-discrimination laws.

The FW jurisdiction should conform to the highest standard set by anti-discrimination laws in Australia and should not create rights to discriminate or exceptions that do not exist under anti-discrimination laws. Workers should have the same protections regardless of which jurisdiction they choose. This should be addressed in the context of this current Inquiry, or if that is not possible, on an urgent basis as soon as possible.

This would also deal with the ALRC's point around "a wider review of the protections and exceptions in the SD Act and anti-discrimination provisions in the FW Act, including in relation to associates." Recommendation 6 of this submission deals with the associate question and recommends that both students and staff should be protected from discrimination on the basis of protected attributes of their family members, carers and associates (as defined in the DD Act). This is an issue that can be addressed now as part of this Inquiry.

The second priority should be the enactment of a religious discrimination Act.

The third priority should be the harmonisation of anti-discrimination laws. The ACTU strongly supports this as a highly desirable reform, but is of the view that is less urgent than the harmonisation of the FW Act and current anti-discrimination law. It should be done as soon as possible after the enactment of a religious discrimination Act. This could be done either in one single Act or by retaining separate Acts. Some of the areas in need of review are definitions of discrimination (direct and indirect) and protected attributes and burdens of proof.

The fourth priority should be looking at options for the enactment of a Human Rights Act. The ACTU strongly supports this reform. However, we note that a Humans Rights Act would not and should not replace anti-discrimination laws, as their coverage, emphasis and application tends to be different.

Recommendation 14: Proposal 14 should be implemented, and further staged reforms should be consulted on and made to simplify and strengthen Commonwealth anti-discrimination law. The first priority should be the alignment of the FW Act with anti-discrimination laws, followed by the enactment of a religious discrimination Act, the harmonisation of anti-discrimination laws, and the enactment of a Human Rights Act.

address

ACTU

Level 4 / 365 Queen Street

Melbourne VIC 3000

phone

1300 486 466

web

actu.org.au

australianunions.org.au

ACTU Australian Unions