

# **DISMISSED, DENIED AND DEMEANED:**

**A NATIONAL REPORT ON LGBTQ+ DISCRIMINATION  
IN FAITH-BASED SCHOOLS AND ORGANISATIONS**



**EQUALITY**

**MARCH 2024**

**[EQUALITYAUSTRALIA.ORG.AU](https://equalityaustralia.org.au)**

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## DISMISSED, DENIED AND DEMEANED

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## ABOUT EQUALITY AUSTRALIA

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

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

**Sydney office:** 414 Elizabeth Street Surry Hills NSW 2010

**Melbourne office:** Victorian Pride Centre, 79-81 Fitzroy Street St Kilda VIC 3182

Telephone: +61 03 9999 4527

Email: [info@equalityaustralia.org.au](mailto:info@equalityaustralia.org.au)

[www.equalityaustralia.org.au](http://www.equalityaustralia.org.au)

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

## ACKNOWLEDGMENTS

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This report does not and is not intended to constitute legal advice.

This report reflects the law as at February 2024 but includes the amendments passed in the *Discrimination Amendment Act 2023* (ACT), *Justice and Community Safety Legislation Amendment Act 2023 (No 3)* (ACT) and *Births, Deaths and Marriages Registration Act 2023* (Qld), which are yet to commence.

# INTRODUCTION BY THE HON MICHAEL KIRBY AC CMG

**In a country like Australia, our laws should protect all of us, equally.**

Most people in Australia would recognise and support that principle.

In the past, the place of LGBTQ+ people in religious settings often gave rise to a particular difficulty. Some religious believers sought to enforce ‘inerrant’ scriptural texts. These often caused serious disadvantages, shame and inequality. Still, this was the reason for devising many broad-based religious exceptions in our laws, including in anti-discrimination laws. At first, these exceptions were extremely wide. Some still are. Eventually, they caused complaints of injustice and demands for change. The changes that have occurred since those times demonstrate today that such exemptions are neither principled nor just.

The *Universal Declaration of Human Rights* (UDHR, 1948) affirms the inherent dignity of all people and their right to their inalienable rights and freedoms. These include the right of people to have and to manifest their religious beliefs. But their rights must also allow accommodation for the rights of others, including LGBTQ+ people and those with different, or no, religious beliefs.

Community perceptions on matters of human sexuality and gender identity have changed with increasing insistence in recent times. New ideas, such as marriage equality, have emerged. Many such ideas have become accepted quite quickly. They are valued within our society, and they encourage a fresh look at overbroad religious exemptions.

The law should provide ample space for people of different beliefs and life experiences to study, work and live alongside one another, including as those beliefs and life experiences may evolve and change over time. This means that we have to move forward together in a way which allows each one of us to coexist, with respect and protection for each other’s dignity and rights.

But how do we devise a rule that, at the one time, allows some of us to have and enjoy a particular religious conviction, while others can remain involved in religious schools and other organisations, while having and expressing divergent experiences and beliefs and the need for respect of their lives? This report seeks to provide answers to these and other related questions.

The laws described in this report are often complex and highly technical. It cannot be expected that every reader will read each and every word of this report. However, the essential idea contained in these pages is basically simple.

In temples, places of theological instruction and other strictly religious environments, it is reasonable and just to expect that the state will hold back its enforcement of the universal human rights of all, to protect the rights of people to have and practise their religious beliefs. Not to do so would be inconsistent with the practice and beliefs of such religions. However, once a person, religious or otherwise, goes beyond such places, it is reasonable and just to expect the state to protect equally the rights and dignity of everyone. This will include others who hold to minority religious opinions or no religious belief at all (a growing proportion of the Australian population). Harmony with the rights and freedoms of others will only be achieved by limiting and narrowing the extent to which the assertions by religious believers will be upheld. Equally, when religious believers go into parts of the secular world, they can expect that reasonable accommodation will be assured to their right to hold and express their beliefs, in a manner that does not impose itself unjustly on others.

There is increasing understanding, and broad acceptance in Australia, that the past overly broad religious exemptions go beyond what is essential and sometimes diminish the enjoyment of the dignity and rights of others.

Where this is so, such exceptions need to be narrowed or curtailed. Certainly it is so when they result in serious diminution in the enjoyment of dignity and rights by others.

Reconciling the interaction of diverse beliefs and experiences in the letter of the law may sometimes be difficult. But, as this report finds, it is not impossible. The binding principle is to be found in the opening words (indeed the opening word) of the UDHR itself; “All human beings are free and equal in dignity and rights. They are endowed with reason and conscience. They should act toward one another in a spirit of brotherhood”. No approach, other than accommodating, can ensure that the dignity and rights of both religious people and others must be enjoyed together in true equality. The dignity and rights of all of us must be respected and upheld equally by the law. Reconciliation of competing claims must be achieved by the touchstone of mutuality, necessary to achieve the promise of equality and dignity to all.

Sydney,  
18 March 2024



# FOREWORD

## **Our laws should protect all of us, equally.**

Yet LGBTQ+ people and the people who love, support and affirm us are discriminated against by religious educational institutions and faith-based service providers across the country, every day.

They can do so because our laws allow it.

Through 26 personal stories and an extensive investigation of publicly available records and financial information, this report reveals the impact and true extent of LGBTQ+ discrimination in religious educational institutions and faith-based service providers in Australia.

While not all religious educational institutions and faith-based service providers wish to discriminate, our report finds that too many still do – and they do it with public money.

Commonwealth laws offer LGBTQ+ people and the people who love, support and affirm us with the weakest protections against discrimination, followed by New South Wales, Western Australia and South Australia. But every state and territory has work to do to get their houses in order.

With 1 in 3 students and almost 2 in 5 staff enrolled or employed in private schools, most of which are religiously affiliated; our laws urgently need to change.

Catholic schools are overwhelmingly silent on LGBTQ+ inclusion, leaving staff and students afraid to be who they are.

LGBTQ+ students are more likely to attend an independent school that discriminates against them than supports them to be their best.

And in 2020 over \$5 billion in taxpayer dollars were invested into faith-based service providers who discriminate against LGBTQ+ people or who have unclear positions on LGBTQ+ inclusion. These providers employ at least 69,500 people and provide services, like healthcare, disability support, financial support and housing, for millions of Australians.

This report principally calls for:

- ensuring Australian anti-discrimination laws protect all LGBTQ+ people and the people who love, support and affirm us;
- removing legal carve-outs allowing religious educational institutions and faith-based service providers to discriminate based on sexual orientation or gender identity, while maintaining narrower exceptions to meet genuine religious needs and in genuine religious contexts; and
- when making these changes, ensuring other exceptions cannot be used as alternative loopholes for reallowing LGBTQ+ discrimination.

We've uncovered the tip of an ugly iceberg of LGBTQ+ discrimination. These are the stories of people who have been dismissed, denied and demeaned simply because of who they are and whom they love.

Ghassan Kassisieh  
Legal Director, Equality Australia  
March 2024



# PERSONAL STORIES OF DISCRIMINATION

**James** was denied the role of prefect at a Christian school in Sydney in 2011 because he was gay.

**Lisa\*** quit her role as an assistant principal at a Catholic school in New South Wales in 2019 after her colleagues were told not to attend her same-sex wedding or give her any gifts.

**Abbie** had to fight to attend the school formal with her girlfriend at a Catholic school in Sydney in 2023.

**Kimberly\***, a teacher at a Catholic school in New South Wales, was told by her principal in 2014 to lie about her relationship with another female staff member to keep her job.

**Caroline\*** is now looking to move her family from Sydney's Northern Beaches after two religiously affiliated high schools refused to enrol her trans daughter and another two threatened to impose extreme conditions as a condition of her enrolment.

**Leah** left her school in Queensland in 2021 after a religious counsellor appointed by her school told her it was a '*choice to be gay*' and spent lunchtimes '*praying the gay away*' with her.

**Elizabeth\***, who is bisexual and married to a man, left her role at an Anglican school in New South Wales in 2023 after despairing the treatment of queer students at her school.

**Mark\***, a father to twins, was refused enrolment for his trans son twice, once at a local Catholic primary school in 2019 and then in 2023 at a local Catholic high school in Sydney's Eastern Suburbs.

**Emma**, a teacher at a Catholic school in Sydney, was told she would be fired if she took maternity leave to have a baby with her female partner in 2022. In the same year, she was overlooked for promotion by a person with far less experience and qualifications than her.

**Joanne\*** was called a 'fake woman' and told to leave a faith-based charity shop in Adelaide in 2022, after she was first forced to use the male bathroom because she was a transgender woman.

**Harley** was forced to hide their sexuality and told they would '*go to hell*' by a staff member at a faith-based homeless shelter after fleeing intimate partner and family violence in Victoria in 2015.

**Matthew\*** was fired from his role as a teacher in 2023 at an Anglican school in Sydney after he delivered a symposium based on his theological training that told students about different expressions of gender in the Bible.

**Daniel** did not apply to renew his teaching contract at a Christian school in Queensland after he was told in 2015 by the principal to stop being openly gay.

**Karen** was fired from her role as a teacher in 2020 at a tertiary college in Sydney after she became engaged to her same-sex partner.

**Steph** was fired from her role as an English teacher at a Christian school in Sydney in 2021 after she came out as a lesbian. The school argued that she was required to attend a church that believed in the immorality of homosexuality and '*prayerfully live a celibate life*' to work there.

**Rachel** lost her job in 2019 at a Christian school in Victoria after she refused to agree to and abide by a statement of faith that marriage ‘*can only be between a male and a female*’.

**Nathan** lost his job in 2020 at a Christian school in Sydney after coming out as gay.

**Elise** was not rehired as a learning support teacher at a Christian school in New South Wales in 2017 after she tried to support students who were bullied by classmates and senior staff because of their suspected sexuality.

**Evie** was forced to attend seven sessions of chaplaincy counselling intended to prevent her from affirming her gender as a girl, without her parents’ knowledge, at a religious school in Victoria between 2011 and 2015.

**Olivia** changed schools in Year 8 in 2018 after her Anglican school in Sydney threatened to write to all the parents of other students in her grade about her gender affirmation.

**Sam** lost her job in 2021 when the Christian school she was working at in Victoria became aware of her sexuality.

**John** kept his sexuality hidden for 37 years while working in the Catholic education system in Victoria before retiring in 2019. He was previously threatened with being outed by an ex-partner and feared losing his job.

**Michael\*** was threatened with being outed when he disciplined a staff member for unprofessional practice while working as a principal at a Catholic school in Victoria.

**Peter\*** was recently overlooked for a promotion for a role he was already performing at a religious school in New South Wales. He believes it was due to his sexuality, which had recently become known to new leadership at the school.

Parents at **Citipointe Christian College** in Brisbane were forced to sign a declaration in 2022 that compared homosexuality to bestiality, incest and paedophilia to keep their children enrolled at the school. Teachers were forced to agree that they could not express their sexuality except through heterosexual married relationships.

Parents at **St Catherine’s School** in Sydney strongly objected to a requirement imposed on their school by the Diocese in 2022 that their next school principal must affirm a belief in marriage as being only between a man and a woman.

*\* Denotes names that have been changed to protect privacy.*

See pages 13-24 of this report.

## KEY TERMINOLOGY:

- ➔ **LGBTQ+ discrimination** means discrimination against LGBTQ+ people, and the people who love, support or affirm us, because of who we are or whom we love.
- ➔ **Religious educational institutions** means schools, colleges and universities administered in accordance with religious beliefs or traditions. They include the Catholic school system and independent schools administered in accordance with religious beliefs or traditions.
- ➔ **Faith-based service providers** means the subset of religious and faith-based organisations in Australia who provide social services and support to the general public, such as healthcare, disability care, aged care, accommodation for people who are homeless or experiencing family violence, family support services such as foster care or adoption services, financial support, and other social services.

See pages 3, 24 and 45-49 of this report.

# KEY FINDINGS AND RECOMMENDATIONS

## LGBTQ+ DISCRIMINATION AND RELIGIOUS EDUCATIONAL INSTITUTIONS

| Public schools |                      |               | Private schools |                  |               |               |                  |               |
|----------------|----------------------|---------------|-----------------|------------------|---------------|---------------|------------------|---------------|
|                |                      |               | Catholic system |                  |               | Independent   |                  |               |
| 6,700 schools  | 2.6 million students | 342,000 staff | 1,800 schools   | 787,000 students | 103,000 staff | 1,100 schools | 621,000 students | 103,000 staff |

- ➔ 1 in 3 students and almost 2 in 5 staff are enrolled or employed in private schools in Australia, most of which are religiously affiliated as part of the Catholic or independent school system.
- ➔ More than 70,000 students and 10,000 staff in private schools are estimated to be LGBTQ+.
- ➔ 9 in 10 of the Catholic educational authorities we reviewed, who together educate 70% of all students in Australian Catholic schools, publish so little information about their position on LGBTQ+ inclusion that prospective parents, students or employees are not able to know from publicly available information whether they will be welcomed or included as LGBTQ+ people. That's also the case for nearly 1 in 3 independent schools. At worst, these silences suggest a systemic suppression of positive and public expressions of LGBTQ+ identities and lives in religious schools across Australia.
- ➔ Independent schools are more likely to be discriminatory rather than affirming places for LGBTQ+ people. Nearly 4 in 10 independent schools show evidence of LGBTQ+ discriminatory practices, compared with 3 in 10 schools that do not.
- ➔ As many as 1 in 3 independent schools require staff to be 'practising' Christians, potentially reducing employment opportunities in independent schools by almost 33% for LGBTQ+ people and others.

See pages 24-45 of this report.

## LGBTQ+ DISCRIMINATION AND FAITH-BASED SERVICE PROVIDERS

### All Australian charities:

46,968 charities  
registered and operating  
\$171.4b annual revenues  
(50.6% derived from gov)  
1.35m staff

### Religious or faith-based charities:

Total annual  
revenue (%  
derived from gov):

Employed  
staff:

Other religious or faith-  
based charities?

Unknown

Unknown

+

85 charities with annual  
revenues with at least  
\$100m (identified  
through manual review)

\$35.8b (57.2%)

254,000

+

6,615 charities with  
'advancing religion' as a  
charitable purpose

\$17.5b (57.1%)

136,000

+

8,071 'basic religious  
charities'

No obligation to  
report – at least  
\$148m (10.7%)

18,400

Source: Data derived from the 2020 ACNC Annual Information Statement data for charities registered and operating in Australia.

- ➔ It is impossible to easily identify the number and characteristics of religious and faith-based organisations from Australian Charities and Not-for-profits Commission (ACNC) data, let alone the subset that provide social services and support to the general public (i.e. faith-based service providers).
- ➔ At least 1 in 3 charities in Australia are religious or faith-based organisations. Faith-based charities account for more than 40% of Australia's charities with annual revenues of at least \$100 million.
- ➔ Taxpayers contributed at least 54 cents in every \$1 dollar earned by faith-based charities in Australia in 2020.
- ➔ Faith-based charities employed at least 370,944 workers in 2020, not including volunteer workers.
- ➔ Almost 1 in 10 of Australia's largest faith-based service providers publicly discriminate against LGBTQ+ people with a further nearly 4 in 10 unclear in their positions on LGBTQ+ inclusion. Together, this cohort received over \$5 billion in government funding and employed over 69,500 people in 2020. The failure to be openly LGBTQ+ inclusive is a barrier to accessing critical services.

See pages 45-57 of this report.

## RECOMMENDATIONS

### Extending basic protections to all LGBTIQ+ people

1. Amend the definitions of protected attributes in Commonwealth, New South Wales, Queensland, South Australian and Western Australian laws to ensure all sexual orientations, gender identities and people with variations of sex characteristics are protected from discrimination. Clarify that asexuals are protected in the remaining jurisdictions.
2. Amend Western Australian laws to remove the requirement for transgender people to have their gender legally updated before they are entitled to protection against discrimination based on their gender identity.

See pages 7-12 of this report.

### Improving protections for students in religious educational institutions

3. Amend Commonwealth, New South Wales and Western Australian laws to remove exemptions that allow religious educational institutions to discriminate against LGBTIQ+ students.
4. Amend South Australian laws to clarify that religious educational institutions cannot discriminate against LGBTIQ+ students.
5. Amend Victorian laws to remove exemptions that allow educational institutions to set discriminatory standards of dress, appearance and behaviour for students. This amendment would address a gap applying to both public and private schools.
6. Amend Commonwealth, New South Wales, Northern Territory and Victorian laws to clarify that exemptions which allow single-sex schools to exclude students based on their sex do not allow discrimination against transgender students, and in Victoria, also do not apply to students who are already enrolled. These exemptions apply to both public and private schools.
7. Amend Commonwealth, New South Wales, South Australian and Western Australian laws to prohibit discrimination against students in religious educational institutions based on their religious beliefs or activities, including where they hold different religious beliefs to their school on matters of sexuality and gender identity.

See pages 60-66 of this report.

### Improving protections for personal associates of LGBTIQ+ people

8. Amend Commonwealth and Western Australian laws to prohibit discrimination based on 'personal association' with an LGBTIQ+ person, such as an LGBTIQ+ family member or friend.

See page 66 of this report.

### Improving protections for staff in religious educational institutions and faith-based service providers

9. Amend Commonwealth, New South Wales, Queensland, South Australian and Western Australian laws to remove exemptions that allow religious educational institutions to discriminate against LGBTIQ+ staff.
10. Amend Commonwealth, Australian Capital Territory, New South Wales, Queensland, South Australian, Tasmanian and Western Australian laws to limit the ability of religious educational institutions to discriminate against staff based on their religious beliefs or activities, except where the required religious beliefs or activities are relevant to the role in question and the discrimination is reasonable and proportionate in the circumstances. To implement this recommendation in Commonwealth, New South Wales and South Australian laws, protections against discrimination based on religious belief and activity (including having no religious belief or refusing to engage in religious activities) also have to be included in anti-discrimination laws.

11. Amend Commonwealth, New South Wales, Queensland, South Australian and Western Australian laws to remove exemptions that allow faith-based service providers to discriminate against LGBTQ+ staff.
12. Amend Commonwealth, Australian Capital Territory, New South Wales, Queensland, South Australian, Tasmanian and Western Australian laws to limit the ability of religious bodies to discriminate against staff based on their religious beliefs or activities, except where the required religious beliefs or activities are relevant to the role in question and the discrimination is reasonable and proportionate in the circumstances. To implement this recommendation in Commonwealth, New South Wales and South Australian laws, protections against discrimination based on religious belief and activity (including having no religious belief or refusing to engage in religious activities) also have to be included in anti-discrimination laws.
13. Amend Commonwealth, Queensland, South Australian, Tasmanian and Northern Territory laws to ensure that 'inherent requirements', 'genuine occupational qualifications' and similar exemptions cannot be used by religious educational institutions and faith-based service providers as an alternative pathway to discriminate against staff based on their sexual orientation or gender identity, or because they hold LGBTQ-affirming religious beliefs.
14. Repeal sections 56(c) of the NSW Act and 50(1)(ba) of the SA Act and replace them with targeted exemptions allowing religious bodies (including religious educational institutions) to select or appoint people of their own faith to exercise religious functions or participate in religious observance or practice consistently with religious traditions.
15. Following the reforms in recommendations 9 - 14, monitor the use of religious observance or practice exemptions in each jurisdiction to consider whether any limitations are necessary on their use by religious educational institutions or faith-based service providers to adequately protect an individual staff member's freedom of thought, conscience and religion.

See pages 67-80 of this report.

#### **Improving protections for people relying on services and support from faith-based service providers**

16. Amend Commonwealth, Australian Capital Territory, New South Wales, Queensland, South Australian, Victorian and Western Australian laws to:
  - a. limit the ability of faith-based service providers to discriminate based on sexual orientation or gender identity whenever they provide goods, services, facilities or accommodation to the general public;
  - b. prohibit discrimination based on religious belief or activity by faith-based service providers whenever they provide goods, services, facilities or accommodation to the general public other than when it:
    - i. is reasonable and proportionate to meet the genuine needs of members of their religious communities;
    - ii. forms part of any religious observance or practice; or
    - iii. is connected to a site of religious significance, such as a place of worship.

To implement this recommendation in Commonwealth, New South Wales and South Australian laws, protections against discrimination based on religious belief and activity (including having no religious belief or refusing to engage in religious activities) also have to be included in anti-discrimination laws. Only minor reforms are required in the Australian Capital Territory to implement this recommendation.

See pages 80-91 of this report.

### **CALLS TO ACTION:**

- ➔ **For all of us: The days of ‘God v gays’ must end.** Some LGBTQ+ people are people of faith, and some people of faith support and affirm LGBTQ+ people. Debates about LGBTQ+ discrimination and religion should not be framed in binary opposition to one another.
- ➔ **For religious schools and organisations: be clear in your inclusion.** If you affirm and include LGBTQ+ people, do not be silent about it. Take steps to imbed and demonstrate meaningful inclusion of LGBTQ+ people in your schools and organisations.
- ➔ **For parents: be advocates for your children.** Check a school’s policy on LGBTQ+ inclusion before you enrol your child.
- ➔ **For lawyers and advocates: embrace new arguments.** Embrace arguments that support the freedom of thought, conscience and religion for everyone, and point out inconsistencies and relevant omissions when you mount your case. Provide pro bono support to people experiencing LGBTQ+ discrimination.
- ➔ **For media: tell our stories.** Highlight the true extent of religious diversity in Australia, not just institutional voices.

See pages 121-123 of this report.

# EXECUTIVE SUMMARY

## A. INTRODUCTION

This report explores LGBTQ+ discrimination in religious educational institutions and faith-based service providers in Australia, and the laws that allow this discrimination against students, workers and people who rely on their services. LGBTQ+ discrimination can be experienced by LGBTQ+ people and the people who love, support and affirm us (see *'What this report is about'* and *'Understanding key concepts'* at 2-3).

In this report we have shared, with permission, the stories of people who have experienced LGBTQ+ discrimination in Australia. We honour the bravery and courage of each person who has shared their story with us. To be fair and to give organisations a chance to improve their practices, we have not individually named the schools and organisations in our research sample. Only organisations which have already been publicly reported are named (see *'Respecting privacy, being fair'* at 3).

### A.1 LGBTQ+ people and our relationship to religion and faith

Although rates of religiosity among LGBTQ+ people are lower than rates reported among the broader Australian population, around 1 in 4 LGBTQ+ people identify with a religion or faith. Two in five of these LGBTQ+ people of faith pray once a week or more regularly, and many describe religion or faith as very or extremely important in shaping their life decisions.

Based on our 2022-23 survey of 4,060 LGBTQ+ people living in Australia, we found that LGBTQ+ people have strong views about religious discrimination. While 64-74% profess no religion, there is strong support among LGBTQ+ people in Australia for protecting people of faith from discrimination in the same way as others. However, when it comes to LGBTQ+ discrimination based on religion, religious and non-religious LGBTQ+ people are clear that there should be no special allowances for religious educational institutions and faith-based service providers. The preferencing of people of a particular faith in student enrolment or leadership positions divides opinion (see *'LGBTQ+ people and our relationship to religion and faith'* at 4-7).

### A.2 Removing religious carve-outs in anti-discrimination laws

Our 2022 federal election survey of 5,578 LGBTQ+ people in Australia showed that removing carve-outs that allow religious organisations to discriminate against LGBTQ+ people ranked as the most important LGBTQ+ issue to LGBTQ+ people in Australia. Yet the complexity of Australia's anti-discrimination laws makes reform in this area both a federal priority and a priority for every state and territory. For LGBTQ+ people to have the same protections in anti-discrimination laws as other groups, up to 15 individual federal, state and territory statutes need to be considered and amended (see *'Understanding anti-discrimination laws in Australia'* at 7-9).

One of the complexities in this area of law is the legal difference between discrimination based on sexual orientation and gender identity on the one hand, and discrimination based on religious belief on the other. That distinction is illustrated by a simple example: it is the difference between being fired because you *are* gay or trans, and being fired because you *believe* gay and trans people are OK. Because there can be different levels of protection against discrimination based on sexual orientation, gender identity and/or religious beliefs in each jurisdiction, LGBTQ+ discrimination can be lawful depending on where in Australia a person lives and how the LGBTQ+ discrimination is framed (at 9-10).

Laws that protect people from discrimination based on their religious beliefs are a double-edged sword for LGBTQ+ people. While they can protect people who refuse to hold discriminatory beliefs about LGBTQ+ people, they can equally protect people who hold anti-LGBTQ+ religious beliefs. If there are to be prohibitions against religious discrimination, then the failure to carefully extend these prohibitions to religious educational institutions and faith-based service providers means that LGBTQ+ discrimination framed as a matter of religious beliefs or 'ethos' may remain lawful (at 10). This report advocates that legislators must reform anti-discrimination laws by ensuring all exemptions in anti-discrimination laws are considered holistically when amending specific religious exemptions.

Intersex and asexual people have unique experiences of religious discrimination that deserve separate consideration and are addressed upfront in this report (see *'Intersex people'* and *'Asexual and aromantic people'* at 10-12). Among



the reforms advocated by this report are improving the definitions of ‘sexual orientation’, ‘gender identity’ and ‘sex characteristics’ in Commonwealth, New South Wales, Queensland, South Australian and Western Australian laws to ensure all LGBTIQ+ people are protected by anti-discrimination laws in the first place. Without these protections, the issue of religious exemptions becomes moot.

## **B. PART I: THE IMPACT AND TRUE EXTENT OF LGBTQ+ DISCRIMINATION**

Through 26 personal stories and an extensive investigation of publicly available records and financial information, Part I of this report documents the impact and true extent of LGBTQ+ discrimination in religious educational institutions and faith-based service providers in Australia.

### **B.1 The extent of discrimination in religious schools**

1 in 3 students and almost 2 in 5 staff are enrolled or employed in private schools in Australia, most of which are religiously affiliated as part of the Catholic or independent school system. We estimate that these schools have more than 70,000 LGBTQ+ students and 10,000 LGBTQ+ staff (see section 2.1 at 24).

For this report, we conducted a review of publicly available information on 10 Catholic educational authorities and 98 independent schools. These 10 Catholic educational authorities are responsible for the administration of over 1,200 schools, educating around 70% of all students enrolled in Catholic system schools in Australia. The 98 independent schools represent a random sample from the 1,127 independent schools in Australia. For each of the educational authorities and schools reviewed, we spent 2 hours searching for publicly available information on each authority and school to mirror the experience of a prospective student, parent or employee looking for information on the authority’s or school’s position on LGBTQ+ inclusion. We rated each authority and school on a scale between 1 (for ‘strongly affirming’) to 7 (for ‘strongly discriminatory’). A rating of 4 was given to authorities and schools that were silent or had ambiguous positions on LGBTQ+ inclusion (see *‘Measuring LGBTQ+ inclusion in religious schools’* at 25).

#### **B.1.1 Catholic educational authorities**

Catholic educational authorities publish limited information overall on their position towards LGBTQ+ inclusion. 9 in 10 of the Catholic educational authorities we reviewed published so little information that it was virtually impossible for prospective parents, students or employees to make informed choices about the degree of LGBTQ+ inclusion they could expect in their potential place of education or employment (see *‘Catholic system schools’* at 26-27). Worse still, this damaging and oppressive culture of silence says to LGBTQ+ people that they have to remain hidden and ashamed of who they are, if they want to keep their jobs or stay at school.

To the extent that information was available, we found examples of both affirming and discriminatory practices towards LGBTQ+ people. However, only 4 of the 10 Catholic educational authorities (one larger authority and 3 smaller ones) had at least some public examples of LGBTQ+ affirming practices (at 27-28).

We also found evidence of employees being required by their employers to live their lives in accordance with the teachings of the Catholic Church, both in public and private. Many LGBTQ+ people would read these requirements as instructions to keep their LGBTQ+ identities hidden (at 28). The pervasiveness and impact of these requirements on LGBTQ+ people who are forced to hide who they are to keep their jobs, or who have been denied advancement in their teaching careers, is articulated in the experiences of Lisa\*, Kimberly\*, Emma, John and Michael\*.

Policies on the enrolment and treatment of transgender students were particularly troubling. One large Catholic school authority insisted in its policy that transgender students be outed to the Archbishop and that the treatment of transgender students be informed by an objective which commonly underpins modern forms of LGBTQ+ conversion practices, namely a ‘need’ to ‘help’ young people ‘accept their body as it was created’. The detrimental effect of this policy is demonstrated by the experience of Mark\*, a parent who sought to enrol his twins at local Catholic schools but was unable to because one of his children was transgender. Another Catholic educational authority which had advocated for a compassionate, respectful and inclusive learning environment for trans and gender diverse students was forced to back down in 2021 (at 29-30).

### B.1.2 Independent schools

Independent schools are more likely to be discriminatory rather than affirming places for LGBTQ+ people. Our review found public examples of LGBTQ+ discriminatory practices in nearly 4 in 10 independent schools, compared with 3 in 10 independent schools that showed at least some evidence of affirming practices. Discriminatory practices were also reflected in the experiences of many people who shared their stories with us, including James, Caroline\*, Leah, Matthew\*, Daniel, Steph, Rachel, Nathan, Elise, Evie, Sam and Peter (see '*Independent schools*' at 30-31).

Among all independent schools in the sample, non-denominational Christian schools were the most discriminatory places for LGBTQ+ people. In contrast, Uniting Church schools were the most likely among Christian schools to show evidence of affirming practices. Other Christian denominations had a wide range of practices and ratings.

Among the small number of Jewish and Islamic schools included in the sample, a Jewish school showed more affirming practices while Islamic schools showed more discriminatory practices (although Islamic schools were less discriminatory places than non-denominational Christian schools).

Like with Catholic system schools, many independent schools – nearly 1 in 3 – also publish so little information about their position on LGBTQ+ inclusion that it is virtually impossible for prospective students, parents and employees to make informed choices about whether LGBTQ+ students or employees would be welcomed and included at the school. When these schools publish information, they often use opaque language, and different schools use the same terms – such as 'Christian ethos', 'Biblical values' or 'Christ centred' – to mean different things (at 31-33, 44).

#### (a) The environment for students

While some independent schools provide affirming environments for their LGBTQ+ students, we also found evidence of independent schools discriminating against LGBTQ+ students, sometimes very openly.

In enrolment practices, we found transgender students uniquely vulnerable to discrimination. Some schools explicitly have policies requiring enrolments for students based on their sex assigned at birth. Not all schools appeared to recognise children could have parents of the same gender. When it came to imposing requirements on students to hold certain religious beliefs as a condition of enrolment, schools had a range of practices. Many schools were vague in their enrolment policies regarding their attitudes towards LGBTQ+ people (at 35-36).

When it came to teachings on sexuality and gender diversity, we found several examples of schools openly condemning homosexuality and transgender people and requiring their school communities to hold similar beliefs. The devastating impacts of these experiences are also articulated by former students James and Leah, and teachers like Elizabeth\*, Matthew\*, Elise and Rachel who refused to endorse blatant forms of LGBTQ+ discrimination. On the other hand, some schools showed stand out examples of LGBTQ+ inclusion, including a range of initiatives celebrating and affirming LGBTQ+ people (at 37-40).

On formal policies regarding bullying, discrimination and student welfare, many schools were silent as to whether LGBTQ+ people were entitled to the same protections as other groups, despite explicitly referring to respect for other forms of diversity in these policies. However, there were some notable exceptions (at 40).

#### (b) Employment practices

Staff in many independent schools were particularly vulnerable to LGBTQ+ discrimination.

As many as 1 in 3 independent schools require staff to be practising Christians, regularly attend Church and/or maintain '*a Christian lifestyle*'. Such requirements are likely to be read by LGBTQ+ people as excluding them from potential employment within these schools, limiting employment opportunities for LGBTQ+ people and others by potentially up to 33% (at 40-41).

Many schools require their employees to live their private lives outside the classroom in accordance with the religious beliefs of the school. These 'lifestyle clauses' in employment policies and contracts included explicit prohibitions on engaging in sexual intimacy outside heterosexual marriage. Experiences like those shared by Steph, Nathan and Sam show how oppressively such requirements could be enforced. However, many 'lifestyle clauses' are vaguely worded, meaning independent schools hold a unique power to define for their employees what private behaviour they

consider to be 'Christian'. We found only 6 schools (out of 88 with a religious ethos) that were clear that their religious ethos was not coded language for discriminatory attitudes towards LGBTQ+ people (at 42-43).

Laws in South Australia and the Australian Capital Territory allow religious schools to discriminate against staff on certain grounds if they first publish a written policy on their position. The intention behind these laws is to force schools to be transparent if they wish to discriminate against staff. Our review found that these legal requirements did nothing to prevent LGBTQ+ discrimination but instead encouraged vaguely-worded statements that provided neither protection nor transparency regarding hiring practices (at 33-35).

### *(c) School governance structures*

Finally, school governance structures added complexity to the position taken on LGBTQ+ inclusion by independent schools. Sometimes, more affirming views within a school community did not align with more discriminatory attitudes among its governing religious authority. As seen in the experiences of parents and teachers at Citipointe and St Catherine's, school communities do not always wish to have anti-LGBTQ views imposed upon them by their governing authorities (at 44).

## **B.2 The extent of discrimination in religious organisations**

A significant segment of religious and faith-based organisations in Australia provide social services to the general public, such as healthcare, aged care, disability care, housing and financial support services. Yet it is difficult to ascertain the total number of religious or faith-based organisations in Australia, let alone the subset of these organisations comprising Australia's faith-based service providers. This in turn makes it difficult to predict which organisations can rely on anti-discrimination exemptions available to 'religious bodies'.

From our review of 2020 Australian Charities and Not-for-profit Commission (ACNC) data, at least 3 in 10 of all charities in Australia and more than 4 in 10 of Australia's largest charities (with revenues of at least \$100 million) are religious or faith-based organisations. In 2020, at least 370,944 people were employed and at least \$45.8 billion was reported in total annual revenues by these organisations, 54.4% of which was derived from government funding (see section 3.1 at 45-51).

For this report we conducted a review of publicly available information on Australia's 70 largest faith-based service providers, which we first had to manually identify by conducting an investigation into ACNC records and publicly available information. Once these faith-based service providers were identified, we spent 2 hours searching for publicly available information on each faith-based service provider to mirror the experience of a prospective service user or employee looking for information on each provider's position on LGBTQ+ inclusion. We rated each provider according to a traffic light system with 'green' indicating LGBTQ+ affirming practices and 'red' indicating LGBTQ+ discriminatory practices. A rating of 'orange' was given to providers that were silent or had ambiguous positions on LGBTQ+ inclusion (see *'Measuring LGBTQ+ inclusion in faith-based service providers'* at 49).

### **B.2.1 Best and worst performers on LGBTQ+ inclusion**

Our review found a wide gap between the best and worst performers on LGBTQ+ inclusion among Australia's largest faith-based service providers. Almost 1 in 10 of Australia's largest faith-based service providers publicly discriminate against LGBTQ+ people, with a further 4 in 10 unclear in their position on LGBTQ+ inclusion. The experiences of Harley and Joanne\* show that even people who go to faith-based service providers for support can face blatant LGBTQ+ discrimination.

Included among the public examples of LGBTQ+ discrimination were refusals to assess same-sex couples for publicly-funded adoption programs, and healthcare, aged care and social service providers associated with religious groups that denounced LGBTQ+ people as 'broken' or 'sinful'. Together, these organisations received nearly half a billion dollars in government funding and employed over 9,500 people in 2020.

Among the better performers on LGBTQ+ inclusion, we found examples of dedicated LGBTQ+ training, clear public statements of support and celebration, consultation mechanisms involving LGBTQ+ people to improve service delivery, targeted services for LGBTQ+ people and the identification of LGBTQ+ people as a target group in diversity and strategic organisational plans (at 49-52).

### **B.2.2 The cost of silence on LGBTQ+ inclusion**

Nearly 4 in 10 of Australia's largest faith-based service providers are silent in their positions on LGBTQ+ inclusion. This cohort received over \$4.7 billion in government funding and employed over 60,000 people in 2020. 6 in 10 provided aged care services, 3 in 10 provided social services and nearly 1 in 4 provided healthcare services.

The cost of this silence is born by LGBTQ+ people and is a barrier to accessing social services, given we know that LGBTQ+ people fear discrimination and anticipate it by self-censoring themselves when they see religious iconography. LGBTQ+ people are more likely to disclose their LGBTQ+ identities when they see outward signs of LGBTQ+ affirmation. Merely staying silent also says to LGBTQ+ people that they should remain hidden or ashamed of who they are (at 53-53).

Similarly, 4 in 10 people employed by Australia's largest faith-based services providers work for an organisation that has an ambiguous position on LGBTQ+ inclusion or openly discriminates against LGBTQ+ people (at 53-54).

### **B.2.3 Public funding, religious affiliation and further complexity**

Neither public funding nor religious denominational affiliation were a reliable indicator of LGBTQ+ inclusivity. We found examples of LGBTQ+ discriminatory practices even among faith-based service providers which receive significant public funding and have denominational peers that do not discriminate against LGBTQ+ people.

Further, we found that charitable groups could have a mixture of ratings and some apparently inclusive service providers had their LGBTQ+ inclusion undermined by association with discriminatory related organisations. It can take years to restore trust with the LGBTQ+ community after an organisation is seen to be homophobic or transphobic, if that trust can ever be rebuilt (at 54-57).

## **C. PART II: EXEMPTIONS IN DISCRIMINATION LAWS IN AUSTRALIA**

Part II explores the exemptions in anti-discrimination laws in Australia which allow LGBTQ+ people and the people who love, support and affirm them to be legally discriminated against by religious educational institutions and faith-based service providers.

Overall, laws in the Northern Territory, Tasmania, the Australian Capital Territory and Victoria offer the greatest protection against LGBTQ+ discrimination. Commonwealth laws perform the worst on every measure of LGBTQ+ discrimination protection, with laws in New South Wales, Western Australia and South Australia also close to the bottom. Laws in Queensland sit in the middle in the protection they offer against LGBTQ+ discrimination. Every jurisdiction in Australia could improve its laws.

### **C.1 Students**

Students in religious educational institutions are particularly vulnerable to LGBTQ+ discrimination under Commonwealth, New South Wales and Western Australian laws. Laws in Victoria and South Australia could also be clarified or improved.

In respect of prospective and current students in religious educational institutions, Commonwealth, New South Wales, Western Australian and possibly South Australian laws allow discrimination against LGBTQ+ students. These jurisdictions, including South Australia, also offer all students in religious educational institutions (whether LGBTQ+ or not) limited or no protection from religious discrimination, leaving it possible for anti-LGBTQ+ religious beliefs to be imposed on any student as a condition of enrolment or education (see sections 4.1 and 4.3 at 60-62 and 64-65).

Commonwealth and Western Australian laws respectively offer no or limited protections to students who are discriminated against because they have LGBTQ+ parents or family members (see section 4.4 at 65-66).

Exemptions on student dress, appearance and behaviour in Victorian laws, and single-sex school exemptions in Commonwealth, New South Wales, Northern Territory and Victorian laws, could also be strengthened and clarified for public and private schools alike (see section 4.2 at 63-64).

## C.2 Workers

Workers in religious educational institutions and faith-based service providers are particularly vulnerable to LGBTQ+ discrimination under Commonwealth, New South Wales, Queensland, South Australian and Western Australian laws. Further, all jurisdictions apart from Victoria leave workers vulnerable to discrimination for refusing to be complicit in LGBTQ+ discrimination.

In respect of prospective and current staff in religious educational institutions and faith-based service providers, Commonwealth, New South Wales, Queensland, South Australian and Western Australian laws allow discrimination against LGBTQ+ workers. These jurisdictions, along with the Australian Capital Territory and Tasmania, also offer all staff within these organisations (whether LGBTQ+ or not) limited or no protection from religious discrimination, making it possible for anti-LGBTQ+ religious beliefs to be imposed on staff as a condition of employment (see sections 5.1 and 5.2 at 67-76).

However, whether a faith-based service provider can take advantage of these exemptions may depend on its purpose and character, due to conflicting authorities on the meaning of a 'religious body' (see *'Are faith-based service providers 'religious bodies'?' at 71-72*).

In addition to specific exemptions for religious educational institutions and religious bodies, this report also highlights other exemptions that could be used to allow LGBTQ+ discrimination against staff in these organisations.

The 'inherent requirements' and 'genuine occupational qualification' exemptions in Commonwealth, Queensland, South Australian, Tasmanian and Northern Territory laws should be clarified in scope. These additional exemptions are vulnerable to being used by religious educational institutions and faith-based service providers as alternative pathways to discriminate against LGBTQ+ staff or staff with LGBTQ+ affirming views (see section 5.3 at 76-78).

Exemptions for religious selection and appointment in New South Wales laws and the administration of religious bodies in South Australian laws should also be tightened.

Exemptions for religious observance and practice in all jurisdictions should remain but be monitored to ensure they are not used oppressively against staff with different religious beliefs (see section 5.4 at 78-80).

## C.3 People seeking services and support

Commonwealth, New South Wales, Queensland, South Australian, Victorian and Western Australian laws need amendment to limit the ability of faith-based service providers to discriminate against LGBTQ+ people whenever they provide services or support to the general public.

Faith-based service providers should only be permitted to discriminate based on a person's religious beliefs or activities when it:

- is reasonable and proportionate to meet the genuine needs of members of their religious community;
- forms part of religious observance or practice; or
- is connected to a site of religious significance, such as a place of worship (see section 6 at 80-91).

## C.4 Amending religious exemptions in anti-discrimination laws

When amending religious exemptions in anti-discrimination laws, care should be taken to review each law as a whole, given the complexity of these laws, the different ways they have been interpreted by courts and tribunals, and the different ways that LGBTQ+ discrimination occurs against LGBTQ+ people and the people who love, support and affirm them. When strengthening these laws, special consideration should be given to any non-religious exemptions that may already apply (such as those available to charities, voluntary bodies or to meet the needs of particular groups) and the implications of any changes on other parts of the law.

The complexity of these laws and how they have been interpreted is explored throughout Part II (see sections 6.1 and 7 at 80-83 and 91-97).

## D. PART III: DRAWING ON INTERNATIONAL LAW AND PRACTICE

Part III of this report explores the international human rights obligations that Australia's anti-discrimination laws must meet and the practices of comparable overseas jurisdictions that could inform reforms to our anti-discrimination laws.

Australian anti-discrimination laws that contain broad exemptions allowing LGBTQ+ discrimination by religious educational institutions and faith-based service providers are out-of-line with international human rights law and out-of-step with many comparable overseas jurisdictions, including the United Kingdom, Canada and South Africa.

### D.1 International human rights obligations

Under international law, the right to equality and non-discrimination, and the freedom of thought, conscience and religion, are fundamental human rights. They are two among several relevant international human rights obligations – including the right to work, education, health and privacy – that bind Australia and are relevant to framing our anti-discrimination protections.

There is a direct interaction between the right to equality and non-discrimination and the freedom of thought, conscience and religion in this context. That interaction arises because everyone is entitled to enjoy these rights and freedoms without discrimination (including on the basis of sexual orientation and gender identity) and both rights and freedoms can be limited.

With regards to the right to equality and non-discrimination, any distinction, exclusion, restriction or preference based on sexual orientation or gender identity can amount to prohibited discrimination unless the criteria for differentiation is reasonable and objective, and the aim is to achieve a legitimate purpose.

With regards to the freedom of thought, conscience and religion, while the right to *hold* a religious belief is unlimited, the right to *manifest* a religious belief (including through worship, observance, practice and/or teaching) can be limited to protect the fundamental rights and freedoms of others.

Children are entitled to enjoy their own freedom of thought, conscience and religion consistent with their evolving capacity, and this freedom protects both people who do and do not profess a religion. The freedom of thought, conscience and religion has a communal aspect but is an individual human right. Religious organisations may be protected under human rights law to the extent they represent their members' individual rights to exercise their freedoms communally (see section 8 at 97-102).

### D.2 International comparisons

Many disputes concerning the interaction between LGBTQ+ discrimination and religion have been resolved in comparable overseas jurisdictions and these provide insights on developing the law in Australia (see section 9 at 103-112).

Overall, Canada, the United Kingdom, South Africa and the European Court of Human Rights have generally preferred the rights of LGBTQ+ people to equality and non-discrimination over countervailing religious beliefs. The opposite is true of the United States of America, where religious freedoms are uniquely protected by the First Amendment to the United States Constitution (at 106-109).

However, in all these jurisdictions, decision-makers have begun their inquiry by treating anti-LGBTQ+ religious beliefs as *prima facie* worthy of respect. Decision-makers overseas have been reluctant to question whether religious beliefs that undermine the dignity of LGBTQ+ people warrant equal protection in the first place (at 105-106).

In coming to their decisions, all jurisdictions also assess the proportionality of competing objectives and interests. That is, by considering a range of factors, they attempt to answer whether LGBTQ+ discrimination should be permitted or endorsed in a particular case because it is a proportionate way to achieve another legitimate aim, namely the expression of countervailing religious beliefs. Few decisions have contended with the argument that LGBTQ+ people are also entitled to enjoy the freedom of thought, conscience and religion equally with others (at 109).



Factors that are more persuasive in the assessment of proportionality include the public nature of services (including whether they are commercial services, publicly funded, public in nature or serve a public purpose), the impact of the discrimination on both LGBTQ+ people and those with countervailing religious beliefs, and how closely the discrimination is connected to religious practice.

Factors that are less persuasive include whether the discriminatory requirement was made transparent and the availability of alternatives, as accepting these arguments would result in limiting the range of options available to LGBTQ+ people compared with others and undermine the right to express fundamental aspects of personal identity as it evolves over time (at 109-112).

## **E. PART IV: THE WAY FORWARD**

Part IV of this report draws together our key findings, reform recommendations and calls to action.

The key findings of this report are that:

- LGBTQ+ discrimination is endemic across religious schools and organisations in Australia;
- LGBTQ+ discrimination affects LGBTQ+ people and the people who love, support and affirm us;
- our laws do not protect all of us, equally; and
- Australia is out of step with international law and practice (see section 10 at 113-119).

Part IV sets out a legal framework for implementing the reform recommendations contained in this report as well as calls to action for all of us, including religious schools and organisations, parents, lawyers and advocates, and the media.

While laws fail to protect against LGBTQ+ discrimination in religious educational institutions and faith-based organisations, there is a role for all of us. Debates pitting people of faith against LGBTQ+ people, and vice versa, must end. Religious schools and organisations can be clearer about their inclusion of LGBTQ+ people. Parents can advocate for their children. Lawyers and advocates can embrace new arguments. And the media can tell our stories so that LGBTQ+ people, particularly those of faith, know they are not alone (see section 12 at 119-123).

# **DISMISSED, DENIED AND DEMEANED:**

**A NATIONAL REPORT ON LGBTQ+  
DISCRIMINATION IN FAITH-BASED  
SCHOOLS AND ORGANISATIONS**



# INTRODUCTION

## WHAT THIS PART COVERS:

- I. What this report is about
- II. Understanding key concepts
- III. Respecting privacy, being fair
- IV. LGBTQ+ people and our relationship to religion and faith
- V. Understanding anti-discrimination laws in Australia
- VI. Intersex people
- VII. Asexual and aromantic people

## Everyone deserves to live, study and work with dignity and respect.

For lesbian, gay, bi+, trans and queer (LGBTQ+) people, that may mean the simple dignity of being seen as who we are or sharing even mundane information about our personal lives with peers, colleagues and the people we approach for support and care.

For many LGBTQ+ people working or studying in religious educational institutions, or working in or relying on faith-based service providers, sharing these everyday aspects of ourselves may be the cause of great fear: a fear of being denied, demeaned or dismissed simply because of who we are or whom we love.

## WHAT THIS REPORT IS ABOUT

This report explores LGBTQ+ discrimination in religious educational institutions and faith-based service providers in Australia, and the laws that legally allow this discrimination.

Many reports have attempted to explain and address these gaps in Australian anti-discrimination laws,<sup>1</sup> but none have comprehensively documented the way that these laws allow and even embolden discrimination against LGBTQ+ people and the people who love, support and affirm us.

Structured in four parts, this report addresses:

- In **Part I: The impact and true extent of LGBTQ+ discrimination**: The stories of real people who have suffered LGBTQ+ discrimination in religious educational institutions and faith-based service providers, and the true extent of this discrimination based on an extensive investigation of publicly available records and financial information.
- In **Part II: Exemptions in discrimination laws in Australia**: Every exemption in Australia's complex federal, state and territory anti-discrimination laws that allow religious educational institutions and faith-based service providers to discriminate against LGBTQ+ people, or people who love, support or affirm us, in education, employment and when providing services.
- In **Part III: Drawing on international law and practice**: The international human rights obligations Australia must meet to realise for everyone equally the right to equality and non-discrimination

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<sup>1</sup> See e.g. New South Wales Law Reform Commission (1999) *Review of the Anti-Discrimination Act 1977 (NSW)*; South Australian Law Reform Institute (SALRI) (2016) *'Lawful Discrimination': Exceptions under the Equal Opportunity Act 1984 (SA) to unlawful discrimination on the grounds of gender identity, sexual orientation and intersex status*; Senate Legal and Constitutional Affairs References Committee (2018) *Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff*; Expert Panel chaired by the Hon Philip Ruddock (2018) *Religious Freedom Review*; Senate Legal and Constitutional Legislation Affairs Committee (2022) *Religious Discrimination Bill 2021 [Provisions]; Religious Discrimination (Consequential Amendments) Bill 2021 [Provisions] and Human Rights Legislation Amendment Bill 2021 [Provisions]*; Law Reform Commission of Western Australia (WALRC) (2022) *Review of the Equal Opportunity Act 1984 (WA): Project III Final Report*; Queensland Human Rights Commission (QHRC) (2022) *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991*.

and the freedom of thought, conscience and religion, as well as how our laws can be improved by looking to the experience of comparable overseas jurisdictions.

- In **Part IV: The way forward**: Our recommendations for reform and calls to action.

This introduction provides contextual and background information and the significance of terms and themes discussed throughout this report.

## UNDERSTANDING KEY CONCEPTS

‘LGBTQ+ discrimination’, ‘religious educational institutions’ and ‘faith-based service providers’ are three concepts used throughout this report.

### The meaning of LGBTQ+ discrimination

By **LGBTQ+ discrimination**, we mean prejudicial attitudes and hostile practices directed at LGBTQ+ people based on their sexual orientation or gender identity, including antipathy towards the expression of LGBTQ+ identities in an equal way to non-LGBTQ+ people.

Victims of LGBTQ+ discrimination can include more than just LGBTQ+ people. They include the children of rainbow families and non-LGBTQ+ people who support and affirm us.

This report addresses LGBTQ+ discrimination in all its forms; in all the ways that anti-LGBTQ+ attitudes and practices are experienced by LGBTQ+ people and the non-LGBTQ+ people who love, support or affirm us.

### The meaning of ‘religious educational institutions’ and ‘faith-based service providers’

This report focuses on LGBTQ+ discrimination in a subset of religious organisations in Australia, being religious educational institutions and faith-based service providers. These organisations form part of a broader range of religious organisations that exist in Australia including charities, trusts, religious institutions, and places of worship. This diversity is explored further in Part I of this report.

By **religious educational institutions**, we mean schools, universities and colleges that provide primary, secondary and/or tertiary education in Australia, and which are founded in religious beliefs or traditions.

By **faith-based service providers**, we mean organisations which provide services to members of the general public beyond their immediate religious communities, and which are founded in religious beliefs or traditions. These services can include goods (such as food or care packages), accommodation, support (financial or otherwise) and personal services, such as healthcare, disability care or aged care.

Although discrimination laws apply in particular areas of public life (such as in ‘goods and services’, ‘accommodation’, etc) and these terms have technical legal meanings, when we use the term “services” and “service provider” in this report generally, we do not intend to limit its meaning to the technical legal meanings found in anti-discrimination laws. By “services” we mean all the services and support that faith-based service providers may provide to members of the general public outside of directly religious services provided only to members of their faith.

## RESPECTING PRIVACY, BEING FAIR

In this report we share with permission the stories of people who have suffered LGBTQ+ discrimination. We have respected any requests for privacy and indicate with the use of an asterisk (\*) where we have used pseudonyms to protect people’s identities. We honour the bravery and courage of everyone who shared their stories with us.

We have also decided not to individually name the religious schools and organisations in our research sample discussed in Part I. This is for several reasons. First, they represent a sample of schools and organisations, and so the results of our research not only speak for a particular school or organisation but to trends in the whole faith-based education and charities sector. Second, we were concerned that identifying discriminatory schools or organisations would make them more entrenched in their positions and less willing to engage with the overall findings of our research. Conversely, we were concerned that identifying affirming schools or organisations might make them targets for attack. Third, given our review was necessarily based on publicly available evidence and we could not offer each school and organisation a chance to respond or improve their LGBTQ+ inclusivity ratings, we did not wish to unintentionally undermine any efforts by people within the school or organisation to improve their LGBTQ+

inclusivity. We have however quoted directly from publicly available sources, as these are statements that these schools and organisations saw fit to publish and can speak for themselves.

## LGBTIQ+ PEOPLE AND OUR RELATIONSHIP TO RELIGION AND FAITH

Given this report deals with LGBTIQ+ discrimination in religious educational institutions and faith-based service providers, it is important to recognise that LGBTIQ+ people of faith are central to this conversation. LGBTIQ+ people of faith are members of our communities, and this report recognises and respects their experiences. A person's sexuality, gender and religion (or lack of religion) are integral parts of a whole that make up who they are.

However, the relationship of many LGBTIQ+ people with religion is complex. Some of us are (or were) believers, and some of us are not. While communities of faith are a source of support and comfort for some, many LGBTIQ+ people have had (and continue to have) traumatic experiences in religious settings. For some LGBTIQ+ people, particularly those of us in multicultural communities, our faith and faith backgrounds are as much part of our cultural identities as they are a commitment to a particular set of beliefs. This section explores some of this complexity.

### LGBTIQ+ people of faith

In *Private Lives 3*, the largest national population survey of LGBTIQ+ people living in Australia to date, 74.2% of the 6,818 participants reported having no current religion or spirituality; a much larger proportion than the 38.9% of the general population who reported having no religion in the 2021 Australian Census.<sup>2</sup> Of the 1,236 LGBTIQ+ participants who identified a religious or spiritual identity in *Private Lives 3*, 13.7% identified a specific religious affiliation (including Catholic, Anglican, Buddhist, Uniting Church, Jewish, Muslim, Greek Orthodox, Presbyterian and Hindu) and the remaining 12.1% identifying themselves as 'other'.<sup>3</sup> Of the participants who indicated belonging to a religious/spiritual community in *Private Lives 3*, only a third (35.1%) said their religious/spiritual community was 'very' or 'extremely' LGBTIQ+ inclusive/friendly. Meanwhile, 44.4% said that their religious/spiritual community was either 'a little' or 'not at all' LGBTIQ+ inclusive/friendly.<sup>4</sup>

In our own 2022-23 consultation on religious discrimination surveying 4,060 LGBTIQ+ people in Australia,<sup>5</sup> a similar proportion of survey respondents – 24.1%<sup>6</sup> – indicated having a religion or faith, with a further 10.1% reporting that they were agnostic. 64% reported having no religion, including those who said they were atheists. Just over 2% indicated that they 'preferred not to say' or provided another response.

Among those who identified as having a religion or faith, Christian religious identities were the most common. 15.2% of the LGBTIQ+ people in Australia in our survey identified with a Christian religion or faith, with Catholic (5.4%), Anglican (4.2%) and Uniting Church (1.9%) accounting for the largest denominational affiliations. Among the other religions and faiths represented in the sample were Buddhists (2.3%), Pagans/Wiccans (1.9%), Spiritualists (1.3%), Jews (1%), Muslims (0.3%), Hindus (0.1%) and Aboriginal religious identities (0.1%).

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<sup>2</sup> A Hill et al (2020) *Private Lives 3: The health and wellbeing of LGBTIQ people in Australia*, Melbourne: The Australian Research Centre in Sex, Health & Society, La Trobe University at 26; Australian Bureau of Statistics (2022) *Religious affiliation in Australia: Exploration of the changes in reported religion in the 2021 Census*, 4 July.

<sup>3</sup> Hill et al, n2 at 26.

<sup>4</sup> Hill et al, n2 at 26.

<sup>5</sup> In terms of the demographics for this survey:

- 42.7% identified as male, 42.7% identified as female, 11% identified as non-binary, 2.4% identified as a different gender and 1.1% preferred not to say. In total, around 27.6% of respondents were trans or gender diverse. 2.1% of respondents were intersex.
- By location, 33.7% lived in New South Wales, 28.4% lived in Victoria, 14.7% lived in Queensland, 9.9% lived in Western Australia, 5.7% lived in South Australia, 3.9% lived in the Australian Capital Territory, 3.1% lived in Tasmania and 0.6% lived in the Northern Territory.
- By age, 2% were under 18 years, 7% were 18-24 years, 17% were 25-34 years, 19% were 35-44 years, 19% were 45-54 years, 19% were 55-64 years, 19% were 65-74 years, 12% were 65-74 years and 5% were 75 years or older.

<sup>6</sup> Being 974 of the 4,044 LGBTIQ+ people who provided a response to this question.

For the around 1,370 LGBTIQ+ survey respondents in Australia who indicated a religion or faith (including agnosticism):

- 37.5% indicated that they prayed at least once or twice a week, including 18.9% who prayed 'almost daily', 'daily' or 'up to several times per day';<sup>7</sup>
- 26% indicated attending religious services (apart from special occasions such as holy days, weddings and funerals) several times a year, or at least monthly;<sup>8</sup>
- 27% indicated that religion or faith was 'very important' or 'extremely important' in shaping their life decisions, with a further 19% indicating that it was 'fairly important'.<sup>9</sup>

### **LGBTIQ+ views on religion and religious discrimination**

Our 2022 LGBTIQ+ federal election survey of 5,578 LGBTIQ+ people living in Australia revealed that ensuring LGBTIQ+ people were protected from discrimination, including by removing carve-outs for religious organisations, was the single most important LGBTIQ+ issue to LGBTIQ+ people. 90.2% of LGBTIQ+ survey respondents ranked this issue as 'very important' to them, with the issue ranking as the most important issue for LGBTIQ+ people regardless of gender, cultural identity, rural or regional location and disability. Along with ending LGBTIQ+ conversion practices, it also ranked as the most important issue for young LGBTIQ+ people under 25 years.<sup>10</sup>

Our subsequent 2022-23 survey on religious discrimination further explored the opinions of LGBTIQ+ people on issues of religious discrimination.

The majority of participants supported the propositions that:

- religious people should be protected from discrimination in the same way as others (25.9% 'strongly agree'; 46.7% 'agree');<sup>11</sup>
- hate speech against religious people should be illegal (29.5% 'strongly agree'; 43% 'agree');<sup>12</sup> and
- religions should be allowed to freely choose their own religious leaders (24.1% 'strongly agree'; 52% 'agree').<sup>13</sup>

Opinions as to whether religious schools should be able to prioritise enrolments from students who share their faith were considerably more divided; with more people inclined to disagree than agree (24.8% 'strongly disagree' and 21.6% 'disagree' versus 5.5% 'strongly agree' and 25.7% 'agree').<sup>14</sup>

In these results, there was little difference in opinion between LGBTIQ+ people who espoused a religion or faith, and those who did not – although LGBTIQ+ people of faith were more inclined to agree that religious schools should be able to prioritise students of their own faith (36% 'strongly agree' or 'agree' for the religious LGBTIQ+ cohort versus 29% 'strongly agree' or 'agree' for the non-religious LGBTIQ+ cohort).

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<sup>7</sup> n=1,370.

<sup>8</sup> n=1,368.

<sup>9</sup> n=1,368.

<sup>10</sup> Equality Australia (2022) [Rainbow Votes: 2022 LGBTIQ+ federal election survey report](#) at 24, 27, 28 and 30.

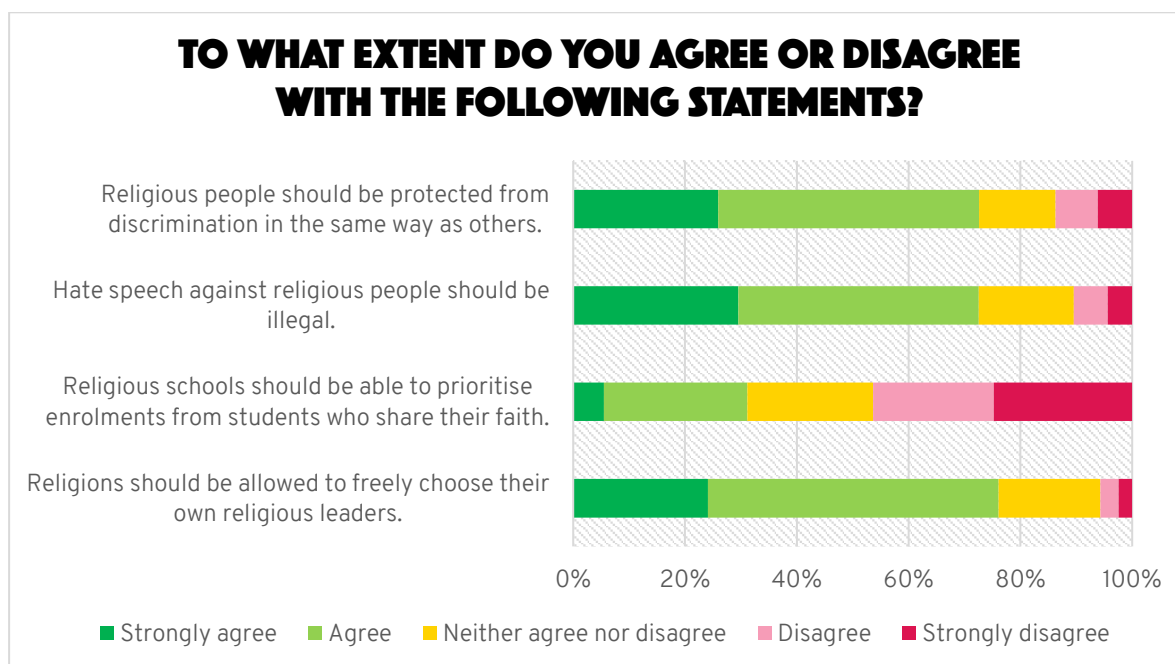
<sup>11</sup> n=3,913 LGBTIQ+ people in Australia.

<sup>12</sup> n=3,919 LGBTIQ+ people in Australia.

<sup>13</sup> n=3,916 LGBTIQ+ people in Australia.

<sup>14</sup> n=3,920 LGBTIQ+ people in Australia.

Figure 1: LGBTIQ+ survey respondents' views on religious discrimination



When asked about the fairness of specific scenarios on a scale of 1 to 5, LGBTIQ+ survey respondents were almost unanimous in ranking the following scenarios at the most extreme end of unfairness:

- a religious school refusing to allow a trans girl to wear the girls' school uniform (88% ranked it as 'extremely unfair');<sup>15</sup>
- a religious foster care agency saying it will only accept applications from potential carers in opposite-sex marriages (87% ranked it as 'extremely unfair');<sup>16</sup> and
- a religious school advertising that it only employs teachers who believe marriage should be between a man and a woman (84% ranked it as 'extremely unfair').<sup>17</sup>

Similarly, the scenario of 'a religious school employing a gay teacher provided he does not tell his students about his sexuality' was considered 'extremely unfair' by 71% of LGBTIQ+ respondents.<sup>18</sup>

Views were more divided about the fairness of 'a Catholic school advertising that it wished to employ a principal who was Catholic', with religious LGBTIQ+ survey respondents much more likely than non-religious LGBTIQ+ survey respondents to rate this as fair; although opinions were divided even among the religious.<sup>19</sup>

<sup>15</sup> n=3,858 LGBTIQ+ people in Australia.

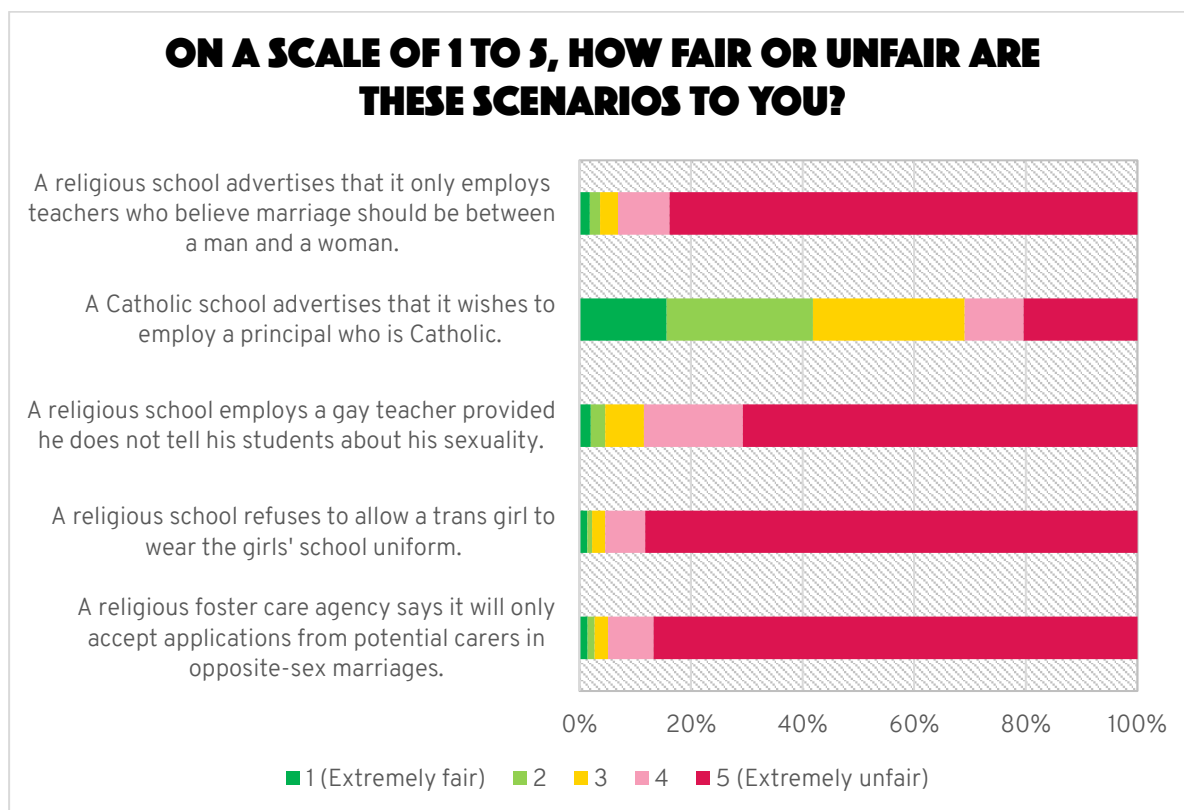
<sup>16</sup> n=3,855 LGBTIQ+ people in Australia.

<sup>17</sup> n=3,856 LGBTIQ+ people in Australia.

<sup>18</sup> n=3,858 LGBTIQ+ people in Australia.

<sup>19</sup> n=3,848 LGBTIQ+ people in Australia.

Figure 2: LGBTIQ+ survey respondents' views on the fairness of discrimination scenarios in religious educational institutions and faith-based service providers



The views of LGBTIQ+ survey respondents reflect broader attitudes in the Australian community. Our commissioned research conducted in December 2018, canvassing the views of 1,026 people, found that 72% of Australians believed that it should be illegal for faith-based schools to fire a teacher or expel a student because they are gay or transgender.<sup>20</sup> Losing a job or expelling a student because of who they are or whom they love is out-of-step with Australian community expectations.

## UNDERSTANDING ANTI-DISCRIMINATION LAWS IN AUSTRALIA

In Part II we explore anti-discrimination laws in Australia that allow religious educational institutions and faith-based service providers to discriminate against students, staff and the people who rely on their services or support.

Anti-discrimination laws in Australia are complex to understand and apply. They need to be reviewed as a whole to ensure that any reforms that remove or narrow religious exemptions do not allow LGBTIQ+ discrimination to continue under different provisions, but do account for religious diversity and allow genuine religious needs to be met. The reform of these laws is explored throughout Parts II, III and IV, as the analysis of Australian laws, our international human rights obligations and comparable overseas jurisprudence unfolds.

In a series of tables in Part II, we have summarised for non-lawyers the LGBTIQ+ discrimination protections afforded to:

- students in religious educational institutions (see Figure 12 at 60);
- workers in both religious educational institutions and faith-based service providers (see Figure 13 at 67); and

<sup>20</sup> See Essential Research (2018) [Exclusion from faith-based schools](#), report prepared for Equality Australia.

- people who rely on faith-based service providers for services and support (see Figure 14 at 80).

In Figure 11 (at 59), we have included a leaderboard that summarises the overall level of protection from LGBTQ+ discrimination afforded by each Australian jurisdiction.

Although complex, the legal detail is included in this report to inform policy and decision-makers on future reforms. However, to assist with the comprehension of the detail, some background information on anti-discrimination laws in Australia is included here to help guide your reading.

## 15 laws, not one

Anti-discrimination laws extend protections to people who are discriminated against based on a range of protected attributes (such as race, disability, sexual orientation, gender identity etc), in certain ‘areas’ of public life (such as employment, education, the provision of goods and services etc), and these protections are subject to a range of exceptions.

In Australia, anti-discrimination laws are contained in both national legislation and the legislation of each state and territory. The Commonwealth has seven statutes that deal with anti-discrimination protections,<sup>21</sup> and each state and territory also have their own anti-discrimination statute.<sup>22</sup> A further Commonwealth law dealing with discrimination based on religious belief or activity is currently foreshadowed.<sup>23</sup>

The main national statute dealing with discrimination based on sexual orientation and gender identity is the *Sex Discrimination Act 1984* (Cth) (**SDA**). However, employment discrimination protections are also found in our national employment statute, the *Fair Work Act 2009* (**FWA**). The Commonwealth also has a law dealing with the process of making a discrimination complaint;<sup>24</sup> separate laws dealing with discrimination based on race,<sup>25</sup> disability,<sup>26</sup> and age;<sup>27</sup> and provisions in the *Marriage Act 1961* (Cth) that provide exemptions from anti-discrimination laws in respect of the solemnisation of marriage, including provisions that override state and territory anti-discrimination laws.<sup>28</sup>

## The legal impact of multiple anti-discrimination laws

State and territory laws are generally intended to operate concurrently with Commonwealth laws, except to the extent of any inconsistency (whereby a valid Commonwealth law would prevail over the inconsistent state or territory law).<sup>29</sup> This means that a person who experiences LGBTQ+ discrimination may be able to assert protections under more than one piece of legislation.

However, while overlap exists, the protected attributes, areas of protection and exemptions also differ considerably between each of Australia’s national, state and territory anti-discrimination laws. This means that LGBTQ+ people, and the people who love, support and affirm us, may have different levels of protections from discrimination depending on where they live in Australia, if they have any protection at all.

<sup>21</sup> The main Commonwealth anti-discrimination statutes are the *Sex Discrimination Act 1984* (Cth) (**SDA**), *Racial Discrimination Act 1975* (Cth), *Disability Discrimination Act 1992* (Cth) and *Age Discrimination Act 2004* (Cth). Further protections and machinery are found in the *Australian Human Rights Commission Act 1986* (Cth). Further employment discrimination protections are found in the *Fair Work Act 2009* (Cth) (**FWA**). Further exemptions are found in the *Marriage Act 1961* (Cth).

<sup>22</sup> *Discrimination Act 1991* (ACT) as amended by the *Discrimination Amendment Act 2023* (ACT) and *Justice and Community Safety Legislation Amendment Act 2023* (No 3) (ACT) [scheduled to fully commence on 11 April 2024] (**ACT Act**); *Anti-Discrimination Act 1977* (NSW) (**NSW Act**); *Anti-Discrimination Act 1992* (NT) (**NT Act**); *Anti-Discrimination Act 1991* (Qld) (**Qld Act**); *Equal Opportunity Act 1984* (SA) (**SA Act**); *Anti-Discrimination Act 1998* (Tas) (**Tas Act**); *Equal Opportunity Act 2010* (Vic) (**Vic Act**) and *Equal Opportunity Act 1984* (WA) (**WA Act**).

<sup>23</sup> The Hon Anthony Albanese MP (2022) [Statement on religious discrimination legislation](#), 10 February.

<sup>24</sup> *Australian Human Rights Commission Act 1986* (Cth).

<sup>25</sup> *Racial Discrimination Act 1975* (Cth).

<sup>26</sup> *Disability Discrimination Act 1992* (Cth).

<sup>27</sup> *Age Discrimination Act 2005* (Cth).

<sup>28</sup> *Marriage Act 1961* (Cth) ss 47–47B.

<sup>29</sup> See e.g. *SDA* ss 10(3), 11(3); *FWA* s 27(1A); Australian Constitution s 109. See also *Viskauskas v Niland* [1983] HCA 15 at [11]–[12]; *University of Wollongong v Metwally* [1984] HCA 74.

The differences in protection across laws in Australia include:

- **Not all LGBTQ+ people are protected under every law.** For example, laws in New South Wales and Western Australia do not protect non-binary people from discrimination,<sup>30</sup> and Western Australia requires transgender people to have medically and legally affirmed their gender before they are covered by the protections available to people based on 'gender history'.<sup>31</sup> This means that non-binary people in New South Wales and Western Australia, and many transgender men and women in Western Australia, can only rely on federal anti-discrimination laws for protection from discrimination based on their gender identity.
- **The people who love, support and affirm LGBTQ+ people are not always protected.** For example, in addition to religious exemptions in many laws, Commonwealth and Western Australian laws also extend no or limited protections in the first place to people who are discriminated against because of their personal association with someone who is LGBTQ+. This means that the family, friends, peers and colleagues of LGBTQ+ people may not be protected from discrimination at all. An example of this kind of discrimination is demonstrated in the case of Mark\* and his children, who were refused enrolment at the same Catholic school because one of the twins was transgender. Further, Commonwealth, New South Wales and South Australian laws also provide very limited protections for people who are discriminated against because of their religious beliefs (or lack of beliefs). This impacts on people who are discriminated against by a religious educational institution or faith-based service provider for refusing to be complicit in LGBTQ+ discrimination based on their own LGBTQ affirming beliefs. By way of example, this kind of discrimination is demonstrated in the case of Rachel Colvin, who lost her job for having religious convictions that affirmed marriage equality.
- **The protections under each law differ.** Not every law covers the same areas, and some laws contain broader exemptions than others. For example, laws in New South Wales exempt all private educational institutions from discrimination protections available on the grounds of sex, disability, age, marital or domestic status, homosexuality and transgender status,<sup>32</sup> meaning that most staff and students who are discriminated against in private educational institutions in New South Wales can only look to Commonwealth laws for protection.

These differences in protection mean that reforms are needed at the Commonwealth level, or in *all* states and territories to achieve LGBTQ+ discrimination protections for everyone, no matter where they live, work and study in Australia. However, in practice, and because of the many differences in federal, state and territory anti-discrimination laws, reform is needed in every jurisdiction to ensure people who experience LGBTQ+ discrimination have the same range of options for seeking justice as people who experience other types of discrimination.

Some of the reforms that are advocated for in this report would also extend protections to other groups who experience discrimination, including women, disabled people, people who are single, divorced or in de facto relationships, people who are pregnant and other people of faith. Our laws should protect all of us, equally.

#### **The difference between discrimination based on sexual orientation and gender identity versus religious belief**

A critical distinction made throughout this report is the legal difference between discrimination based on sexual orientation and gender identity on the one hand, and discrimination based on religious belief on the other.

LGBTQ+ discrimination occurring at religious educational institutions and faith-based service providers can be framed in both ways. For example, if you are fired because you are gay or transgender, this is discrimination based on your sexual orientation or gender identity. If you are fired because you refuse to *believe* that marriage can only be the

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<sup>30</sup> NSW Act s 38A; WA Act s 35AA.

<sup>31</sup> WA Act s 35AB.

<sup>32</sup> NSW Act ss 25(3)(c), 31A(3)(a), 38C(3)(c), 38K(3), 40(3)(c), 46A(3), 49D(3)(c), 49L(3)(a), 49ZH(3)(c), 49ZO(3), 49L(3)(a) and 49ZYL.



union of a man and a woman, this is discrimination based on your religious belief (or lack of belief). LGBTQ+ people can experience both forms of discrimination; people who love, support or affirm us generally suffer the latter.<sup>33</sup>

Depending on how LGBTQ+ discrimination is framed and who is affected, the legal protections may be different. This adds great complexity in ensuring our laws protect everyone who experiences LGBTQ+ discrimination, no matter the form it takes and whether the person is themselves LGBTQ+ or not.

The differing experiences of Steph Lentz and Rachel Colvin provide apposite examples. Steph was fired for refusing to affirm a religious belief that homosexuality was immoral and committing herself to live a celibate life as a same-sex attracted woman. This is an example of discrimination based on both sexual orientation and religious belief. Rachel, who herself was a woman married to a man, was constructively dismissed because she refused to personally affirm a religious belief that marriage could only be between a man and a woman. This is an example of discrimination based on religious belief only. Steph and Rachel faced differing levels of protection because they lived in different states of Australia with state laws extending differing protections, and our Commonwealth laws also did not extend adequate protection.

That is why this report interrogates not only the protections that apply against discrimination based on a person's sexual orientation or gender identity, but also the protections that apply based on a person's religious beliefs or lack of beliefs (especially those beliefs regarding sexuality or gender that a religious educational institution or faith-based service provider may insist that its staff, students or service users subscribe to).

### **Religious discrimination protections: a double-edged sword for LGBTQ+ people**

Finally, as the debate over the Morrison Government's Religious Discrimination Bill showed, religious discrimination laws have a special significance for LGBTQ+ people.

On the one hand, laws that protect people from discrimination based on religion can protect LGBTQ+ people who have religious beliefs or engage in religious activities from discrimination. They can also protect LGBTQ+ people who have no religious beliefs or who refuse to engage in religious activities, because these laws generally protect atheists and non-believers as well.<sup>34</sup>

On the other hand, given the troubled history and experiences that many of us have with religious institutions that do not affirm us or the everyday expression of our sexuality or gender, they can also provide a safe harbour for people who seek to discriminate against us based on anti-LGBTQ+ religious beliefs.

While it is true that some religions see LGBTQ+ discrimination as antithetical to their beliefs, there is also case law in Australia which confirms that religious beliefs which discriminate against LGBTQ+ people can also be protected by religious discrimination laws.<sup>35</sup>

This again reinforces the need to look at anti-discrimination laws in Australia as a whole, not only those laws and exemptions dealing with discrimination based on sexual orientation or gender identity.

## **INTERSEX PEOPLE**

In this report we have respected the unique position that intersex people face when we talk about religious discrimination. This is why we have dealt with discrimination faced by intersex people in this report separately and upfront, and why we use the acronym 'LGBTQ+' – without the 'I' – throughout this report except where it is intended.

Intersex people, or people born with variations of sex characteristics, describes a group of people with innate physical sex characteristics (such as genitals or sex chromosomes) that vary from medical norms for male or female bodies. Some religions seek to distinguish between intersex people and LGBTQ+ people, characterising one group as born with unblameworthy variations and the other as engaging in blameworthy conduct.

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<sup>33</sup> Some laws also provide protections to people who are perceived to be LGBTQ+ or who are personally associated with LGBTQ+ people, meaning that non-LGBTQ+ people may be able to argue discrimination based on sexual orientation or gender identity in limited cases.

<sup>34</sup> ACT Act Dictionary (definition of 'religious conviction'); Qld Act Sch 1 (definitions of 'religious belief' and 'religious activity'); Tas Act s 3 (definitions of 'religious activity' and 'religious belief or affiliation'); Vic Act s 4(1) (definition of 'religious belief or activity'); WA Act s 4(3).

<sup>35</sup> *Hordyk and Wanslea Family Services Inc* [2022] WASAT 117 (*Hordyk*) at [98], [111] and [296]-[297].

Many intersex people are heterosexual and identify with the male or female gender assigned to them at birth. However, intersex people may also have the same diversity of sexualities and gender identities, and therefore may also be gay, lesbian, bi+, queer and/or trans or gender diverse. Accordingly, they may experience discrimination based on their sexual orientation and gender identity like other LGBTQ+ people.

Intersex people also have standalone discrimination protections in Commonwealth law and in all state and territory anti-discrimination laws except in New South Wales and Western Australia.<sup>36</sup> These protections are sometimes subject to the same religious exemptions as those applying to discrimination based on sexual orientation and gender identity,<sup>37</sup> and sometimes they are not.<sup>38</sup>

Even though some religions appear to distinguish intersex people from LGBTQ+ people, intersex people can still suffer discrimination based on religious attitudes and practices. They can do so when they identify as gay, lesbian, bi+, queer, trans or gender diverse, or express themselves in ways which disrupt gendered religious norms. They can also experience LGBTQ+ discrimination when they are presumed to be LGBTQ+ or because they are personally associated with LGBTQ+ people.

Intersex people can also experience specific forms of intersex discrimination when their sex characteristics mean they are unable or unwilling to comply with certain religious requirements based on sex, such as religious requirements regarding hair, or religious norms and expectations such as those concerning fertility, procreation and sexual behaviour. Finally, when some religions seek to mark out intersex people as different to LGBTQ+ people, they can do so in a way which stigmatises intersex people, such as by suggesting they are associated with a 'broken world' rather than part of the great natural diversity in human bodies.<sup>39</sup>

## ASEXUAL AND AROMANTIC PEOPLE

Like intersex people, asexual people face unique experiences of religious discrimination. An extensive exploration of asexual and aromantic experiences of religious discrimination has been the subject of a report by Kate Wood, stemming from a joint project conducted by the Ace & Aro Collective AU (AACAU) and ACT Aces.<sup>40</sup>

Asexual and aromantic people have substandard protections against discrimination in Australia. Asexual and aromantic people are protected under sexual orientation discrimination protections in the Northern Territory,<sup>41</sup> and likely in the Australian Capital Territory, Victoria and Tasmania.<sup>42</sup> The Commonwealth SDA, and laws in New South Wales, Queensland, South Australia and Western Australia currently do not extend sexual orientation discrimination protections to asexual and aromantic people.

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<sup>36</sup> SDA s 5C; FWA ss 153(1), 195(1), 351(1) and 772(f); ACT Act s 7(1)(v); NT Act s 19(1)(ca); SA Act s 29(4); Tas Act s 16(be); Vic Act s 6(oa). Discrimination protections based on 'sex characteristics' are also forthcoming in Queensland: see *Births, Deaths and Marriages Registration Act 2023* (Qld) s 152 (not yet commenced). The Law Reform Commission of Western Australia has recommended that sex characteristics be included as a protected attribute in the WA Act: WALRC, n1 at 116, rec 52.

<sup>37</sup> See e.g. SDA s 37; SA Act ss 34(3), 35(2b) and 50.

<sup>38</sup> See e.g. SDA s 38; Vic Act s 82(2).

<sup>39</sup> See e.g. Anglican Church – Diocese of Sydney (2019) *Doctrine Statement on Gender Identity*, Annexure A at [4].

<sup>40</sup> See K Wood (2021) *"I don't know if this counts but...": Asexual Lived Experiences Survey 2021: Final Report* at 68-104.

<sup>41</sup> NT Act s 4(5A).

<sup>42</sup> Definitions of 'sexual orientation' in Australian Capital Territory and Tasmanian laws are not exhaustive, while the definition of 'sexual orientation' in Victorian laws are intended to include asexuality based on comments made by the Attorney-General during legislative debate when the definition was introduced. See ACT Act Dictionary (definition of 'sexuality'); Tas Act s 3 (definition of 'sexual orientation') and Vic Act s 4(1) (definition of 'sexual orientation').

### **REFORMS NEEDED:**

1. Amend the definitions of protected attributes in Commonwealth, New South Wales, Queensland, South Australian and Western Australian laws to ensure all sexual orientations, gender identities and people with variations of sex characteristics are protected from discrimination. Clarify that asexuals are protected in the remaining jurisdictions.
2. Amend Western Australian laws to remove the requirement for transgender people to have their gender legally updated before they are entitled to protection against discrimination based on their gender identity.

# PART I: THE IMPACT AND TRUE EXTENT OF LGBTQ+ DISCRIMINATION

## WHAT THIS PART COVERS:

- I. Personal stories of LGBTQ+ discrimination
- II. The extent of discrimination in religious schools
- III. The extent of discrimination in religious organisations

Religious educational institutions and faith-based service providers employ, educate and provide services to millions of people in Australia and are provided with significant funding by government. Not all organisations wish to discriminate against LGBTQ+ people, but the testimonies we have collected and our analysis shows that many still do. Laws that allow religious educational institutions and faith-based service providers to discriminate against LGBTQ+ people are having a significant impact in both enabling discrimination and tarnishing the reputations of organisations that are affirming and inclusive places for LGBTQ+ people to work, study or access support.

Through a collection of personal testimonies and an extensive investigation of publicly available records and financial information, this Part reveals the impact and true extent of LGBTQ+ discrimination in religious educational institutions and faith-based service providers in Australia today.

## 1. PERSONAL STORIES OF LGBTQ+ DISCRIMINATION

This section summarises the stories of people who have shared with us their experiences of LGBTQ+ discrimination in religious educational institutions and faith-based service providers in Australia. To protect the identity of people, we have used pseudonyms where names are marked with an asterisk (\*).

### DENIED SCHOOL OPPORTUNITIES BECAUSE HE WAS GAY



**James Elliot-Watson** went to a Christian school in Sydney.

In Year 10, James was successfully interviewed to become a prefect. A few weeks later he revealed to one of his teachers that he was gay.

A meeting followed with his Year Coordinator and the Vice Principal, who told him he could no longer proceed with the leadership position and that he must not tell anyone else at the school about his sexuality. He was outed to his parents, who acted on the school's request to get him counselling.

Over the next year, James struggled with feelings of shame and poor mental health which came to a head one day in 2012 when he unexpectedly came out to everyone in his class. The school suspended James and made him meet with an 'ex-gay man' who told him that he could change.

James was also forced to stop leadership camps and other extracurricular activities such as choir and fundraising committees.

## DENIED PROMOTION BASED ON HER SAME-SEX RELATIONSHIP

**Lisa\*** was employed in the Catholic education system in NSW for 16 years, working her way up to assistant principal.

When she began her career Lisa was married to a man. They later divorced and Lisa began a relationship with a woman. Lisa kept the relationship quiet after they moved in together but did not hide it.

Lisa needed a year off work after a medical accident in 2018. During this time her partner handled all communication with the school. When Lisa returned to work, she was told that her new relationship was in breach of her contract and that she could be fired at any time.

Despite having an excellent employment record, as evidenced by her many promotions, Lisa was told she could no longer advance in her career within the Catholic system. She married her partner a short time later and the school told her colleagues not to attend the wedding or give her any gifts. Lisa quit six months later.

## TAKING A PARTNER TO THE SCHOOL FORMAL

**Abbie Frankland**, 18, couldn't wait to go to her girlfriend's Year 12 school formal.

They had bought tickets months earlier, found outfits and booked nail appointments. With only a month to go, they were informed that St Ursula's College in Kingsgrove would not allow same-sex couples to attend.

Abbie went public with a petition in October 2023, making national headlines and garnering support from across the political spectrum, including NSW Premier Chris Minns and Federal Education Minister Jason Clare.

Only six days out from the formal and under immense public pressure, the Catholic school in Sydney finally revised its position. Abbie says it was '*an amazing night*'.



## SAY YOU'RE SINGLE OR YOU'RE FIRED



**Kimberly\*** got a job as a PE teacher at a Catholic school in regional NSW in 2001.

After 12 years at the school Kimberly began dating another female staff member. Following a complaint from a fellow teacher, the couple was called in for a meeting with the principal.

They were told their same-sex union was against the values of the school and both of them would lose their jobs if they did not formally state they were not in a relationship.

Kimberly questioned why her relationship was deemed unsuitable and against the Catholic ethos when other staff were living in de facto relationships and some women had given birth without being married.

Kimberly refused the principal's offer and walked out of his office without a job. She called the union and was told there was nothing she could do because of the school's religious nature. The couple met again with the principal the next day and were told that they would be welcomed back if they stated they were not a couple, so the principal could answer 'honestly' if he was questioned about their relationship. Kimberly's partner, who was financially supporting two young children, encouraged her to rethink her position and they both returned to work. Kimberly struggled with lying about who she was and left her job a few months later.

## NO SCHOOL FOR MY DAUGHTER

**Caroline\*** lives in Sydney's Northern Beaches with her husband and three children, the youngest of whom is an eight-year-old trans girl.

The young girl loves gymnastics, painting her nails and jumping on the trampoline, and she has been a welcome addition to her state-run primary school that supported her and her family.

But the young girl, who eagerly awaits the day she starts high school with her peers from primary, has been denied enrolment by two religiously affiliated high schools on the Northern Beaches. Another two religious independent schools said they would only consider her application if Caroline and her husband agreed to extreme conditions, such as the principal being involved with her medical journey.



Caroline and her family love where they live, their neighbours and the schools their kids go to, but they are looking to move so that their youngest will be accepted for who she is and have the same opportunities as her older brother and sister.

## TAUGHT SHE WOULD 'BURN IN HELL'

**Leah** went to a Christian college in regional Queensland between the ages of 14 and 16.

During religious studies and in some English classes, students would discuss the topics of homosexuality and the trans experience. Her classes repeatedly heard that queer people were making a choice for which they would 'burn in hell'.

They were also told that there was no such thing as trans people, who were actually 'autistic' and 'messed up in the head'. Leah came out as queer in her last six months at the school, during which time she suffered from an eating disorder.

She was appointed a religious counsellor who told her that her sexuality was a sin and her 'repeated sins' had caused her eating disorder. They spent lunchtimes 'praying her eating disorder and her sins away'. Leah left the school a short time later, in 2021, and completed her schooling elsewhere. She still struggles with overcoming the damage done to her.

*"You still feel dirty all the time. It takes a lot to get it out of your head because it has been ingrained in you that you are sinning all the time."*

## NO ONE TO PROTECT MY STUDENTS FROM HARM

**Elizabeth\*** worked in a non-teaching support role at an Anglican school in the Sydney region for eight years.

She left her job in July 2023 after despairing at the treatment of queer students. During her time at the school, Elizabeth watched those students who came out as gay or trans struggle with the lack of acceptance; their mental health and wellbeing deteriorating as a result. They would be 'encouraged' to find another the school, forced to leave their friends and those staff who supported them.



Elizabeth was distressed by the stripping of supportive queer texts from the school library and a compulsory Christian studies class for Year 10 students featuring *Teen Sex By The Book*, which states same-sex relationships are the result of misplaced sexual desire and encourages a queer vow of abstinence. Elizabeth, who is married to a man and identifies as bisexual, left the school because of its culture of harm towards queer students.

## REFUSED ENROLMENT FOR MY TRANS CHILD, TWICE

**Mark\*** lives in Sydney's Eastern Suburbs and is a father to twins, a girl and a trans boy.

Mark and his wife sought to enrol the twins in a local Catholic primary school in 2019, having moved to a new home on the same street a few months earlier.

The family toured the school and met with the principal who appeared supportive of their 8-year-old son. They paid a \$200 enrolment deposit, and their application went to the Archdiocese for final approval.

Mark called and emailed the school repeatedly over the coming weeks to confirm a start date. More than a month later he was contacted by the school receptionist who told him the twins would be *'better served'* by their current public school.

A few years later Mark tried to enrol his son in a Catholic high school known for being progressive and inclusive. Mark had a positive phone conversation with the headmaster who told him the Complex Case Management Team would compile a briefing paper on his son for the Archdiocese.

Mark spent the next six months trying to find out whether his son would be accepted. He was eventually told that his son's enrolment was not successful because the waiting list was particularly long that year.

In conclusion, I can only assume that someone in power vetoed the whole process, and you were then tasked with pulling whatever lever you needed to in order to find an "Out" - Disappointing but not entirely unexpected and flies in the face of "Inclusion".

I am so very proud of the person [REDACTED] is and the strength he has already shown to address the challenges that he faces - the Catholic church could learn a lot from him.

*Above: Extract from Mark's response to the school's rejection letter dated 14 November 2023*

## DENIED LEAVE AND OVERLOOKED FOR PROMOTION



**Emma Harris** is a teacher and practising Catholic who worked in the Catholic school system in Sydney for ten years.

While working in Catholic education, Emma split from her then husband and met her partner Clare\*. Emma and Clare\* decided to have a baby and in 2022, Emma spoke to her school principal about taking maternity leave. During this conversation, Emma disclosed her relationship with Clare\*. Emma was told that if she took maternity leave, Catholic schools leadership would use this as evidence against her, and she would be fired.

Also in 2022, Emma applied for an assistant leadership position after successfully acting in the same role for a year. She also applied for a more senior position that became available at the same time. Emma was unsuccessful in both applications, and the more senior role was given to a candidate who was less qualified than Emma and who had far less experience.

In late 2022, Emma left the school. She felt that she would be targeted because of her relationship with Clare\* and that she would not have opportunities to progress her career if she stayed.



## DISCRIMINATION AT A CHARITY SHOP

**Joanne\*** is a trans woman living in South Australia.

In 2022, Joanne was shopping with her friends and her wife at a charity store in Adelaide run by a large faith-based organisation.

When Joanne asked a staff member for directions to the bathroom, the staff member told her she had to use the male bathroom and called her a 'fake woman'. The staff member followed Joanne to the bathrooms and physically blocked her from entering the female bathroom. Joanne told the staff member she had a right to use the female toilet but she was told that she had no choice.

When Joanne came out of the male bathroom, the staff member told her she had to leave the store. As Joanne left the store she saw the staff member re-enacting the exchange with other staff members and laughing.

Joanne wrote a letter to the organisation about her experience, but she never received a reply.



## DISCRIMINATION WHILE HOMELESS



In 2015, **Harley** fled intimate partner and family violence, seeking accommodation at a refuge provided by a faith-based organisation in Victoria.

During their time at the refuge, they were counselled against disclosing their sexuality or wearing rainbow items of clothing. They were told they were '*going to hell*' by a staff member who said they would '*pray for God to show them the way*'. Harley left the refuge and spent three nights sleeping on the streets instead.

In 2021, Harley and their wife sought emergency accommodation from a different faith-based organisation. This time, Harley's wife (who is a transwoman) was told that she would need to go to a men's shelter rather than access the same facility as Harley.

## FIRED FOR DELIVERING A MESSAGE OF LOVE

**Matthew\*** began working as a relief teacher at an Anglican school in Sydney in 2022 before moving on to a full-time role later that year.

During chapel he heard senior members of staff speak to students about the seriousness of the sexual sin of homosexuality using Jesus's example: *'If your eye causes you to sin, gouge it out'*.



During a Year 11 symposium on Christ and Culture the students were told that anything outside of heteronormative sex was *'inhuman'*. Matthew was especially troubled by a Q&A session with Year 11 students who were presented with the statement *'sex is always between a man and a woman'*. Those who agreed were asked to remain seated and those who did not were told to stand. The two students who stood were mocked and jeered by the rest of the room.

Matthew raised his concerns about these *'harmful messages'* to the school board, the Chaplain and other staff. In March 2023 he was asked to deliver a symposium on gender using his theological training. During his presentation he told the students that God created us all in his image, and that there are different expressions of gender in the Bible.

Matthew was called into the principal's office two days later and fired without warning during an 11-minute meeting, going home to his three-year-old daughter and heavily pregnant wife.

## STOP BEING OPENLY GAY

**Daniel Craig** was hired as a substitute teacher at a Pentecostal high school on the Gold Coast in 2014. He achieved positive academic results and praise from staff and students and was subsequently offered a year contract.



In 2015 Daniel marched in Mardi Gras with a queer Christian group. Three weeks later he was called in to a meeting with the Principal and Executive Principal. They told him a parent had seen him marching on TV and that he was *'a known homosexual'*.

Daniel was told to stop being openly gay and warned that if other parents made similar complaints the school would have to *'take further action'*.

Daniel decided he did not want to live in fear of losing his job at any moment or be forced to hide who he was, and he did not apply to extend his contract at the end of the year.

## 'PASTORALLY' FIRED THEN GASLIT

**Karen Pack** is a committed Christian and an ordained pastor.

In 2020, Karen was fired from her role as a teacher at a Baptist tertiary college in Sydney after she became engaged to her same-sex partner, Bronte.

Karen was employed by the college in February 2018 and lectured in chaplaincy and spiritual care, a post-graduate program she had been engaged by the college to develop.

In a statement emailed to Karen's students after her employment was terminated, the college admitted that Karen had a 'deep and abiding faith in Jesus' and was an 'excellent and committed educator'. It explained that the decision to end her role was made by the Principal with the support of the College Board and Leadership Team, based on the position held by the college on same-sex marriage.<sup>43</sup>



Above: Karen Pack and her wife, Bronte

Despite the school's statement to students, the Principal of the college later publicly denied firing Karen and asserted that she had agreed to resign from her role because she could no longer adhere to a key value of the college about the nature of marriage.<sup>44</sup> The Principal of the College further explained his decision to terminate Karen's employment to the Parliamentary Joint Committee on Human Rights as him having 'entered a very strong pastoral conversation' with Karen, in which 'we [sic] came to the conclusion that this was not where should continue to exercise her gift, which is a very strong gift'.<sup>45</sup>

Equality Australia supported Karen with her matter.

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

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

Above: Extract from the statement sent to Ms Pack's students by the college at the time she was fired

<sup>43</sup> M Vincent and L Kewley (2021) 'Karen Pack was praised as an 'excellent' educator, but she says she was sacked by her employer Morling College for being gay - but the College disputes this', ABC News, 8 April.

<sup>44</sup> Vincent and Kewley, n43.

<sup>45</sup> Commonwealth of Australia, Parliamentary Joint Committee on Human Rights (2021) [Official Committee Hansard](#), 21 December at 43.

## STAY CELIBATE OR LOSE YOUR JOB

**Steph Lentz** was fired from her role as an English teacher at a Christian school in Sydney in 2021 after she came out as a lesbian.

The school denied that the termination of her employment was due to her sexual orientation but was instead because she failed to fulfil an *'inherent, genuine occupational requirement'* of her employment.

The employment requirement that the school sought to impose on Steph was that she must personally believe, and attend a church that believed, in the immorality of homosexuality and that same-sex attracted people must *'prayerfully live a celibate life'*.

Steph offered to respond to any questions raised by her students about sexuality by presenting the school's strong convictions while acknowledging that some Christians hold different views.

She was fired on 13 January 2021.

Equality Australia supported Steph with her matter.

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

In paragraphs 2, 3, 5 and 6 of your letter of 28 December, you have asserted that you believe the School's issue is your sexual orientation or sexuality. The School again assures you that is not the case. The School's questions to you have at all times been directed to whether you fulfil the inherent, genuine occupational requirement of clause 35.1(c) of the MEA. **The School accepts that there are faithful Christians who see their sexual orientation as homosexual or who experience same sex attraction, and yet who recognise that it would be wrong to act on their temptations and who prayerfully live a celibate life.** Accordingly, the issue is not your sexual orientation but whether you fulfil the inherent, genuine occupational requirement of clause 35.1(c) of the MEA.

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

## LOST HER JOB FOR STAYING TRUE TO HER CONVICTIONS

**Rachel Colvin** was a committed Christian and mother of three married to a male partner.

In 2019, Rachel was constructively dismissed from her role as a teacher at a non-denominational Christian School in Ballarat after 10 years' service.

Rachel was forced to resign after she refused to agree to and abide by an amended statement of faith, contrary to her own religious beliefs, that marriage 'can only be between a male and a female'.

Rachel was forced to resign notwithstanding her offer to teach in accordance with the schools' beliefs.

The matter was brought before the Victorian Civil and Administrative Appeals Tribunal, and was settled between the parties.

Equality Australia supported Rachel with her matter.



*Above: Rachel Colvin and her family*

## MORE PERSONAL STORIES

The following people have also shared with Equality Australia their personal stories of LGBTQ+ discrimination or spoken publicly about their experiences:

- **Nathan Zamprogno** is a gay man who lost his job as a teacher at a Christian School in Sydney in 2020 after 20 years of service because the school discovered his sexuality. Nathan shared his story with a Senate committee in 2022.<sup>46</sup>
- **Elise Christian** is a teacher and committed Christian who worked in a learning support role with children aged between 10 and 12 at a Christian school in New South Wales in 2016 and 2017. She believes she lost her job because she tried to support students who were seriously bullied by classmates and senior staff because of their suspected sexuality. Elise shared her story with a Senate committee in 2021.<sup>47</sup>
- **Evie MacDonald** is a trans girl who attended a religious school in the Mornington Peninsula in Victoria between 2011 and 2015. In 2015, when Evie was 10 years old, a teacher divided the class into boys and girls. When Evie said she wanted to be with the girls the teacher physically dragged her to the group of boys. She was also forced to attend seven sessions of chaplaincy counselling intended to prevent her affirming her gender as a girl, without her parents' knowledge. Evie shared her story with *The Age* in 2018.<sup>48</sup>
- **Olivia Stewart** is a trans girl who attended a co-ed Sydney Anglican school in Year 7. When she informed the school of her intention to start Year 8 as a girl, Olivia's family were told that if she stayed at the school they would write to the parents of other students to inform them there was a

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<sup>46</sup> Commonwealth of Australia, Senate Legal and Constitutional Affairs Legislation Committee (2022) [Official Committee Hansard](#), 21 January at 9; T McIlroy (2022) ["Don't ask, don't tell" on gay teachers being sacked](#), *Australian Financial Review*, 21 January.

<sup>47</sup> Commonwealth of Australia, Senate Legal and Constitutional Affairs Legislation Committee (2021) [Official Committee Hansard](#), 21 December at 78; D Giannini and A Brown (2021) ["Teacher's tears at religious laws inquiry"](#), *The Canberra Times*, 21 December.

<sup>48</sup> F Tomazin (2018) ["Religious leaders and health practitioners could face prosecution for gay "conversion"'](#), *The Age*, 16 May.

trans student at the school. Olivia changed schools. Olivia shared her story with the *Sydney Morning Herald* in 2021.<sup>49</sup>

- **Sam Cairns** is a lesbian teacher who lost her job at a Christian school in Victoria in 2012 after 7 years' service because the school became aware of her 'choice of sexuality'.<sup>50</sup>
- **John** is a gay man who worked as a teacher and principal at various schools in the Catholic education system for 37 years. His ex-partner threatened to out him to his employer, which he strongly believes would have resulted in him losing his job. He always kept his sexuality a secret out of fear and felt he could not talk about it with his colleagues. After retiring in 2019, he has since returned to work.
- **Michael\*** is a gay man and committed Catholic who worked as a principal in a Catholic school in Victoria but kept his sexuality a secret for fear of losing his job. When he disciplined a staff member over unprofessional practice, that staff member threatened to out him to the school community. He met with the Victorian Attorney-General during the debate on reforms in Victoria, who spoke about his story in Parliament.<sup>51</sup>
- **Peter\*** is a gay man who worked as a teacher at a religious school for many years. Following a leadership change at the school, Peter was overlooked for a promotion for a role that he was already performing despite being the most qualified applicant for the position and having an exemplary teaching record. Peter's sexual orientation had recently become known to a member of the school leadership who was involved in the hiring process.
- **Citipointe Christian College** in Brisbane forced parents to sign a declaration of faith in 2022 to keep their children enrolled. The declaration included the statement that *'any form of sexual immorality (including but not limited to; adultery, fornication, homosexual acts, bisexual acts, bestiality, incest, paedophilia, and pornography) is sinful and offensive to God and is destructive to human relationships and society'*. Teachers were also forced to accept that it was *'a genuine occupational requirement'* of their role to ensure they did not express their sexuality except through heterosexual, monogamous relationships, expressed intimately through marriage. A group of Citipointe students and parents are now represented in a legal complaint to the Queensland Human Rights Commission.<sup>52</sup>
- **St Catherine's School** in Sydney advertised a role for a new principal which required them to affirm they believed in marriage only as between a man and a woman. Most parents in the school community opposed the requirement and wrote to the school council. Separately, several Sydney Anglican principals wrote to the Diocese with concerns over the requirement, including its impact on gay students and parents.<sup>53</sup>

Further experiences of LGBTQ+ discrimination have been documented over the years, including media reports that:

- **Foundation Christian College** in Western Australia told a 7-year-old student in 2015 that she could only stay at the school if she did not speak about her father's sexuality or relationship with a male partner. The father was told by that school that his child would never have been admitted if they had known he was gay.<sup>54</sup>

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<sup>49</sup> C Fitzsimmons (2021) ["I'm still the same person inside": Olivia's journey coming out as a transgender teen](#), *Sydney Morning Herald*, 17 January.

<sup>50</sup> B Schnieders and R Millar (2021) ["Steph Lentz was sacked this year for being gay, it was perfectly legal"](#), *Sydney Morning Herald*, 10 August.

<sup>51</sup> Parliament of Victoria, Legislative Council Parliamentary Debates (2021) [Hansard](#), 3 December 2021 at 5138.

<sup>52</sup> S Chenery and K Murray (2022) ["How Citipointe Christian College's "sexuality contract" brought queer students out of the shadows and onto the national stage"](#), ABC News, 2 November; B Smee (2022) ["Citipointe Christian College teachers threatened with dismissal for expressing homosexuality"](#), *The Guardian*, 21 March.

<sup>53</sup> J Baker (2022) ["St Catherine's appoints 'active Christian' principal amid same-sex marriage row"](#), *Sydney Morning Herald*, 28 June.

<sup>54</sup> N Hondros (2015) ["Gay man's daughter not welcome at Mandurah Christian School"](#), *WAToday*, 29 October.



- **Craig Campbell**, a committed Christian, lost his job as a teacher at a Christian college in Western Australia in 2017 after he told senior staff he was in a relationship with a man. He was never told the reason for his dismissal directly, but the school principal confirmed it was due to an *'inconsistency with his beliefs on sexuality and the college's beliefs'*.<sup>55</sup>

## 2. THE EXTENT OF DISCRIMINATION IN RELIGIOUS SCHOOLS

This section explores the extent of LGBTQ+ discrimination in religious schools based on a review of publicly available information for a sample of religious educational institutions in Australia.

Reviewing publicly available information comes with its limitations. A desktop review cannot and does not purport to examine the lived experience of those within these schools, which is important when seeking to understanding the complete picture on LGBTQ+ inclusion in practice. The desktop review gives us an insight into how schools talk about LGBTQ+ issues publicly, if at all. When publicly available information exposes LGBTQ+ discrimination it provides us with warning signs that the situation on the ground is not welcoming and safe for LGBTQ+ staff and students and those who love, support or affirm us. When the information shows signs of LGBTQ+ inclusion, it provides examples of how all schools can improve their practices – but proof of inclusion takes more than mere talk or written policies. It is also about how respected and valued people feel, regardless of who they are or whom they love. When publicly available information says nothing about LGBTQ+ people or inclusion, this highlights a problem in and of itself. Staying silent on LGBTQ+ people and their inclusion in the life of a school, in policies on harassment or bullying, in enrolment forms and job advertisements speaks volumes to LGBTQ+ people. It says that your fear of being denied, demeaned or dismissed simply because of who you are or whom you love is a real one. When reading the results of our desktop reviews, keep the personal stories of people who have experienced LGBTQ+ discrimination that we discussed in section 1 in mind, as they fill the gaps when the publicly available information is not available.

### 2.1 How many students and staff are in religious schools?

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

There are 9,581 schools in Australia of which 1,762 are Catholic system schools and 1,127 are independent schools.<sup>56</sup> Over 80% of independent schools are also religiously affiliated, and include independent Catholic, Anglican, Christian, Uniting Church, Lutheran, Islamic and Jewish schools, among others.<sup>57</sup>

A key difference between Catholic and independent schools is how they are organised and administered. Within the Catholic system, the two main categories of Catholic schools are:

- diocesan schools (being those administered by the Catholic dioceses under the authority of the Bishop through a local diocesan Catholic schools authority); and
- other Catholic school authorities conducted and administered by religious institutes or Ministerial Public Juridic Persons (PJPs).<sup>58</sup>

Independent schools have autonomous governance arrangements, with more than 80% of schools governed by a local school board or council. Within the bounds of legislation and government policy, each independent school is responsible for its own educational programs, financial decisions and staffing, among other matters.<sup>59</sup>

Out of the 4.03 million enrolled students in Australia, around 2.6 million (65.1%) are enrolled in public schools, leaving around 787,000 (19.5%) enrolled in Catholic system schools and around 621,000 (15.4%) enrolled in

<sup>55</sup> C Moodie (2018) [‘Teacher who lost school job after revealing he was in same sex relationship warns of impact of religious review’](#), ABC News, 12 October.

<sup>56</sup> Australian Bureau of Statistics (2022) [Schools, Australia 2021: Table 35b Number of All Schools by States and Territories, Affiliation and School type, 2010-2021](#), Data release dated 23 February 2022.

<sup>57</sup> Independent Schools Australia (2022) [‘Types of schools and systems’](#), website accessed 24 November 2022.

<sup>58</sup> National Catholic Education Commission (2022) [Australian Catholic Education Statistics 2021](#).

<sup>59</sup> Independent Schools Australia (2022) [‘Autonomy and accountability’](#), website accessed 20 October 2022.

independent schools.<sup>60</sup> Around 51% of students in private schools are in secondary school, while 49% are in primary school.<sup>61</sup>

Out of 548,700 staff employed by schools in Australia, 103,096 (18.8%) are employed by Catholic system schools and 103,225 (18.8%) are employed by independent schools.<sup>62</sup> Out of all staff employed in Catholic and independent schools, 64% and 58% respectively are employed as teachers, with the remainder of employees comprising specialist support staff or other staff.<sup>63</sup>

As set out in Part II, sections 4.1 and 5.1 of this report, the degree of legal protection from LGBTQ+ discrimination for students and staff in private schools, most of which are religiously affiliated, depends on laws in each jurisdiction. Students and staff are particularly vulnerable to LGBTQ+ discrimination in religious schools under Commonwealth laws, and under laws in New South Wales, Western Australia and South Australia. Staff are also vulnerable to LGBTQ+ discrimination in religious schools under laws in Queensland, and protections in the Australian Capital Territory, the Northern Territory and Tasmania could be further improved.

Based on a conservative estimate of approximately 5% of people who are LGBTQ+,<sup>64</sup> this means that more than 70,000 students and more than 10,000 staff in religious schools in Australia are LGBTQ+ and may be vulnerable to discrimination on this basis. This does not include non-LGBTQ+ students and staff who love, support or affirm us.

## 2.2 How LGBTQ+ inclusive are religious schools?

### MEASURING LGBTQ+ INCLUSION IN RELIGIOUS SCHOOLS

**To measure LGBTQ+ inclusion within religious schools in Australia, we conducted a review of 10 Catholic educational authorities and 98 independent schools. Using publicly available information, we rated each for their degree of LGBTQ+ inclusion on a scale of 1 ('strongly affirming') to 7 ('strongly discriminatory'). A rating of 4 ('unable to tell' / 'silent') was given where – after 2 hours of electronic and/or manual searching of publicly available information – we were not able to determine the school or educational authority's attitude or practices towards LGBTQ+ people.**

To identify the degree of LGBTQ+ inclusion in religious schools, we conducted a desktop review of a sample of educational authorities and schools in both the Catholic and independent school systems. The purpose of this review was to identify whether a person, such as a parent or guardian, could discern from publicly available material the position of a school or school authority on LGBTQ+ inclusion, as well as evidence of inclusive or discriminatory practices towards LGBTQ+ students and staff.

Taking account of the different governance arrangements in the Catholic and independent school systems, we conducted a review of:

- 10 Catholic educational authorities responsible for over 1,200 Catholic system schools; and
- 98 independent schools.

The 10 Catholic educational authorities were selected to ensure a sample of Catholic system schools located in both urban and regional areas and belonging to both smaller and larger dioceses. Collectively, these educational authorities educate well over half-a-million students in over 1,200 schools located in Victoria, New South Wales, South Australia, Western Australia and the Australian Capital Territory, or around 70% of all students enrolled in Catholic system schools in Australia. Four of these Catholic educational authorities are each responsible for over 100 schools, while the remaining six are each responsible for less than 100 schools. However, the four larger Catholic school authorities are together responsible for over 900 schools.

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<sup>60</sup> Australian Bureau of Statistics (2022) [Schools, Australia 2021](#), Data release dated 23 February 2022.

<sup>61</sup> Australian Bureau of Statistics (2022) [Schools, Australia 2021](#): Table 42b Number of Full-time and Part-time Students by Affiliation, Sex, Grade, Age and Indigenous Status, States and Territories, 2006-2021, Data release dated 23 February 2022.

<sup>62</sup> Australian Bureau of Statistics (2022) [Schools, Australia 2021](#): Table 50a In-school Staff (Number), 2006-2021, Data release dated 23 February 2022.

<sup>63</sup> Australian Bureau of Statistics, n62.

<sup>64</sup> See Equality Australia, n10 at 10.



The 98 independent schools were randomly selected from a list of all independent schools located in jurisdictions which provide exemptions to schools under anti-discrimination laws protecting LGBTQ+ people.<sup>65</sup> Schools in New South Wales, Western Australia, South Australia, Victoria and the Northern Territory were part of this review.<sup>66</sup> 88 of these 98 schools were religiously affiliated, while the remainder were independent schools in New South Wales which were exempted from anti-discrimination laws as private educational institutions.<sup>67</sup>

As set out in more detail in Schedule A, the review collected and analysed publicly available evidence, including information found on each independent school's or Catholic educational authority's website, social media platforms and other websites or news articles referring to the school, educational authority or schools within the authority's remit. Each educational authority or school was given a rating of between 1 and 7 based on an analysis of the whole of the evidence collected, with 1 being 'strongly affirming' and 7 being 'strongly discriminatory'. A rating of 4 'Unable to tell' / 'Silent' was given where – after 2 hours of electronic and/or manual searching of publicly available information – we were not able to determine the school's or educational authority's attitude or practices towards LGBTQ+ people.

The results of these reviews follow.

## CATHOLIC SYSTEM SCHOOLS

**Catholic educational authorities rarely indicate their position on LGBTQ+ inclusion, and when they do, the position is unclear. We found examples of both LGBTQ+ affirming and discriminatory practices, sometimes within the same Catholic educational authority. This means that LGBTQ+ staff and students at Catholic system schools may not feel safe to disclose their sexual orientation or gender identity, instead fearing how they will be treated by their school. Worse still, it says to LGBTQ+ people that they should remain hidden or ashamed of who they are, if they want to keep their jobs or stay safe at school.**

The findings of our review into Catholic educational authorities include that:

- overall, there is limited information available on the position of Catholic educational authorities towards LGBTQ+ people, or policies which apply in schools within their remit – suggesting a systematic suppression of LGBTQ+ identities and lives;
- to the extent that information is available, there are examples of both affirming and discriminatory practices towards LGBTQ+ people in Catholic system schools;
- LGBTQ+ staff in particular do not know where they stand under vaguely-worded employment conditions that require them to live lives consistent with Catholic teachings.

As the stories of Lisa\*, Kimberly\*, Emma, John and Michael\* in Part I, section 1 highlight, the public erasure of LGBTQ+ lives may well be intentional, has a devastating effect and may itself be a form of LGBTQ+ discrimination.

### Limited information is available on the position towards LGBTQ+ inclusion

Overall, many Catholic educational authorities say little in publicly available material which could be accessed by a prospective employee, student or parent or guardian seeking to determine the attitude of the educational authority towards LGBTQ+ people. This alone disproves the claim that parents, students or employees are able to exercise informed choices regarding their place of education or employment. At worst, it points to a systemic suppression of the public expression of LGBTQ+ identities and lives in Catholic system schools across Australia, as evidenced in the experiences of students and teachers like Abbie, Kimberly\*, Emma, John and Michael\*.

Out of the 10 Catholic educational authorities, 9 (90%) were given a rating of between 3 and 5, meaning either that they were largely or completely silent about their positions about LGBTQ+ inclusion, or we found some evidence of affirming or discriminatory practices but not strong evidence either way. Only one smaller Catholic educational authority was given a rating of 2, meaning that it was affirming of LGBTQ+ people.

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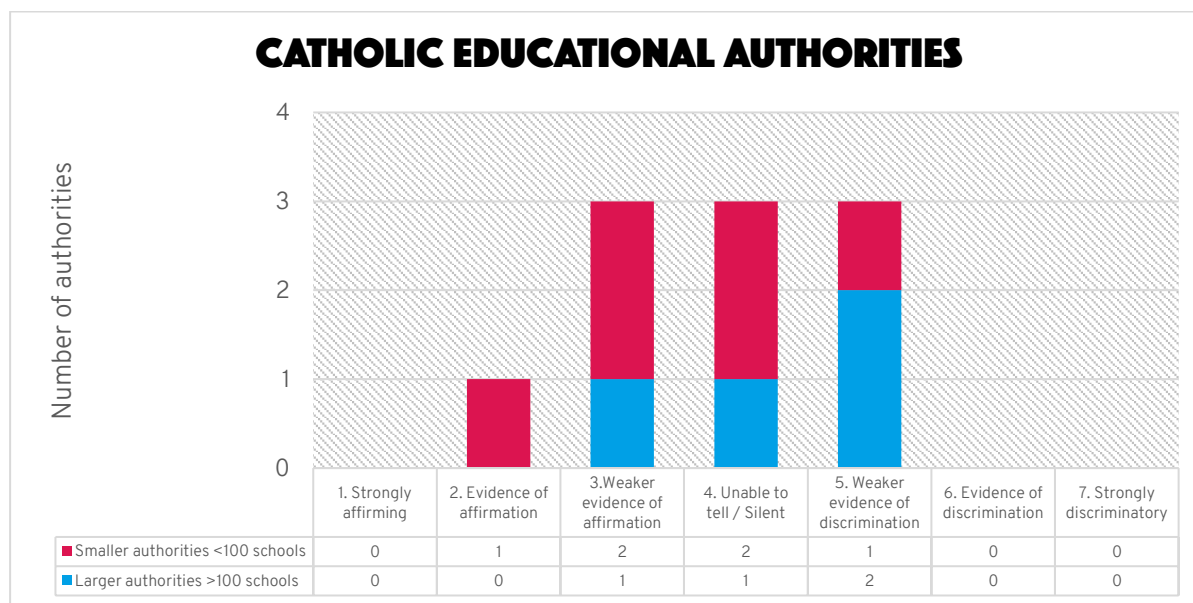
<sup>65</sup> At the time of the review, these jurisdictions were New South Wales, Western Australia, South Australia, Victoria and the Northern Territory. However, subsequent reforms in Victoria and Northern Territory have removed or narrowed some of these exemptions.

<sup>66</sup> For information on why these jurisdictions were selected, see *Schedule A: Religious schools review methodology*, section 13.2.

<sup>67</sup> For a breakdown of schools by state, type and denomination see *Schedule A: Religious schools review methodology*, section 15.2.

On the whole, smaller Catholic educational authorities which are responsible for less than 100 schools appear more likely to be affirming of LGBTQ+ people than larger Catholic educational authorities responsible for more than 100 schools. However, the difference is marginal as most Catholic educational authorities do not have clearly stated positions on LGBTQ+ inclusion either way.

Figure 3: The rating of Catholic educational authorities by size



There were several reasons for the lack of information available. This included little information being available online at all, a lack of clarity in some of the information available online, and in many cases, no information or references to LGBTQ+ people or matters in places where such information might be expected.

For example:

- some Catholic school authorities did not reference sexual orientation or gender identity specifically in published policies or website resources, even when they referenced other minority groups;<sup>68</sup>
- one large Catholic educational authority had a draft student and diversity inclusion policy that affirmed the equal worth and dignity of all humans and called on Catholic schools and offices to develop processes to address discrimination based on sexual orientation and gender identity.<sup>69</sup> However, attempts to identify a final policy were unsuccessful;
- two school authorities referred to having a gender dysphoria or 'gender incongruence' policy, but these documents did not appear to be available online;<sup>70</sup>
- one smaller Catholic school authority had a social media policy that required users of social media to 'promote Catholic values and perspectives',<sup>71</sup> but it was not clear how the policy would respond to material affirming of homosexuality or transgender people.

<sup>68</sup> E.g. Catholic school authorities nos. 9 and 10.

<sup>69</sup> Catholic school authority no. 4.

<sup>70</sup> Catholic school authorities nos. 2 and 5.

<sup>71</sup> Catholic school authority no. 2.

While care must always be taken when drawing inferences from silences, the omission of references to LGBTQ+ people in places where other forms of diversity are routinely referred to or even celebrated, alongside the personal accounts of people like Lisa\*, Kimberly\*, Emma, John and Michael\*, point to a more systemic problem of LGBTQ+ discrimination in Catholic educational institutions. Persistent and intentional silences about LGBTQ+ people and lives leave many LGBTQ+ people feeling they have to hide or feel ashamed of who they are.

Further, looking at these ratings by the approximate number of enrolled students, around 1 in 3 Catholic school students are enrolled in Catholic system schools controlled by authorities given a rating indicating evidence of LGBTQ+ discriminatory practices.

### **Examples of LGBTQ+ inclusion**

Certain Catholic educational authorities demonstrated some evidence of affirming practices towards LGBTQ+ people. The director of one smaller Catholic educational authority lent his support to a Catholic mass celebrating the inclusion of LGBTQ+ people held within the diocese.<sup>72</sup> This authority also had a supportive and affirming policy for transgender students, including affirming diversity in gender expression and sexual formation as a *'naturally occurring phenomenon'* and stating that diversity in physical, psychological and spiritual conformations is made *'in God's image'*.<sup>73</sup> Along with this educational authority, two other Catholic educational authorities specifically made reference to sexuality and gender (or gender identity) in their student welfare policies.<sup>74</sup>

One larger Catholic educational authority, which was rated 3, had very little to say overall on LGBTQ+ inclusion on its website or in its policy documents.<sup>75</sup> However, we found isolated examples of LGBTQ+ inclusive practices, such as a reference in one annual report that recognised a student who had won a debating competition speaking on understanding and accepting the transgender community. Further, a school within its remit was reported to have been supporting transgender students, and another school's newsletter featured information on a *'student-initiated and student-run'* group promoting LGBTQ+ inclusion. These later examples were not referred to in the educational authority's documentation, but were found through online searches.

### **LGBTQ+ staff do not know where they stand**

To the extent they were described at all online, employment practices at Catholic system schools were described vaguely. For example, one larger Catholic educational authority required all applicants to be *'fully aware that the maintenance of the Catholic ethos of the school through a manner of life and stated beliefs which are in keeping with the teachings of the Catholic Church is a condition of employment for all staff.'*<sup>76</sup> Another larger Catholic educational authority had an employee code of conduct which required staff to *'support the aims of, and act consistently with, the Catholic ethos of the school'*, while respecting that *'individuals have a right to their personal opinions on political and social issues in a private capacity as members of the community'*.<sup>77</sup> What maintaining a Catholic ethos *'through a manner of life and stated beliefs which are in keeping with the teachings of the Catholic Church'*, or *'act[ing] consistently with... the Catholic ethos'* actually means is not clear, nor is how it would apply to a person living with their same-sex partner or a person who is transgender. However, LGBTQ+ people could clearly read such statements as at least requiring them to keep their sexual orientation or gender identity hidden, as the experiences of John and Michael\* show. Further, as the experiences of Lisa\*, Kimberly\* and Emma illustrate, requirements to keep your sexuality hidden can also be enforced oppressively.

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<sup>72</sup> Catholic school authority no. 6.

<sup>73</sup> Catholic school authority no. 6.

<sup>74</sup> Catholic school authorities nos. 5, 6 and 7.

<sup>75</sup> Catholic school authority no. 1.

<sup>76</sup> Catholic school authority no. 5.

<sup>77</sup> Catholic school authority no. 4.

One smaller Catholic educational authority did however allow applicants to identify using a non-binary descriptor, 'Mx', on their employment application form.<sup>78</sup> This authority also stated in a news article in 2018 that it was not aware that any of its schools discriminated against prospective employees on the basis of their sexuality.

### **Discrimination towards LGBTQ+ people**

Alongside overwhelming silences regarding the inclusion of LGBTQ+ people, we also found evidence of express discrimination towards LGBTQ+ people taking place within Catholic system schools.

In 2017, some parents objected when two Catholic system schools emailed parents a pamphlet advertising a presentation against same-sex marriage hosted by the Australian Family Association that would be taking place in the school hall of one of their schools. The pamphlet implied same-sex marriage was unnatural and stated that it would lead to *'radical sex education such as "safe schools" enforced in all schools'*, *'extreme gender ideology imposed on everyone'* and *'children denied their mother or father'*.<sup>79</sup>

In another example, one Catholic educational authority's enrolment form required students to be enrolled *'in the name on their birth certificate or passport'*.<sup>80</sup> This practice disadvantages transgender and gender diverse students who are much less likely to have birth certificates or passports accurately recording their gender and name at the point of enrolment.

There were also some troubling elements in a larger Catholic educational authority's policy on gender dysphoria. While affirming the inherent dignity of everyone and saying that the authority was committed to providing a safe and supportive learning environment for students experiencing gender dysphoria, the policy began by stating that the Catholic Church affirms that *'beyond the understandable difficulties which individuals may experience, the young need to be helped to accept their own body as it was created'*.<sup>81</sup>

The policy required all cases to be treated with confidentiality and sensitivity, and required the school to develop specific strategies so the student was not subjected to bullying and/or harassment. However, the policy also indicated that:

- *'requests for support'* for a transgender child *'might not be accommodated'*, without indicating what kind of requests for support would or would not be accommodated;
- the Archbishop must be notified (in addition to the Principal and a various staff members) *'of the background and status of the case and notification, and the substance of any related requests'*;
- a decision to accommodate a *'request for support'* would require a *'pastoral support plan'*, developed in consultation with certain staff and *'supported by the Parish Priest'*, and the plan must also be agreed to by the student's parents or carers, and *'where appropriate, the student'*; and
- protocols regarding the student's specific areas of need – such as toileting and use of change rooms, as well as participation in sport – would be agreed to in consultation with the student's parents or carers.<sup>82</sup>

There was nothing in this policy committing to any specific course of conduct to appropriately affirm the child in their gender, such as by referring to them by their correct name or pronouns. There was no requirement for the child to be given access to the same or similar opportunities as other children, including with respect to accessing toilets, change rooms or sports activities. The policy did not address the child's privacy, or protecting the child from harm, if their parents opposed their gender affirmation or were in conflict. Rather, it was the parents' agreement – and not the child's agreement – which was compulsory for any agreed course of conduct. There was no prohibition in the so-called *'pastoral care support plans'* against conversion practices that sought to change or suppress the child's gender

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<sup>78</sup> Catholic school authority no. 9.

<sup>79</sup> Catholic school authority no. 10.

<sup>80</sup> Catholic school authority no. 2.

<sup>81</sup> Catholic school authority no. 8.

<sup>82</sup> Catholic school authority no. 8.

identity. Finally, it required a transgender child to be outed to the Archbishop for no discernable reason. As Mark\*'s experience demonstrates, such policies are actively enforced against transgender students and their families.

We also found an example of a Catholic educational authority that was pressured into reversing its opposition to the One Nation NSW Education Legislation Amendment (Parental Rights) Bill 2020, which would have prohibited certain discussions of gender diversity in the classroom. This Catholic educational authority withdrew its submission opposing the bill after some priests and parents within the diocese objected to the position it had taken, and called on the Bishop and educational authority's head to resign.<sup>83</sup>

In a pastoral letter dated 27 April 2021, the Bishop explained the educational authority's position:

*As a Catholic community, we believe that all students – including those who identify as gender diverse – should have the opportunity to reach their potential, to learn with their peers and feel a sense of belonging in their school. The Bill prohibits the schools from affirming and supporting these children who are already at risk of marginalisation. We have to remember that at times the teachers are the only people these children might trust in helping them in these sensitive matters. By banning their discussion, the school community is unable to address unhealthy and discriminatory attitudes that may exist in their learning environment.*

*I emphatically reject the notion of gender ideology. What I advocate for is a compassionate, respectful, inclusive, Gospel-centred learning environment and a deep commitment to the wellbeing of all students, particularly those at risk. Their lives must not be made more intolerable by unjust laws such as elements of the "Latham" Bill that I have articulated above.*

By 5 May 2021, the educational authority had submitted to the pressure, revoking its earlier submission opposing the bill outright and instead submitting that the bill should be improved. In its second submission, the authority reiterated the Catholic position that 'the young need to be helped to accept their own body as it was created'. The example demonstrates that even religious leaders who attempt to support transgender students in their care face attacks for taking positions guided by their own religious conscience.

## INDEPENDENT SCHOOLS

**Students and staff at independent schools are considerably vulnerable to LGBTQ+ discrimination. Independents schools are more likely to be discriminatory places for LGBTQ+ students and staff than they are to be inclusive and affirming places. Moreover, nearly 1 in 3 independent schools do not indicate their position on LGBTQ+ inclusion. This means that students, staff and parents may have no way of knowing whether LGBTQ+ people will be treated with dignity and respect.**

The findings of our review include that:

- independent schools are more likely to be discriminatory rather than affirming places for LGBTQ+ people;
- non-denominational Christian schools are the most discriminatory schools for LGBTQ+ people;
- the requirement in some anti-discrimination laws for schools to have a written policy if they wish to take advantage of religious exemptions does not reduce LGBTQ+ discrimination, and may in fact increase it;
- nearly 1 in 3 independent schools do not reveal their position on LGBTQ+ inclusion at all, further disproving the claim that parents, students or employees are able to exercise informed choices regarding their place of education or employment.

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<sup>83</sup> M Koziol (2021) 'Parents are the primary educators': Catholics backflip on Latham's anti-trans bill, *Sydney Morning Herald*, 9 May.

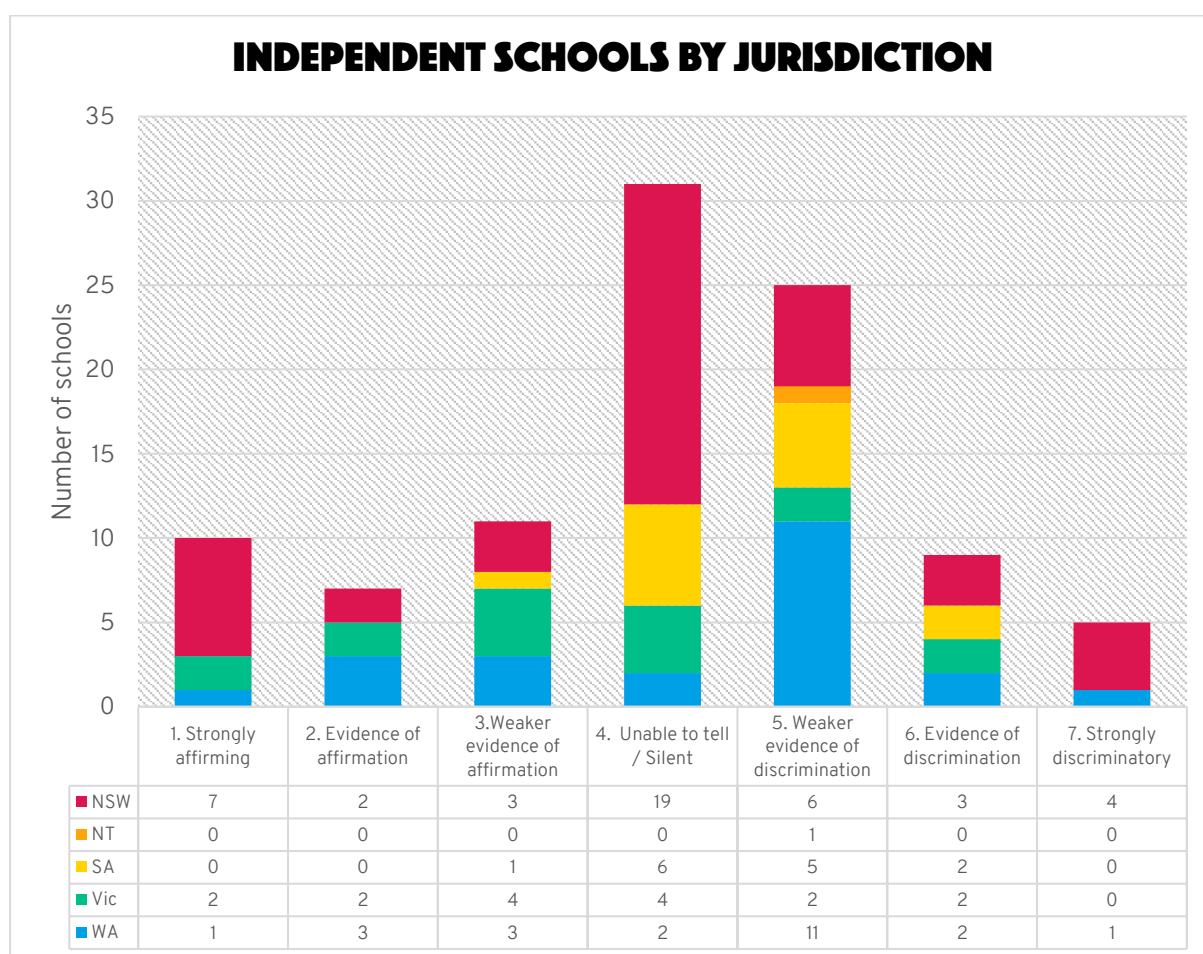
### Independent schools are more likely to be discriminatory rather than affirming places for LGBTQ+ people

Independent schools are more likely to be discriminatory places for LGBTQ+ students and staff than they are to be inclusive and affirming places.

Out of the 98 independent schools we reviewed, 39 (39.8%) schools were rated 5 or higher, meaning they ranged from showing some evidence of discrimination towards LGBTQ+ people to being 'strongly discriminatory'. This evidence of systematic LGBTQ+ discrimination was also borne out in the stories of many people, including James, Caroline\*, Leah, Matthew\*, Daniel, Steph, Rachel, Nathan, Elise, Evie, Sam and Peter, as well as the parents at Citipointe and St Catherines.

On the other hand, 28 independent schools (28.6%) were rated 3 or lower, meaning they ranged from showing some evidence of affirmation towards LGBTQ+ people to being 'strongly affirming'. As discussed below, we found some schools leading the field on LGBTQ+ inclusion.

Figure 4: The rating of independent schools by jurisdiction



### **Non-denominational Christian schools are the most discriminatory places for LGBTQ+ people**

When comparing how independent schools in the sample rated by denomination type, independent non-denominational Christian schools were the most likely to show evidence of discriminatory attitudes or practices towards LGBTQ+ people.

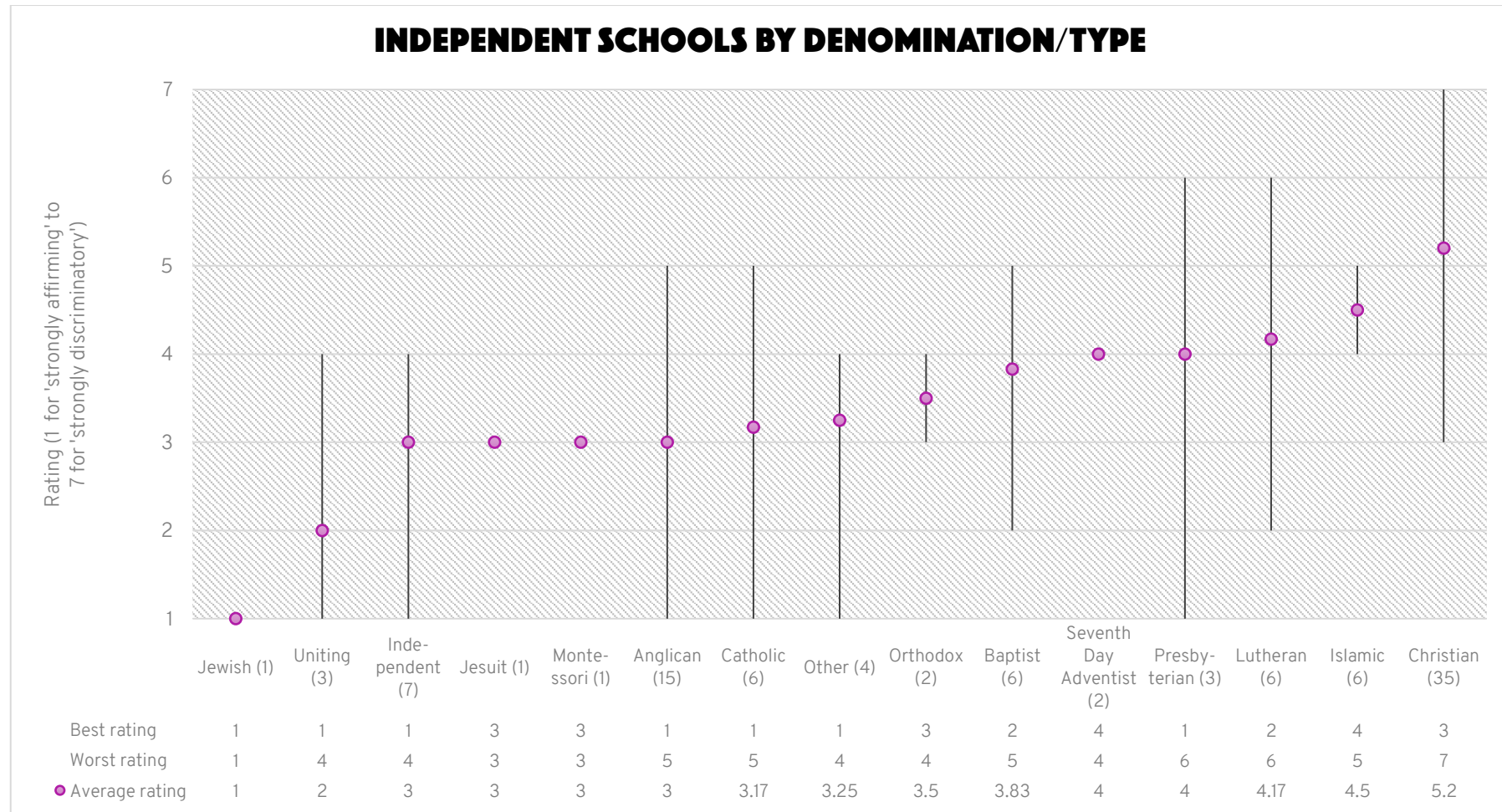
The 35 non-denominational Christian schools in the sample had the highest average score, being 5.2, with a range of between 3 (meaning 'weaker evidence of affirmation towards LGBTQ+ people') to 7 (meaning 'strongly discriminatory'). Only 2 non-denominational Christian schools showed any positive evidence of affirmation towards LGBTQ+ people. Again, the strength of this evidence bears out in the personal stories of many people who shared their experiences with us.

By contrast, Uniting Church schools were the Christian schools most likely to show evidence of affirming LGBTQ+ people. Anglican, Catholic, Lutheran, Baptist and Presbyterian schools showed a wide range of practices and attitudes, with some trending towards affirming LGBTQ+ people.

Minority faiths and denominations were also represented in the sample, with many Islamic schools saying very little, if anything, about LGBTQ+ people. The one Jewish school in the sample was strongly affirming.

Independent schools in New South Wales that were not religiously affiliated trended towards showing evidence of affirming LGBTQ+ people, although there were a range of scores.

Figure 5: The scoring ranges and means of independent schools by denomination/type





### **Allowing schools with written policies to discriminate does not reduce LGBTQ+ discrimination**

As discussed in Part III, sections 5.1 and 7.3, religious schools are allowed to discriminate against their staff based on their sexual orientation or gender identity under South Australian laws, and based on their religious convictions under Australian Capital Territory laws, if those schools have published a written policy. The policy intention behind these legislative requirements has been to reduce discrimination by forcing transparency.

However, we found no evidence that requiring schools to have written policies outlining their religiously-based employment practices reduces LGBTQ+ discrimination. In fact, by analysing the differences in scores across states and territories in our sample, this tool for enlivening a religious exemption may even have increased efforts to hide LGBTQ+ discrimination.

Broken down by jurisdiction, we found relatively little difference in measures of LGBTQ+ inclusion at independent schools based on their state or territory, notwithstanding South Australia's requirement to make public a policy if the school wishes to discriminate based on sexual orientation or gender identity.

Victoria, New South Wales and Western Australia each had schools with ratings across the range (ratings between 1-6 or 1-7), with South Australia having a narrower range of ratings (ratings between 3-6). However, average ratings across each of the states were similar, with South Australia having the worst average (ranging from 3.5 in Victoria to 4.57 in South Australia). This suggests that, notwithstanding South Australia's requirement for a written policy, South Australian independent schools were in fact more likely on average to be discriminatory than other states and territories. The only exception to this was the Northern Territory, but it only had one school in the sample which scored a rating of 5.

A review of the publicly available policies in South Australia revealed that these policy requirements tended to drive discrimination underground rather than hold schools accountable for LGBTQ+ discrimination. Schools are coy about explicitly stating in a policy that they wish to discriminate against LGBTQ+ people, instead cloaking their intentions behind vague language that provides no protection nor transparency regarding hiring practices.

For example, one school stated that its staff guide students through the curriculum which is '*taught through our biblical lens*', and that it seeks to '*model*' its values.<sup>84</sup> Another described in its enrolment policy that it '*seeks to maintain an intentional Christian focus in daily life and attitudes*'.<sup>85</sup> A job advertisement for a teaching position at another school said that the key responsibilities included demonstrating '*a commitment to uphold and contribute to the ... [religious] ethos*' of the school.<sup>86</sup> All of these policies could be read as featuring language which cloaks LGBTQ+ discrimination, as none are explicit about including LGBTQ+ people.

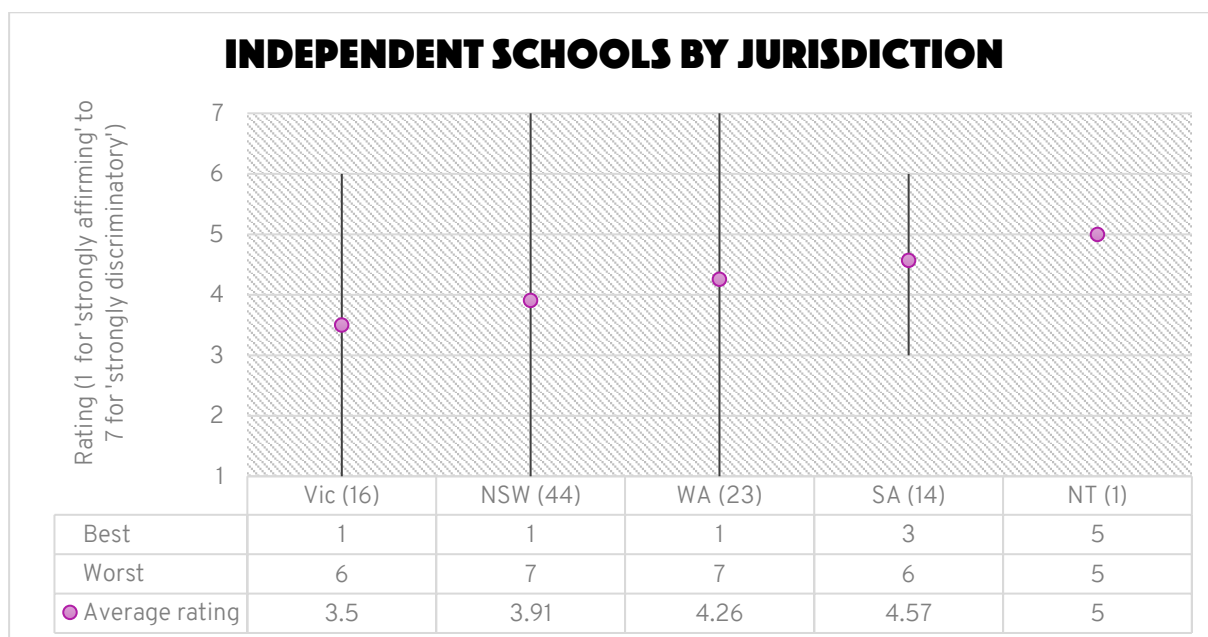
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<sup>84</sup> Independent school no. 36.

<sup>85</sup> Independent school no. 54.

<sup>86</sup> Independent school no. 73.

Figure 6: The scoring ranges and means of independent schools by state or territory



### Enrolment practices

Independent schools have a range of enrolment practices, some of which explicitly discriminate against LGBTQ+ students while others indicate that the school is an inclusive and welcoming place for LGBTQ+ people and families.

Trans students are uniquely vulnerable to discrimination at the point of enrolment in independent schools.<sup>87</sup> For example, a girls' school in New South Wales indicated that it was a condition of enrolment for a student to identify as a girl throughout the duration of their enrolment, but this school also excluded girls who were transgender from enrolment. It defined a 'student' in its enrolment conditions as *'a child of the biologically female sex who identifies as such'*.<sup>88</sup> Another Christian school in Western Australia required a child's gender on its enrolment form to be *'either male or female' 'as per birth certificate'*.<sup>89</sup> In contrast, some single-sex independent schools indicated that they may not necessarily exclude an enrolled student if they later affirmed a different gender. For example, one boys' school in Western Australia stated that *'any current student would continue to be a valued part of the school and community should they choose'* if they were to affirm a different gender while at school. The school stated that it would always have what was best for the individual student as its most fundamental concern.<sup>90</sup>

When it comes to religious affiliation, some independent religious schools welcome students from any religious background, while others mostly limit enrolment to students of the same faith.<sup>91</sup> However, this did not necessarily indicate a school's attitudes to matters of sexuality or gender identity. For example, one Jewish school which preferred to enrol students from Jewish families also had policies that encouraged employees from all backgrounds and faiths (including no faith) to apply, and had policies in place that explicitly acknowledged and respected that there were a *'range of gender and sexuality identities within the [school] community'*.<sup>92</sup>

<sup>87</sup> E.g. Independent school nos. 4, 64 and 66.

<sup>88</sup> Independent school no. 64.

<sup>89</sup> Independent school no. 4.

<sup>90</sup> Independent school no. 59.

<sup>91</sup> E.g. Independent school nos. 11, 19, 20, 32, 42, 45, 58, 60, 91, 92 and 94.

<sup>92</sup> Independent school no. 11.

Some schools approach the requirement for religious adherence among their students fairly liberally. For example, one school stated: *'Students will be encouraged to explore Scripture and discover how God's story and their story can be brought together, and given opportunities to express that through classroom, worship and service experiences. Students will have the freedom to say 'no' to God's story but are invited to continue exploring its relevance to their lives.'*<sup>93</sup> Another school states in its handbook that the *'school does not proselytise, coerce or indoctrinate... There is no requirement or compulsion to agree with the Christian faith as it is encountered in the School.'*<sup>94</sup>

However, some independent schools do impose a requirement on students to subscribe to certain beliefs that are explicitly discriminatory towards or condemnatory of LGBTQ+ people as a condition of enrolment. For example, the enrolment policy of one school in South Australia required *'a commitment to actively support[ing] the Christian ethos of the School'*, among which its core values included recognising marriage as a life-long commitment between a man and a woman.<sup>95</sup> Another Christian school, which accepted enrolments from students who were not Christian, adopted Catholic education policies in respect of sexuality, including the need for *'students to be able to distinguish the difference between what the Church teaches about persons and what the Church teaches about actions'*.<sup>96</sup>

In many cases it is not clear what beliefs students and their parents were being asked to subscribe to as a condition of their enrolment. This is despite many schools expressing preferences for enrolling children whose families understood and supported the values and ethos of the school, or which required staff and students to support the ethos of the school.<sup>97</sup> For example:

- one school in Victoria indicated that it expected parents enrolling their children to *'share the Biblical values and beliefs... and to live lives consistent with these values and beliefs both inside and outside the [school]'*.<sup>98</sup> It did not define what those values and beliefs were;
- one school in Western Australia required students and parents to recognise that the school taught the required curriculum *'while maintaining a Christian ethos and accept that teachers interpret knowledge from a Christian perspective'*.<sup>99</sup> Its student handbook stated that students were expected to *'uphold the values and respect the Christian ethos'* of the school.<sup>100</sup> It did not provide details as to what its Christian ethos and perspective entailed;
- one school indicated in its enrolment agreement that parents must agree to support the school's approach in respect of *'health and wellbeing education addressing sex, drugs and mental health matters (at an age appropriate level)'*. It made no mention of its views on homosexuality or gender diversity, but subscribed to a view of the Bible as *'the infallible, inerrant and inspired word of God,... solely and absolutely authoritative in all matters of Christian faith and praxis'*.<sup>101</sup>

Finally, the inclusion of rainbow families at enrolment could also vary. For example, some schools allow gender diverse parents or parents of the same sex to properly describe themselves and their parental role on their child's enrolment form,<sup>102</sup> but this was not the universal experience.<sup>103</sup>

One school said that, while it welcomed enrolments from children and their families, irrespective of their faith, sexual orientation or gender identity (among other attributes), it made clear in its enrolment conditions that the school

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<sup>93</sup> Independent school no. 46.

<sup>94</sup> Independent school no. 91.

<sup>95</sup> Independent school no. 93.

<sup>96</sup> Independent school no. 16.

<sup>97</sup> E.g. Independent school nos. 1, 14, 16, 28, 35, 45, 54, 57, 58 and 79.

<sup>98</sup> Independent school no. 35.

<sup>99</sup> Independent school no. 45.

<sup>100</sup> Independent school no. 45.

<sup>101</sup> Independent school no. 28.

<sup>102</sup> E.g. Independent school no. 63.

<sup>103</sup> E.g. Independent school nos. 67, 76, 89 and 95.

desired all students to ‘come to have a personal faith in Jesus Christ’ and sought to impart to all students ‘a Biblical understanding of God’ and ‘a Christian way of living’.<sup>104</sup> It did not specify what it understood to be its Biblical understandings of God or Christian ways of living, and how that may be conveyed to LGBTQ+ students or students in rainbow families.

Many LGBTQ+ people would read language such as ‘Christian ethos’, ‘Christian ways of living’ and ‘Biblical values and beliefs’ as excluding them. If that is not what is meant by these schools, they could be more explicit in their enrolment forms and brochures that they welcome LGBTQ+ people and do not see their ethos, ways of living or values as incompatible with the equal expression of LGBTQ+ identities.

### **The environment for students**

Almost 40% of the independent schools in our sample had evidence of discriminatory attitudes and practices towards LGBTQ+ people in their publicly available information. By contrast, almost 30% of independent schools in our sample had evidence of affirming attitudes and practices towards LGBTQ+ people. This reveals the great diversity of experiences for LGBTQ+ students, with many examples of inclusive and discriminatory practices at independent schools.

### **Teachings on sexuality and gender diversity**

Some independent schools indicated that there was a lack of consensus within the school community on matters of sexuality or gender diversity, and this lack of consensus would be reflected in the classroom, even if the school had its own views. For example, one Victorian school stated in a prospective student booklet:

*[The school] recently revised its policy on Sex Education and related matters. Part of this policy is that staff will ensure that discussion on sex and sexually related matters will be conducted respectfully and sensitively, recognising that not all Christians agree about these matters. A traditional understanding of biblical principles for this area of life will be presented, as well as an acknowledgement of different understandings amongst Christians and respected theologians. Appropriate consideration of age and maturity will also be taken into account. In regard to enrolment, our school does not discriminate in regard to sexuality and gender.*<sup>105</sup>

Another school suggested that students might be exposed to examining and identifying the biblical foundation for the mission statements of various Christian organisations and/or denominational statements on a range of life issues, such as social justice, homosexuality and women’s ordination.<sup>106</sup> It also identified marriage as the ‘context in which a man and a woman commit themselves to each other’, and that this was the ‘context in which God protects human sexuality’.<sup>107</sup>

Several independent schools were less clear about what they taught students regarding sexuality. For example, one Islamic school indicated that it provided education on HIV, Hepatitis C and sexually transmissible infections as part of the broader sexuality and relationships education program.<sup>108</sup> However, it did not say anything about what it taught regarding sexuality or gender diversity.

Conversely, some independent schools made clear that differences of opinion on matters of sexuality were not welcome.<sup>109</sup> Some of these schools were clear in their condemnation. For example, one school in New South Wales stated in its statement of beliefs that: ‘Believers will also seek to use their bodies to honour God, and will flee all sexual immorality, including sexual relations outside of marriage and homosexual practices’.<sup>110</sup>

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<sup>104</sup> Independent school no. 34.

<sup>105</sup> Independent school no. 53.

<sup>106</sup> Independent school no. 23.

<sup>107</sup> Independent school no. 23.

<sup>108</sup> Independent school no. 41.

<sup>109</sup> E.g. Independent school nos. 19 and 21.

<sup>110</sup> Independent school no. 21.

One Christian school in Western Australia, which formed part of a network of schools in several states, had a position statement on marriage and sexuality which stated, among several things:

*God's original intention was that marriage was to be consummated between one man and one woman (Genesis 2:24, Matthew 19:5, Ephesians 5:31)... God's intention is that the only legitimate place for sexual intimacy is within a committed marriage (Hebrews 13:4; 1 Corinthians 6:18-20) ... Gender Identity – a person's gender is biologically determined and assigned by God (Genesis 1:27).*

*... [W]hile on the one hand we acknowledge that sexual immorality is contrary to God's design and desire, we continue to offer a humble and loving concern for all people regardless of their views on sexuality and marriage. We do not seek to stand in condemnation of those who have embraced sexual lifestyles which we believe are contrary to the biblically accepted expressions of sexuality and marriage. Yet at the same time we do not endorse such lifestyles. We believe that the gospel brings the conviction of sin and guarantees not only our cleansing from sin and the gift of eternal life, but also the power to deliver us from sin (Romans 1:16).*

*[The school's] expectation is that our employees, in the course of their employment, not act in a way that they know, or ought reasonably to know, is contrary to the religious doctrines and beliefs of [the school], which includes this [Statement].<sup>111</sup>*

This Christian school group also provided advice to parents on Christian parenting in articles written by school staff. One article prefaced its advice with the following statement: 'We understand that sin has shattered God's perfect world, including his ideal for marriage and family life. We know some parents are dealing with issues like single parenting or raising a child who has special needs.' In discussing drugs, alcohol and sex with children, it included the following advice: 'Family trust can be built via open, nonjudgmental dialogues about relationships, sex, and sexuality. Look for opportunities to bring these concerns up in regular situations, such as when they appear in a movie, TV show, or book.' However, the single resource suggested for parents to assist them with speaking to their children about sex was a book by a Christian sexologist whose website includes statements listing gay sex alongside rape, incest and violence, and which states that 'Family shows on TV normalise homosexual sex, premarital sex, extramarital affairs and incest'.<sup>112</sup> In an article on identity, the sexologist states that people can be 'convinced by their friends and other influences that surround them to experiment and explore their sexuality and believe that their identity is in their sexuality, gender and sexual behaviour (gay, lesbian, bi-, fluid, trans, queer, questioning, asexual, pangender, and so on)'.<sup>113</sup> Some of these ideas come very close to assumptions that underpin modern forms of conversion practices seeking to change or suppress a person's sexual orientation or gender identity.<sup>114</sup> Another school advertised a parent seminar by the same sexologist.<sup>115</sup>

These examples reflect other research documenting students' experiences of being exposed to classroom debates on their identities, discriminatory attitudes and even being exposed to conversion practices in religious schools.<sup>116</sup> The devastating impact of discriminatory practices are also articulated in the experiences shared by current and former students James, Olivia and Leah, and teachers like Elizabeth\*, Elise, Matthew\* and Rachel who refused to be complicit in blatant LGBTQ+ discrimination at their schools.

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<sup>111</sup> Independent school no. 8.

<sup>112</sup> P Weerakoon (2014) '[Sexual integrity in a sexualised world](#)', 15 April.

<sup>113</sup> P Weerakoon (2016) '[Parenting 2: The search for identity](#)', 2 June.

<sup>114</sup> A Venn-Brown (2018) '[Conversion Therapy in Australia: The state of the nation](#)' at 5-6 and 27; C Csabs et al (2020) '[SOGIEC Survivor Statement](#)' at section 1.2.

<sup>115</sup> Independent school no. 83.

<sup>116</sup> See e.g. T Jones (2023) '[Religious freedom and LGBTIQ+ students](#)', *Sexuality Research and Social Policy* at 1133-1151; C Glance et al (2023) *State of Play Report II: LGBTIQ+ Young People's Experiences of High School*, Youth Pride Network at 43-45.

### Examples of affirming LGBTQ+ environments

While there were troubling examples of discriminatory practices in independent schools, there were also examples of affirming and inclusive practices among religious schools in the sample.<sup>117</sup> For example, one Anglican school in New South Wales published a school newsletter which included the following:

*At [school] we welcome and embrace students and their families from different cultures, ... and students who are sexually and gender diverse. I know that sometimes as children and as adults when we come across difference that is unfamiliar a common response can be to distance ourselves from the person or family whose difference we do not understand. This is particularly the case when the difference encompasses sexuality and gender.*

*As parents I would encourage you to talk with your children about diversity and acceptance not as abstract concepts but in the real way it presents itself in everyday life. On any given school day your child will come into contact with other children who are in some way different to them. As parents and educators it is our job to support our children and students in our care to better understand difference as something to celebrate and accept not to judge and ostracise.<sup>118</sup>*

One Baptist school published an extensive policy that acknowledged gender and sexual diversity, and included a section on theology relating to gender which stated:

*1. Listen and be present. Proverbs 18:13*

*2. Remember the big story. God made us in his image. He called what he made 'Good' (it works, functional, reliable). The fall came and God made accommodations in clothing, food etc. Gender is sacred.*

*3. What does the bible say?<sup>119</sup>*

Some schools were clear front-runners in their inclusion and celebration of LGBTQ+ people.<sup>120</sup> For example, some schools posted about their participation in the Sydney Gay and Lesbian Mardi Gras and celebrated national or international days relevant to LGBTQ+ people, such as Transgender Day of Visibility, Wear it Purple Day and International Day against Homophobia, Biphobia and Transphobia.<sup>121</sup>

Other examples of LGBTIQ+ inclusion and celebration included the following:

- one school in Victoria participated in pride-themed football rounds;<sup>122</sup>
- one Jewish school invited an openly gay orthodox rabbi to speak to senior students at their school, indicating on a social media platform that it 'proudly denounce[d] discrimination on the basis of sexual orientation and gender identity';<sup>123</sup>
- another school in Western Australia invited a Senator to address senior students about their time in parliament, including their involvement in marriage equality legislation;<sup>124</sup>
- one school in New South Wales hosted a forum for parents and carers of trans and gender diverse young people with a transgender psychotherapist as the host;<sup>125</sup> and

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<sup>117</sup> E.g. Independent school nos. 7, 11, 18, 27, 48, 59, 74 and 77.

<sup>118</sup> Independent school no. 18.

<sup>119</sup> Independent school no. 7.

<sup>120</sup> E.g. Independent school nos. 6, 12, 18, 27, 44, 47, 59, 62 and 74.

<sup>121</sup> E.g. Independent school nos. 6, 27, 44, 47 and 62.

<sup>122</sup> Independent school no. 12.

<sup>123</sup> Independent school no. 11.

<sup>124</sup> Independent school no. 78.

<sup>125</sup> Independent school no. 18.

- another school featured a non-binary student and a staff member in a Wear it Purple day profile.<sup>126</sup>

### ***Formal policies on bullying, discrimination, equal opportunity and student welfare***

Formal policies on bullying, harassment and student welfare varied considerably, suggesting that some schools may approach discrimination based on sexual orientation or gender identity differently to other forms of discrimination.

Several schools specifically prohibited bullying due to a student's sexuality or gender identity.<sup>127</sup> For example, one school required its staff to have an '*understanding and commitment to the Anglican ethos of the school*' but specifically prohibited members of its school community from discriminating against or harassing any member of the school community on the basis of LGBTIQ status. Its suspension and expulsion policy specifically stated that no student is to be discriminated against on homosexuality or transgender grounds.<sup>128</sup> Other schools spoke of respecting diversity generally, and often referred to welcoming people of different races and religions, but did not specifically refer to sexual orientation or gender identity in their statements.<sup>129</sup> This reflects a similar finding in 2023 research showing that religious schools are significantly less likely to have discrimination and bullying policies in place that protect LGBTQ+ young people compared to public schools.<sup>130</sup>

Some schools instructed staff not to express personal views that would discriminate against any student based on sexuality,<sup>131</sup> or in some cases, on gender identity.<sup>132</sup> However, other schools simply stated that staff were not to express personal views on sexuality in the presence of students (seemingly, whether these views were affirming or not).<sup>133</sup> On the other hand, one school specifically applied an internet filter on its servers which blocked students from accessing any websites '*that cater to or discuss the gay, lesbian, bisexual or transgender lifestyle*'.<sup>134</sup>

Few schools published policies ensuring transgender students were provided with equal opportunities to other students. However, there were some notable exceptions. One Jewish school had a child protection policy that required students who were transgender to be consulted on their preference of change rooms, bathrooms and sleeping arrangements so that their wishes could be considered while '*a decision with the best interests of all students in mind*' is made.<sup>135</sup> Another school in Victoria had a child safety code of conduct that required its personnel to '*respect decisions that people make about their gender identity and consult and support children and young people to feel, and to be, safe*'.<sup>136</sup> That experience however is far from universal, as Oliva's experience shows.

### **Employment practices**

#### ***Prospective employees***

When it comes to employing staff, some religious schools indicated that they employed people without discrimination as to their religious beliefs.<sup>137</sup> However, many schools – as many as 1 in 3 in our sample – required staff to be practising Christians, regularly attend Church and/or maintain '*a Christian lifestyle*'.<sup>138</sup> These schools were not often forthcoming as to whether being LGBTQ+ meant a person could meet such requirements, nor were they transparent about the beliefs they expected staff to hold on matters such as sexuality or gender diversity in order to demonstrate

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<sup>126</sup> Independent school no. 27.

<sup>127</sup> E.g. Independent school nos. 11, 13, 27, 29, 30, 32, 34, 68, 70, 81, 91 and 96.

<sup>128</sup> Independent school no. 48.

<sup>129</sup> E.g. Independent school nos. 5, 9, 31, 37, 45, 57, 65, 69, 75, 79 and 93.

<sup>130</sup> Jones, n116 at 1138-1139.

<sup>131</sup> E.g. Independent school nos. 39, 45, 49 and 53.

<sup>132</sup> E.g. Independent school nos. 48, 70 and 74.

<sup>133</sup> E.g. Independent school nos. 79 and 81.

<sup>134</sup> Independent school no. 19.

<sup>135</sup> Independent school no. 11.

<sup>136</sup> Independent school no. 68.

<sup>137</sup> E.g. Independent school no. 11 (Jewish school), 43 (multifaith school) and 58 (Islamic school).

<sup>138</sup> E.g. Independent school nos. 4, 7, 13, 14, 21, 22, 23, 25, 29, 31, 34, 35, 38, 39, 42, 46, 56, 60, 61, 73, 76, 83, 85, 86, 88, 90, 91 and 98.

their faithfulness. However, the experiences of teachers like Steph, Matthew\*, Daniel, Rachel, Nathan and Sam point to much more blatant forms of LGBTQ+ discrimination in practice.

The vaguely-described religious employment requirements included:

- one school in South Australia which stated that an essential attribute for employees was having a *'servant heart, vibrant Christian faith and actively involved in a local church'*<sup>139</sup>
- a Western Australian school that required every teacher and educational assistant to *'engage in personal and professional activity leading to growth as a teacher, firmly grounded in the Word of God'*<sup>140</sup>
- a school in Victoria which required its staff to *'ensure God is honoured in all they all do'*<sup>141</sup>
- a school in New South Wales which required all its employees *'to be committed Christians able to communicate an authentic Christian worldview'*<sup>142</sup>
- another school which said it only employed *'committed evangelical Christians'* and indicated to applicants that their Christian faith would be explored as part of the application and interview process.<sup>143</sup>

Some schools asked prospective employees about their religious practices and beliefs, including their beliefs on homosexuality, without indicating the consequence of answering or failing to answer those questions.<sup>144</sup> For example, an application form for a position as a teacher at one Christian school in New South Wales required applicants to:

*Give your own definition of a Christian. Give a brief account of your conversion and Christian experience. How would you work with Christians from backgrounds or traditions that differ from yours? (eg Reformed, Evangelical, Pentecostal, etc.) How would you handle differences with other Christians? What do you think a Christian school's position ought to be regarding the following?*

- *The authority and historical accuracy of the Bible*
- *The theory of evolution and its relationship to what the Bible teaches*
- *The use of drugs, alcohol, tobacco and marijuana*
- *Homosexuality.*<sup>145</sup>

Another school asked prospective employees to describe their *'doctrinal stance on major tenets of the Christian faith'*, and *'social/moral issues that Christian schools should have definite views on and express your opinion'*.<sup>146</sup> Another school asked prospective employees to provide a definition of a Christian.<sup>147</sup>

Some schools asked prospective employees to indicate the church they currently attended and for how long, but did not indicate the consequences for prospective staff failing to answer this question or answering in a particular way.<sup>148</sup>

Many LGBTQ+ people would read the above statements and practices as intended to exclude them or as coded ways of conveying discriminatory anti-LGBTQ+ attitudes and practices. The experiences of teachers like Steph, Rachel, Matthew\*, Daniel, Nathan and Sam would only serve to confirm those fears.

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<sup>139</sup> Independent school no. 38.

<sup>140</sup> Independent school no. 42.

<sup>141</sup> Independent school no. 50.

<sup>142</sup> Independent school no. 98.

<sup>143</sup> Independent school no. 34.

<sup>144</sup> E.g. Independent school nos. 17, 29, 34, 60, 70, 76, 97 and 98.

<sup>145</sup> Independent school no. 76.

<sup>146</sup> Independent school no. 83.

<sup>147</sup> Independent school no. 98.

<sup>148</sup> E.g. Independent school nos. 17, 29, 60, 70, 97 and 98.



### **Lifestyle clauses**

Many schools explicitly require their employees to live their private lives outside the classroom in accordance with the religious beliefs of the school. 'Lifestyle' clauses abounded in employment policies and forms that were published online.<sup>149</sup>

Some of these lifestyle clauses were explicitly discriminatory towards LGBTQ+ people. For example, two Christian schools in New South Wales stated in their staff codes of conduct:

*Staff must not become involved in inappropriate relationships as defined by the [school's] beliefs, values, ethos and practices. Evangelical Christian Biblical principles and statements about sexual relationships are to be our guide in these matters. The key ones are: (a) sexual intimacy is only to be given expression in faithful, heterosexual marriage (noting that the teachings on homosexual relationships are not culture specific in Scripture).*<sup>150</sup>

Another school in New South Wales stated that it only employed 'committed evangelical Christians' and expected its Board, staff and leaders to behave in accordance with scripture, including that 'sexual relations outside marriage between a man and a woman, will not be accepted, either on or off campus'.<sup>151</sup>

Another Christian school in Western Australia incorrectly relied on Queensland laws in its employment application form in stating:

*It is a genuine occupational requirement (subject to the provisions of the Anti-Discrimination Act 1991) of the [school] that, consistent with the Act, staff members must not act in a way that they know, or ought reasonably to know, is contrary to the religious beliefs of the [school]. Nothing in their deliberate conduct should be incompatible with the intrinsic character of their position, especially, but not only, in relation to the expression of human sexuality through heterosexual, monogamous relationships, expressed intimately through marriage.*<sup>152</sup>

Similar statements in the policies and forms of independent Christian schools across the country highlighted the spread of these discriminatory practices towards LGBTQ+ people.<sup>153</sup> These were also the same kinds of occupational requirements that were relied on to fire Steph from her job as an English teacher at a Sydney school in 2021.

Other schools were less direct in the way they framed their lifestyle clauses but the effect appears to be the same. For example, a Christian school in New South Wales expressed its employment conditions as follows:

*You are required to acknowledge that it is an inherent requirement of the position to conform with the doctrines, tenets, beliefs or teachings of Christianity as espoused and interpreted by the [school].*<sup>154</sup>

This school also posted a letter on its website which asked all members of its school community to vote 'no' in the marriage postal survey.

In another example, an Islamic school indicated in its Staff Code of Conduct that staff were required to ensure their conduct was 'consistent with the ethos' of the school whether 'during or outside working hours'. One of the guiding principles of the school were that 'Islam upholds the sanctity of marriage and the family unit'. Staff were also required to dress in accordance with Islamic modesty requirements, with a strict differentiation between male and female dress, no long hair for men and 'unorthodox or casual dress' prohibited.<sup>155</sup> It was unclear whether transgender students, particularly non-binary students, would be given a choice of uniform that accorded with their gender identity.

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<sup>149</sup> E.g. Independent school nos. 4, 7, 8, 20, 23, 24, 25, 29, 34, 35, 38, 42, 46, 56, 58, 60, 61, 83, 85 and 86.

<sup>150</sup> Independent school nos. 24 and 83.

<sup>151</sup> Independent school no. 34.

<sup>152</sup> Independent school no. 20.

<sup>153</sup> E.g. Independent school nos. 8 and 34.

<sup>154</sup> Independent school no. 14.

<sup>155</sup> Independent school no. 58.

Another Islamic school took a narrower approach in defining its requirements, indicating that it did not discriminate on the grounds of sexual orientation but that it was *'incumbent that staff adhere to the Islamic principles that guide our [school]'*.<sup>156</sup>

In many cases, the lifestyle clauses were vaguely worded, making it unclear whether LGBTQ+ people could comply with these employment conditions. For example:

- one school in South Australia required its teachers to *'exemplify and model the Christian lifestyle in and beyond the school'*;<sup>157</sup>
- another school in South Australia required its staff to declare that they subscribe to the school's Statement of Faith and *'live in a manner that gives strong evidence of this belief and their acceptance of God's grace in their life'*;<sup>158</sup>
- a school in Victoria stated that it expected all its staff to be committed Christians *'whose lifestyle and beliefs, inside and outside the [school] reflect Biblical values'*;<sup>159</sup>
- one school's staffing policy stated that all staff be *'a witness to the love of God through Christ in the full range of relationships, programs and activities in which they are involved'*.<sup>160</sup>

The lack of clarity in these employment conditions could be particularly confusing for employees in situations where the school appeared to have affirming policies towards LGBTQ+ students, but who required staff to be *'church attending, practicing Christian[s]'* who *'endeavour at all times to demonstrate the [school's] values in attitude and practice'*.<sup>161</sup>

By contrast, some schools required their employees to be supportive of the religious ethos of the school but made clear in other information that the school was inclusive.<sup>162</sup> For example:

- one school indicated that it expected teachers to support the Christian ethos of the school but also published a Facebook post showing students and staff celebrating Wear It Purple Day, supporting young people in the LGBTQ+ community;<sup>163</sup>
- one school required its staff to have a working understanding of and strong commitment to the Catholic ethos of the school, in the context of a clear position that *'homophobia diminishes the dignity of all'* among other statements affirming LGBTQ+ people;<sup>164</sup>
- one school described itself as being committed to *'progressive Christian values'* and offered staff the option of male, female or other gender markers in their application form;<sup>165</sup>
- one school in Western Australia required staff to demonstrate positive support for the Christian ethos and values of the school, but its governing authority made clear that sexual orientation and gender are not considerations in the employment of staff or the enrolment of students.<sup>166</sup>

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<sup>156</sup> Independent school no. 2.

<sup>157</sup> Independent school no. 39.

<sup>158</sup> Independent school no. 46.

<sup>159</sup> Independent school no. 35.

<sup>160</sup> Independent school no. 23.

<sup>161</sup> E.g. Independent school no. 7. See also independent school nos. 13 and 29.

<sup>162</sup> Independent school nos. 18, 48, 62, 74, 77 and 78.

<sup>163</sup> Independent school no. 62.

<sup>164</sup> Independent school no. 74.

<sup>165</sup> Independent school no. 33.

<sup>166</sup> Independent school no. 77.

## Ambiguity in position

Nearly 1 in 3 independent schools were not clear about their position towards LGBTQ+ people. Out of 98 independent schools, 31 (31.6%) schools were rated '4. Unable to Tell / Silent', meaning that – after 2 hours of electronic and/or manual searching of publicly available information – we were not able to determine the school's attitude or practices towards LGBTQ+ people.

The difficulty in ascertaining an independent school's attitudes or practices towards LGBTQ+ people was increased by the fact that many used similar language to mean very different things. For example, the meaning of language like 'Christian ethos', 'Biblical values' or 'Christ centred' was often opaque.

Many schools described themselves as 'Christ centred' and/or providing a 'biblical' or 'Christian worldview' with evidence suggesting that these terms could be used to mean holding certain views that were not affirming of diverse genders or sexualities.<sup>167</sup>

Other schools that used like terms showed evidence that they may be LGBTIQ+ affirming. For example:

- one school described itself as being '*grounded in biblical values*' but had policies against bullying based on a person's '*sexuality, sexual preference or transgender nature*';<sup>168</sup>
- one school with an information technology policy that prohibited electronic communications offending the mission, values and Christian beliefs of the school, also profiled students and teachers discussing non-binary gender identities and LGBT+ visibility within the school community;<sup>169</sup>
- one school described itself as offering a '*Christ centred education service*' but indicated that it endeavoured to '*create an open and inclusive climate of acceptance, care, love, dignity, respect and support for each member of the community*', including regardless of their sexual orientation.<sup>170</sup>

In the absence of positive indications of inclusion, many LGBTQ+ people would read their invisibility in the information published by a school as indicators of a discriminatory environment in which they have to hide who they are to remain safe at work.

## Complexity of administration

The governance of independent schools varies and that governance structure can have impacts on the attitudes or practices of the school towards LGBTQ+ people. This is because, beyond the school itself, the school's governance and policies can be informed by the networks or administrative entities that it forms part of, or in some cases, religious leaders or communities who have influence in the operation or management of the school.

In some cases, the school's affirming attitudes towards matters of sexuality and gender appeared to accord with those of its governing authorities. For example:

- one school in Western Australia was part of a church governing authority that indicated it '*proactively outreach[ed] to create opportunities and an inclusive environment for students and staff who identify as LGBTI*'.<sup>171</sup>
- one school indicated that, in collaboration with the principal, the school's chaplain owed '*canonical obedience in all things*' to the relevant Bishop. In that case, the Bishop had publicly supported marriage equality laws;<sup>172</sup>

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<sup>167</sup> E.g. Independent school no. 17, 19, 29, 32, 36 and 57.

<sup>168</sup> Independent school no. 13.

<sup>169</sup> Independent school no. 37.

<sup>170</sup> Independent school no. 49.

<sup>171</sup> Independent school no. 77. See also independent school no. 78.

<sup>172</sup> Independent school no. 10.

- another Victorian school was affiliated with a particular church whose clergy and community had expressed regret that it was not possible for same-sex marriages to take place in Anglican churches under current Australian law.<sup>173</sup>

However, in other cases, the school's affirming inclinations towards matters of sexuality and gender did not align with those of its governing authorities. For example, one school in New South Wales that was relatively silent on the issue of sexuality and gender on its own website, was associated within a governance structure where the philosophy of the administrative body held a binary view of gender.<sup>174</sup> Another school, which described itself as '*an inclusive Christian community*' and '*progressive*', was associated with an Anglican diocese that declared its view on marriage was limited to lifelong commitments between a man and a woman.<sup>175</sup> The experience at schools such as Citipointe and St Catherine's highlight the objection of many parents to having anti-LGBTQ+ views imposed upon their schools by their governing authorities.

Finally, several schools are affiliated with networks which have a variety of positions on LGBTQ+ matters, both affirming and discriminatory.<sup>176</sup> This can mean that the approach of the school on LGBTQ+ issues is dependent on or informed by the attitudes and practices of people who are not formally part of the school executive.<sup>177</sup>

### 3. THE EXTENT OF DISCRIMINATION IN RELIGIOUS ORGANISATIONS

This section explores the extent of LGBTQ+ discrimination in religious organisations based on a review of publicly available information for a sample of faith-based service providers in Australia. The focus of this review is on faith-based service providers, but as becomes clear in this section it is difficult to ascertain the number of faith-based service providers in Australia based on readily accessible public information.

As with our schools review, reviewing publicly available information comes with its limitations. A desktop review cannot and does not purport to give a complete picture of LGBTQ+ inclusion among faith-based service providers. Many faith-based service providers are silent on LGBTQ+ people and inclusion, providing LGBTQ+ people with no outward signs of welcome or safety. When a provider intends to serve the broader community by providing healthcare, aged care, disability support, housing and family violence services and support, these omissions are significant and inhibit accessible service delivery, if not amounting to forms of discrimination in and of themselves.

#### 3.1 How many religious organisations are there, and what are their characteristics?

**At least 3 in 10 charities in Australia are religious or faith-based organisations, but the real proportion is likely to be higher. For example, among the 211 registered and operating charities with annual revenues of at least \$100 million, more than 40% are religious or faith-based organisations.**

**Religious or faith-based organisations employ at least 370,944 people in Australia. Government funding also accounts for more than half of the total annual revenue reported by Australia's largest religious and faith-based organisations.**

**The subset of these religious and faith-based organisations which provide social services and support to the general public (that is, apart from purely religious services) is not easily identifiable from available data. The largest of these faith-based service providers are instead identified manually in the next section.**

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<sup>173</sup> Independent school no. 12.

<sup>174</sup> Independent school no. 17: '*Sexual beings, male or female, two complementary kinds of humanity. Therefore... schools are careful to include a consideration of and respect for gender difference in all relevant aspects of their activities, but especially in the classroom*'.

<sup>175</sup> Independent school no. 37.

<sup>176</sup> E.g. Independent school nos. 8, 12, 17, 21, 22, 25, 28, 32, 35, 36, 38, 50, 56, 57, 60, 65, 69, 70, 71, 77 and 95.

<sup>177</sup> E.g. Independent school no. 17.

## A SNAPSHOT OF THE CHARITIES SECTOR IN AUSTRALIA

47,666 charities<sup>178</sup> are listed as registered in the Australian Charities and Not-for-profit Commission's (ACNC) 2020 Annual Information Statement dataset.<sup>179</sup> Out of the 47,666 registered charities, 45,968 (96.4%) charities indicated having conducted activities in the reporting period.

Out of the 45,968 charities registered and operating in the 2020 reporting period:

- \$171.4 billion was reported in total annual revenue;
- \$86.7 billion was reported in revenue derived from government, accounting for 50.6% of total annual revenue. Among these charities, 13,802 (30%) charities reported some revenue from government and 6,569 (14.3%) charities reported at least \$500,000 in revenue from government;
- 1.35 million people were employed by these charities, including 503,189 full time, 493,427<sup>180</sup> part time and 356,356 casual workers; and
- 3.5 million people were engaged by these charities as volunteer workers.

These figures give a baseline by which to compare the proportion of registered and operating charities in Australia that are religious or faith-based.

## THE DIFFICULTY OF IDENTIFYING RELIGIOUS OR FAITH-BASED ORGANISATIONS

Identifying the full proportion of the 45,968 registered and operating charities that are religious or faith-based is not possible from ACNC records, although some religious or faith-based charities can be more readily identified because they report being 'basic religious charities' and/or having 'advancing religion' among their charitable purposes. Without these markers, the only way to identify whether a charity is religious or faith-based is by reviewing information they publish about themselves, including their name and information in their governance documents or on their website. Even then, identifying whether an organisation is faith-based is not always easy. For example, some significant charities with religious origins – such as Barnardos and the YMCA – may no longer identify themselves as faith-based organisations, and we have not included them as such in our review below.

The difficulty of identifying religious and faith-based charities is important because it is not always easy to know whether a religious exemption can apply to the organisation. As set out in Part II, section 5.2 of this report, whether an organisation qualifies as a 'religious body' under various anti-discrimination laws is the first step in determining whether they have the benefit of a religious exemption.

Despite the difficulty in identifying all religious and faith-based organisations, we have attempted to estimate the proportion of charities based on the information available.

## THE NUMBER AND NATURE OF RELIGIOUS AND FAITH-BASED ORGANISATIONS

Out of the 45,968 charities registered and operating in the 2020 reporting period, at least 14,686 (31.9%) of these charities are religious or faith-based organisations. These have been identified because they self-report as being a 'basic religious charity' and/or having 'advancing religion' as one of their charitable purposes.<sup>181</sup> However, the real number of religious and faith-based charities – particularly among larger charities – is likely to be considerably higher. Among the largest charities in Australia by revenue, we have identified more than 40% that are religious or faith-based organisations.

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<sup>178</sup> Charities are able to report to the ACNC as charitable groups, comprising a group of charities. This report does not disaggregate charitable groups.

<sup>179</sup> [Australian Charities and Not-for-profit Commission 2020 Annual Information Statement \(AIS\) data](#), available at [data.gov.au](#).

<sup>180</sup> Not including one basic religious charity that appears to have erroneously reported employing over 5 million part time staff, while simultaneously indicating that they only had a total of 1.9 full time equivalent staff.

<sup>181</sup> Within the 14,686, 8,071 (55%) self-identify as basic religious charities, while 6,615 (45%) are not.

Taken together, our analysis of the data below reveals that:

- at least 3 in 10 charities in Australia are religious or faith-based organisations, while that proportion – particularly among larger charitable organisations – is likely to be higher;
- at least 370,944 are employed by religious or faith-based organisations in Australia, not including volunteer workers;
- at least \$45.8 billion is reported in total annual revenue among religious or faith-based organisations in Australia. Among those religious or faith-based organisations identified below, \$24.9 billion of reported revenue – or more than half (54.4%) – is derived from government funding.

### **Basic religious charities**

Out of 45,968 registered and operating charities in the 2020 reporting period, 8,071 (17.6%) charities self-identify as 'basic religious charities'. Most of these charities are individual churches, dioceses, religious societies and religious trusts.

Charities that self-identify as being 'basic religious charities' do not have to answer financial information questions in their Annual Information Statement, submit annual financial reports or comply with the ACNC Governance Standards.<sup>182</sup> However, a charity cannot self-identify as a 'basic religious charity' if it:

- has a charitable purpose other than 'advancing religion';
- is registered under certain corporations laws or associated incorporations legislation;
- is reporting to the ACNC as part of a group;
- has deductive gift recipient (DGR) endorsement;
- receives more than \$100,000 in government grants in the reporting period or previous two reporting periods; and
- does not participate in the national redress scheme related to institutional child sexual abuse.<sup>183</sup>

7,580 (94.5%) of the 8,071 self-identified basic religious charities reported no annual revenue in the 2020 annual reporting period. This may be because they had no revenue or elected not to provide information regarding their revenues. Of those charities that reported annual revenues, the total annual revenue reported was \$148 million of which \$15.8 million (10.7%) was derived from government. These total reported annual revenues amount to 0.09% of the total revenues reported by registered and operating charities in the 2020 annual reporting period.

Basic religious charities reported employing over 18,400 staff, with 6,064 people employed full time, 8,151 people employed part time,<sup>184</sup> and 4,220 people employed casually. This amounts to 1.4% of the total workers employed by registered and operating charities in the 2020 annual report period.

### **Charities with 'advancing religion' among their charitable purposes**

Out of the 45,968 registered and operating charities in the 2020 reporting period, a further 6,615 (17.6%) charities identify 'advancing religion' as among their charitable purposes in the ACNC register and are not 'basic religious charities'. These charities include religious or faith-based organisations delivering education, healthcare, aged care and other social services, such as disability care services, poverty relief and services for people at risk of homelessness. They also include charities delivering religious activities, such as religious education, retreats and worship services.

Among these 6,615 charities:

- \$17.5 billion is reported in total annual revenue;

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<sup>182</sup> Australian Charities and Not-for profits Commission Act 2012 (Cth) sub-divs 45-10(5) and 60-60.

<sup>183</sup> Australian Charities and Not-for profits Commission Act 2012 (Cth) sub-div 205-35.

<sup>184</sup> Not including one basic religious charity, see n180 above.

- \$10 billion is reported in revenue derived from government, accounting for 57.1% of total annual revenue. Among these charities, 2,941 (44.5%) charities reported some revenue from government and 714 (10.8%) charities reported at least \$500,000 in revenue from government;
- 136,061 people were employed by these charities, including 56,498 full time, 51,828 part time and 27,735 casual workers;
- 296,151 people were engaged by these charities as volunteer workers.

This amounts to these charities receiving 11.5% of the total government revenue received by all registered and operating charities in Australia and employing 10.1% of all paid workers employed by registered and operating charities in Australia. Among these 6,615 charities with a religious purpose, 1,121 (16.9%) are classified by the ACNC as 'large' based on reported annual revenue of \$1 million or more, and 1,123 (17%) are classified as 'medium' based on annual revenue of at least \$250,000 but less than \$1 million.

Among these 6,615 registered and operating religious charities:

- 5,027 (76%) report 'advancing religion' as their only charitable purpose;
- 1,069 (16.2%) report 'advancing education' as a charitable purpose;
- 398 (6%) report 'advancing social or public welfare'<sup>185</sup> as a charitable purpose;
- 96 (1.5%) report 'advancing health'<sup>186</sup> as a charitable purpose;
- 122 (1.8%) are public benevolent institutions.

### Other faith-based charities

Beyond those charities self-identifying as basic religious charities or that have 'advancing religion' among their charitable purposes, there is a large number of additional religious and faith-based organisations that cannot be easily identified from ACNC records.

As an illustration, we looked at all charities registered and operating in Australia in the 2020 reporting period that reported total annual revenues of at least \$100 million. Together, these 211 charities account for \$90.7 billion (or 53%) of the \$171.4 billion reported in total annual revenues for charities registered and operating in the 2020 reporting period. Out of the 211 charities falling within this category, only 14 identified 'advancing religion' among their charitable purposes and there were no basic religious charities in this group. Yet, we identified at least another 71 charities that were faith-based when reviewing their names, registered purposes or websites. That means, that at least 85 (or 40.3%) out of the 211 charities with annual revenues of \$100 million are religious or faith-based organisations.

Of the 85 religious or faith-based organisations with total annual revenues of at least \$100 million:

- \$35.8 billion is reported in total annual revenue;
- \$20.5 billion is reported in revenue derived from government, accounting for 57.2% of total annual revenue. Among these charities, 82 (96.5%) charities reported some revenue from government, all of which was at least \$500,000;
- 253,752 were employed by these charities, including 87,129 full time, 119,503 part time and 47,120 casual workers;

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<sup>185</sup> The purpose of 'advancing social or public welfare' includes the purposes of:

- relieving the poverty, distress or disadvantage of individuals or families;
- caring for and supporting the aged or individuals with disabilities;
- caring for, supporting and protecting children and young individuals (and, in particular, providing child care services);
- assisting the rebuilding, repairing and securing of assets after certain natural disasters: *Charities Act 2013* (Cth) s 15.

<sup>186</sup> The purpose of 'advancing health' includes the purpose of preventing and relieving sickness, disease or human suffering: *Charities Act 2013* (Cth) s 14.

- 87,068 people were engaged by these charities as volunteer workers.<sup>187</sup>

### 3.2 How LGBTQ+ inclusive are Australia's largest faith-based service providers?

#### MEASURING LGBTQ+ INCLUSION IN FAITH-BASED SERVICE PROVIDERS

A significant segment of religious and faith-based charities in Australia provide social services to the general community, such as healthcare, aged care, disability care, housing and financial support services. To measure LGBTQ+ inclusion within these faith-based service providers, we conducted a review of the 70 largest faith-based service providers in Australia by revenue. Using publicly available information, we rated each for their degree of LGBTQ+ inclusion using a traffic light system (with 'green' indicating LGBTQ+ affirming practices and 'red' indicating LGBTQ+ discriminatory practices). A rating of 'orange' was given where – after 2 hours of electronic and/or manual searching of publicly available information – we were unable to determine the organisation's attitude or practices towards LGBTQ+ people, or the evidence was mixed.

To identify the degree of LGBTQ+ inclusion among faith-based service providers, we conducted a desktop review of the 70 largest faith-based service providers based on their total annual revenue as reported to the ACNC in the 2020 reporting period. These 70 faith-based service providers include some of Australia's most prominent faith-based charities and charitable groups. Collectively, these faith-based service providers reported \$25.9 billion in total annual revenue in the 2020 reporting period, of which \$12.8 billion (49.3%) was derived from government funding. They also employed 202,863 people. All were affiliated with Christianity.

The purpose of this review was to identify whether a person seeking access to services or employment could discern the position of an organisation on LGBTQ+ inclusion from publicly available material, as well as to identify evidence of inclusive or discriminatory practices towards LGBTQ+ service users and staff.

As set out in more detail in Schedule B, the review collected and analysed publicly available evidence, including information found on each service providers' website, social media platforms and other websites or news articles referring to the organisation. We rated each for their degree of LGBTQ+ inclusion and categorised them using a traffic light system, with 'green' indicating LGBTQ+ affirming practices and 'red' indicating LGBTQ+ discriminatory practices. Particularly strong examples of affirming or discriminatory practices were marked as 'Green plus' or 'Red plus' respectively. Finally, a rating of 'orange' was given where – after 2 hours of electronic and/or manual searching of publicly available information – we were not able to determine the organisation's attitude or practices towards LGBTQ+ people, or the evidence was mixed.

The results of these reviews follow.

#### KEY FINDINGS FROM OUR REVIEW

**Australia's largest faith-based service providers have been on a journey towards LGBTQ+ inclusion but significant gaps remain. Whether by omission or through clear evidence of discrimination, around 5 in 10 of Australia's largest faith-based service providers give LGBTQ+ people little comfort that they will be free from discrimination at work or when they access social services such as healthcare, disability care, accommodation or financial support.**

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<sup>187</sup> Among the 71 charities that did not identify 'advancing religion' among their charitable purposes within this group;

- \$28.1 billion is reported in total annual revenue;
- \$14.9 billion is reported in revenue derived from government, accounting for 53% of total annual revenue for this group. 70 (98.6%) charities reported some revenue from government, all of which was at least \$500,000;
- 216,448 people were employed, including 71,298 full time, 104,343 part time and 40,810 casual workers;
- 74,765 people were engaged as volunteer workers.



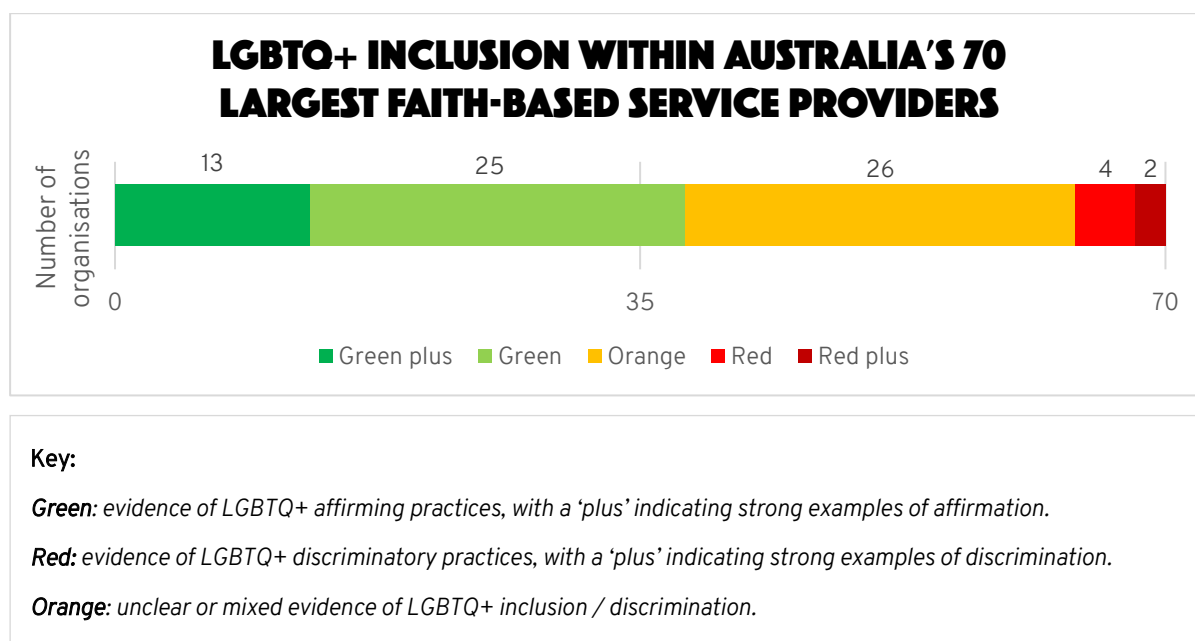
The findings of our review into Australia's largest faith-based service providers include that:

- there is a wide gap between the best and worst performers on LGBTQ+ inclusion among Australia's largest faith-based service providers. Almost 1 in 10 of Australia's largest faith-based service providers discriminate against LGBTQ+ people, with a further 4 in 10 being unclear in their position on LGBTQ+ inclusion;
- a significant number of Australia's largest faith-based service providers are silent in their positions on LGBTQ+ inclusion, which is likely to increase the barriers to accessing services among LGBTQ+ people who fear discrimination based on their sexual orientation or gender identity;
- neither public funding nor religious denomination is a reliable indicator of LGBTQ+ inclusivity, with examples of LGBTQ+ discriminatory practices even among faith-based service providers which receive significant public funding and have denominational peers that do not discriminate against LGBTQ+ people.

### Trending towards LGBTQ+ inclusion but with significant gaps

Overall, just over half of Australia's 70 largest faith-based service providers show signs of being LGBTQ+ inclusive, with around 1 in 5 service providers leading the field on LGBTQ+ inclusion. However, around 4 in 10 (or 37.1%) of Australia's largest faith-based service providers do not clearly state their position on LGBTQ+ inclusion or there is mixed evidence regarding the extent of their LGBTQ+ inclusivity. Almost 1 in 10 (or 8.6%) provide clear and public examples of LGBTQ+ discriminatory practices.

Figure 7: The ratings of Australia's 70 largest faith-based service providers on LGBTQ+ inclusion



### Examples of LGBTQ+ discrimination

On one end of the spectrum, healthcare, aged care, education and other social service providers were among the six faith-based service providers with positive evidence of LGBTQ+ discrimination.

Examples of LGBTQ+ discrimination included:

- Two faith-based service providers that explicitly excluded same-sex couples from their adoption programs.<sup>188</sup> These unrelated faith-based service providers collectively employed over 6,000 staff and received over \$300 million in government funding, accounting for half of their collective annual revenue in the 2020 reporting period.
- Aged care and social service providers who were part of a religious group that described homosexuality as a *'sexual sin'* alongside bestiality and spread misinformation about the so-called causes of transgenderism. The same religious group proactively opposed reforms seeking to ban LGBTQ+ change and suppression practices (or so-called conversion 'therapy') and protect LGBTQ+ people from discrimination in religious bodies.<sup>189</sup> An associated social services provider also had discrimination complaints made against it by LGBTQ+ and other staff.<sup>190</sup> This religious group however stated that its aged care service provider complied with its obligations under the SDA (which does not allow discrimination against LGBTQ+ people in Commonwealth-funded aged care services).<sup>191</sup> Together, this religious group (including its service providers) received over \$171 million in government funding, accounting for two-thirds of its total annual revenue in the 2020 reporting period.
- Healthcare, aged care and social service providers who were part of a religious group that described homosexuality as a *'manifestation of the disturbance and brokenness in human inclinations and relations caused by the entrance of sin into world'*. While this religious group said that it did not condone singling out any group for derision or abuse, it condemned the *'homosexual lifestyle'* and warned that homosexual intimacies, which it listed alongside fornication, adultery, incest and polygamy, were *'destructive'*. Over 3,500 people are employed by the charitable group, which receives several million dollars in public funding – although this is a small proportion of their total annual revenues as a religious group.<sup>192</sup>

Further, Harley's and Joanne\*'s experiences of discrimination at faith-based organisations point to a bigger problem on the ground than may be apparent in publicly available information.

### **Examples of LGBTQ+ inclusion**

On the other end of the spectrum, there were many examples of LGBTQ+ inclusive practices and initiatives which have been taken forward by several faith-based service providers including:

- dedicated LGBTIQ+ inclusivity training with staff;<sup>193</sup>
- clear statements affirming support for LGBTIQ+ people, including among staff and service users, on public-facing material such as websites;<sup>194</sup>
- the celebration of LGBTIQ+ days and events of significance, including through social media posts and in person events with staff and service users;<sup>195</sup>
- the formation of LGBTIQ+ advisory groups, focus groups and networks to inform service design and delivery to be more inclusive of LGBTIQ+ people;<sup>196</sup>

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<sup>188</sup> Organisation nos. 16 and 30.

<sup>189</sup> Organisation nos. 47 and 55.

<sup>190</sup> Organisation no. 55.

<sup>191</sup> Organisation nos. 47 and 55.

<sup>192</sup> Organisation no. 10.

<sup>193</sup> E.g. Organisation nos. 3, 8, 26, 34, 39, 44, 43, 46, 57 and 64.

<sup>194</sup> E.g. Organisation nos. 3, 4, 11, 15, 17, 21, 24, 26, 31, 33, 34, 38, 39, 43, 44, 57, 59, 60, 61 and 64.

<sup>195</sup> E.g. Organisation nos. 3, 8, 11, 15, 17, 26, 27, 33, 34, 38, 39, 43, 44, 46, 57 and 67.

<sup>196</sup> E.g. Organisation nos. 3, 25, 39, 43, 44, 56, 57 and 59.

- the provision of LGBTIQ+ specific services, such as mental health services or services supporting trans and gender diverse populations;<sup>197</sup>
- the provision of intake forms that are more inclusive of people with different genders;<sup>198</sup>
- identifying LGBTIQ+ populations as a target group in diversity plans and organisational strategic plans;<sup>199</sup>
- Rainbow Tick accreditation;<sup>200</sup> and
- supporting LGBTIQ+ advocacy.<sup>201</sup>

Some faith-based service providers indicated that they had taken more proactive steps towards LGBTIQ+ inclusion in recent years.<sup>202</sup> For example, one healthcare provider reported having taken several steps to create a more supportive environment for LGBTIQ+ patients and staff. Among those measures included celebrating international days of significance to the LGBTIQ+ community, introducing a pilot of gender-neutral toilets, expanding staff training to enhance understanding of LGBTIQ+ issues and updating language in patient forms to affirm trans and gender diverse people.<sup>203</sup> Another social services provider, which had even historically sought exemptions to exclude transgender women from its women's homelessness services, now indicated that they offered housing to transgender women in dorms based on their affirmed gender, regardless of their physical characteristics or their stage of transition. They had supported the removal of religious exemptions in Commonwealth-funded aged care in 2013 and last year also marked International Transgender Day of Visibility on their social media platforms.<sup>204</sup>

Among the faith-based service providers leading the field on LGBTQ+ inclusion were:

- a provider of social services with an LGBTIQ+ youth advisory group and a dedicated position statement committing to reviewing its services, policies, processes and procedures to ensure a safe and inclusive environment for LGBTIQ+ staff and all who use its services and programs;<sup>205</sup>
- a provider of healthcare services that co-designed one of its facilities with people with lived experience, including LGBTIQ+ people, to ensure it would feel welcoming and safe;<sup>206</sup>
- a provider of healthcare services that has identified among its strategic goals increasing access to healthcare for vulnerable groups, including LGBTIQ+ communities, and which prominently displays its support for LGBTIQ+ staff and service users on its website – stating that '*LGBTQI+ diversity is welcomed and celebrated... [and the service provider] is committed to providing a safe space for people of diverse sexualities and gender*';<sup>207</sup>
- a provider of aged care services with Rainbow Tick accreditation, an LGBTIQ+ network for residents, family members, staff and volunteers, non-binary gender options on its service application form, and clear statements in its job postings that it welcomes residents, staff and volunteers regardless of their religion, gender or sexuality.<sup>208</sup>

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<sup>197</sup> E.g. Organisation nos. 8, 17, 44 and 67.

<sup>198</sup> E.g. Organisation nos. 13, 17, 39, 44 and 57.

<sup>199</sup> E.g. Organisation nos. 8, 11, 26, 39, 60 and 67.

<sup>200</sup> E.g. Organisation nos. 8, 44, 57 and 60.

<sup>201</sup> E.g. Organisation nos. 24, 27, 33, 38 and 44.

<sup>202</sup> Organisation nos. 7, 14, 27, 43 and 46.

<sup>203</sup> Organisation no. 7.

<sup>204</sup> Organisation no. 27.

<sup>205</sup> Organisation no. 56.

<sup>206</sup> Organisation no. 25.

<sup>207</sup> Organisation no. 11.

<sup>208</sup> Organisation no. 57.

## The cost of silence in respect of LGBTQ+ inclusion

A significant number of the faith-based service providers in our review – or nearly 2 in 5 – appeared to observe an organisational silence or near silence regarding LGBTQ+ people and inclusion.<sup>209</sup> For example:

- we found no reference to LGBTQ+ people or LGBTQ+ welcoming language for one healthcare provider, despite searches on their website and large social media platforms that marked other days and events of significance relevant to several other groups. This provider employed over 4,000 people and derived over three-quarters of its total annual revenue from government funding;<sup>210</sup>
- with one exception, we could find no reference to LGBTQ+ people or LGBTQ+ welcoming language on another faith-based social services provider's website or social media platforms, including after conducting online Google searches. This provider employed almost 1,000 people and derived over \$7 million in government funding.<sup>211</sup> The one exception was a single reference to LGBTQ+ people contained in the biography of a doctor employed by the provider who stated that her practice was inclusive of all women and families and was a safe space for members of the LGBTQ+ community.

The significant proportion of large, faith-based service providers with unclear positions on LGBTQ+ inclusion is concerning when considering the nature of the services provided by these providers. 6 in 10 of these organisations provided aged care services, 3 in 10 provided social services (such as disability care, family and domestic violence support, alcohol and drug support services, unemployment services, housing, and emergency support), and nearly 1 in 4 provide healthcare services. Together, this cohort reported total annual revenue of \$9.44 billion in the 2020 reporting period, of which 50.2% was derived from government funding. They employed over 60,000 people.

Research reveals that LGBTQ+ people approach service providers with religious beliefs expecting to be met with discriminatory attitudes about LGBTQ+ people, and this can impede the disclosure of a person's LGBTQ+ identity.<sup>212</sup> For example, while LGBTQ+ affirming visual markers (such as leaflets, stickers, posters or rainbow symbols) can promote the disclosure of LGBTQ+ identities in healthcare settings,<sup>213</sup> religious icons can impede disclosure in healthcare settings among LGBTQ+ people.<sup>214</sup> This means that, regardless of whether a faith-based service provider actually discriminates against LGBTQ+ people, failing to show support for LGBTQ+ people will be read by many LGBTQ+ people as tending to confirm their fears of the likelihood of discrimination. When LGBTQ+ people do not feel safe to openly discuss who they are and their needs with service providers, they may not receive the same care or quality of service as others do, if they seek the service at all.

## The treatment of employees is less clear

On the whole, the way that Australia's largest faith-based service providers treat prospective and current LGBTQ+ employees is less clear than how they promote their services. On the one hand, some organisations clearly include LGBTQ+ people in their employment policies and practices.<sup>215</sup> During the marriage equality debate, some even felt the need to publicly comfort staff that they were not at risk of losing their jobs if they were in a same-sex relationship.<sup>216</sup> On the other hand, many providers are silent on their position towards LGBTQ+ employees or people

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<sup>209</sup> E.g. Organisation nos. 5, 9, 20, 28, 29, 45, 50, 51, 52, 54, 55, 62, 63, 64 and 68.

<sup>210</sup> Organisation no. 20.

<sup>211</sup> E.g. Organisation no. 51.

<sup>212</sup> S Westwood (2022) '[Religious-based negative attitudes towards LGBTQ people among healthcare, social care and social work students and professionals: A review of international literature](#)', *Health Soc Care Community*; 30:e1449-e1470 at 4.4.2.

<sup>213</sup> H Brooks et al (2018) '[Sexual orientation disclosure in health care: a systemic review](#)', *British Journal of General Practice* 68(688): e187-e196.

<sup>214</sup> C Koh et al (2014) '["I demand to be treated as the person I am": experiences of accessing primary health care for Australian adults who identify as gay, lesbian, bisexual, transgender or queer](#)', *Sexual Health* 11(3) at 258-264.

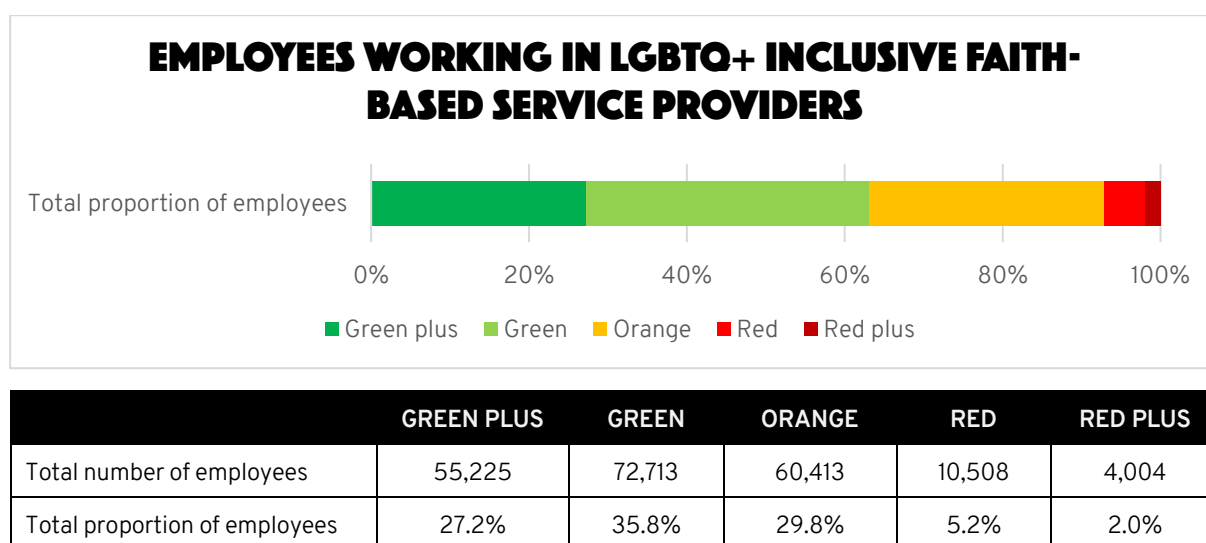
<sup>215</sup> E.g. Organisation nos. 3, 4, 8, 7, 11, 13, 15, 17, 31, 38, 43, 44, 46, 56, 57, 61 and 64.

<sup>216</sup> E.g. Organisation nos. 4, 11 and 15.

who affirm them, even if they say something about their services being delivered without discrimination.<sup>217</sup> Some have even expressed anti-LGBTQ+ views or had complaints of discrimination raised by LGBTQ+ employees.<sup>218</sup> We also found examples of employees who were fired in respect of imputed beliefs about sexual behaviour (not specifically homosexuality or bisexuality) that conflicted with the religious teachings of the organisation.<sup>219</sup>

Out of the 202,863 people employed by Australia's 70 largest faith-based service providers, just over 6 in 10 (or 63.1%) work at an organisation where we were able to find some evidence of LGBTQ+ inclusive practices. That means, that around 4 in 10 work at an organisation where the position of LGBTQ+ people is unclear or we could observe discriminatory practices towards LGBTQ+ people. 7.2% of employees worked in 'red' rated organisations.

Figure 8: The number of employees working in LGBTQ+ inclusive faith-based service providers



### Denominations are not reliable indicators of LGBTQ+ inclusivity

While all of Australia's 70 largest faith-based service providers are affiliated with Christianity, they each derive from a range of denominational traditions. Catholic, Anglican and Uniting Church service providers are the most prevalent among the 70 providers.

However, even within most denominations, there were a range of ratings. Faith-based service providers affiliated with Anglican, Baptist, Catholic and Uniting Church denominations appeared across the rating bands, suggesting that denominational affiliation is not always a reliable predictor of LGBTQ+ inclusivity. Based on this, it is hard to see how faith-based service providers that have more inclusive denominational peers can justify LGBTQ+ discriminatory practices as necessary to their religious doctrines or the susceptibilities of their adherents.

For example, among Anglican and Baptist service providers, we saw organisations on opposite ends of the spectrum. While two Anglican social service providers explicitly advertised and promoted foster carers who were in same-sex relationships,<sup>220</sup> a different Anglican service provider expressly indicated that it *'does not place children for adoption with same sex couples'*.<sup>221</sup> While one Baptist service provider had no evidence of LGBTQ+ affirming practices and

<sup>217</sup> E.g. Organisation nos. 5, 20, 42, 45, 36, 37, 53, 64 and 68.

<sup>218</sup> E.g. Organisation nos. 47 and 55.

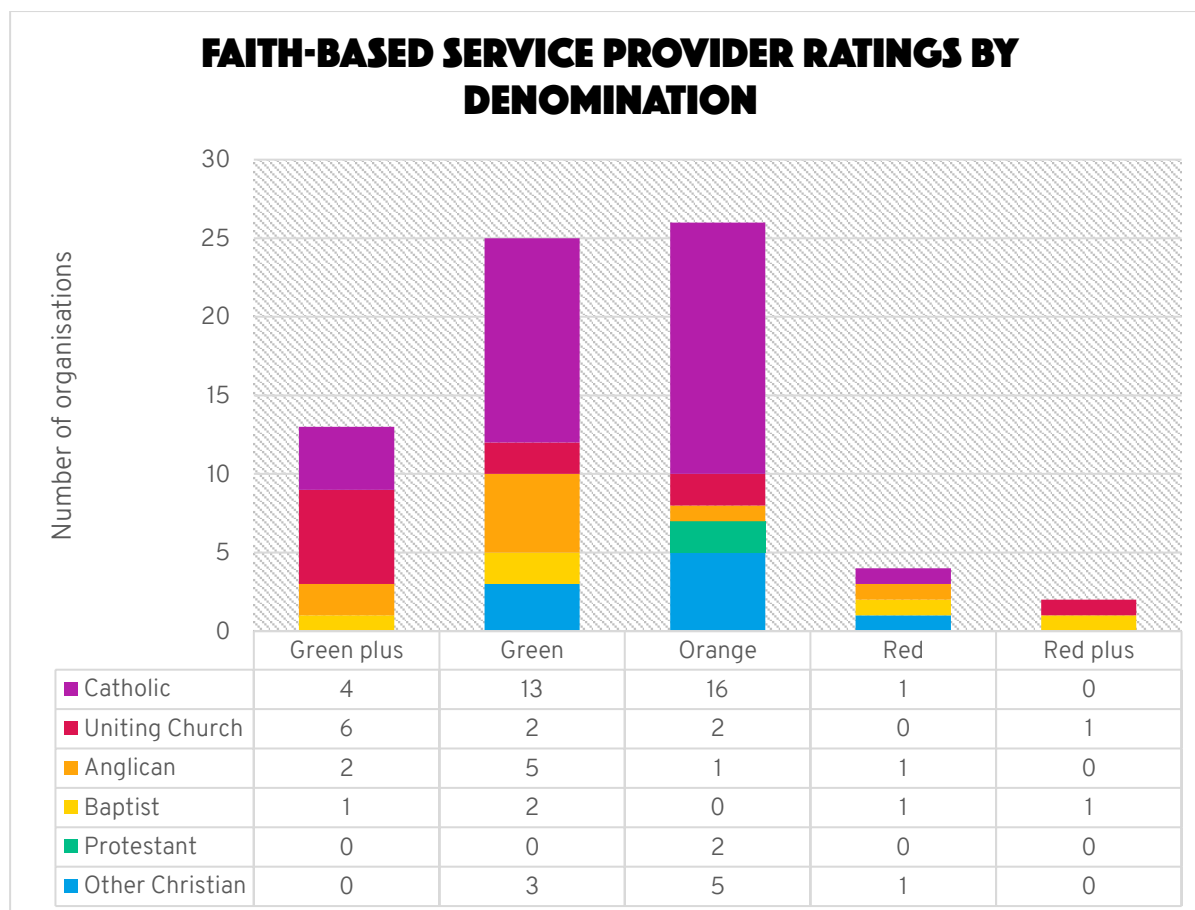
<sup>219</sup> Organisation no. 45.

<sup>220</sup> Organisation nos. 31 and 44.

<sup>221</sup> Organisation no. 16.

some evidence of LGBTQ+ discrimination,<sup>222</sup> another Baptist service provider explicitly acknowledged the discrimination and exclusion faced by people due to their sexual or gender identity and promoted and advocated for inclusive service delivery, including training for staff and handbooks featuring LGBTQ+ people.<sup>223</sup>

Figure 9: The rating of Australia's 70 largest faith-based service providers by denomination



### Public funding is not a reliable indicator of LGBTQ+ inclusivity

Although Australia's largest 70 faith-based service providers derive a significant amount of their revenue from government funding, the amount of public funding is not always a reliable indicator of LGBTQ+ inclusivity.

Overall, revenue derived from government comprised nearly half of the total annual revenues reported by Australia's largest 70 faith-based service providers in the 2020 reporting period. Furthermore, out of the 70 faith-based service providers in the 2020 reporting period:

- 58 (or 82.9%) derived at least 30% of their funding from government; and
- 50 (or 71.4%) derived at least 50% of their funding from government.

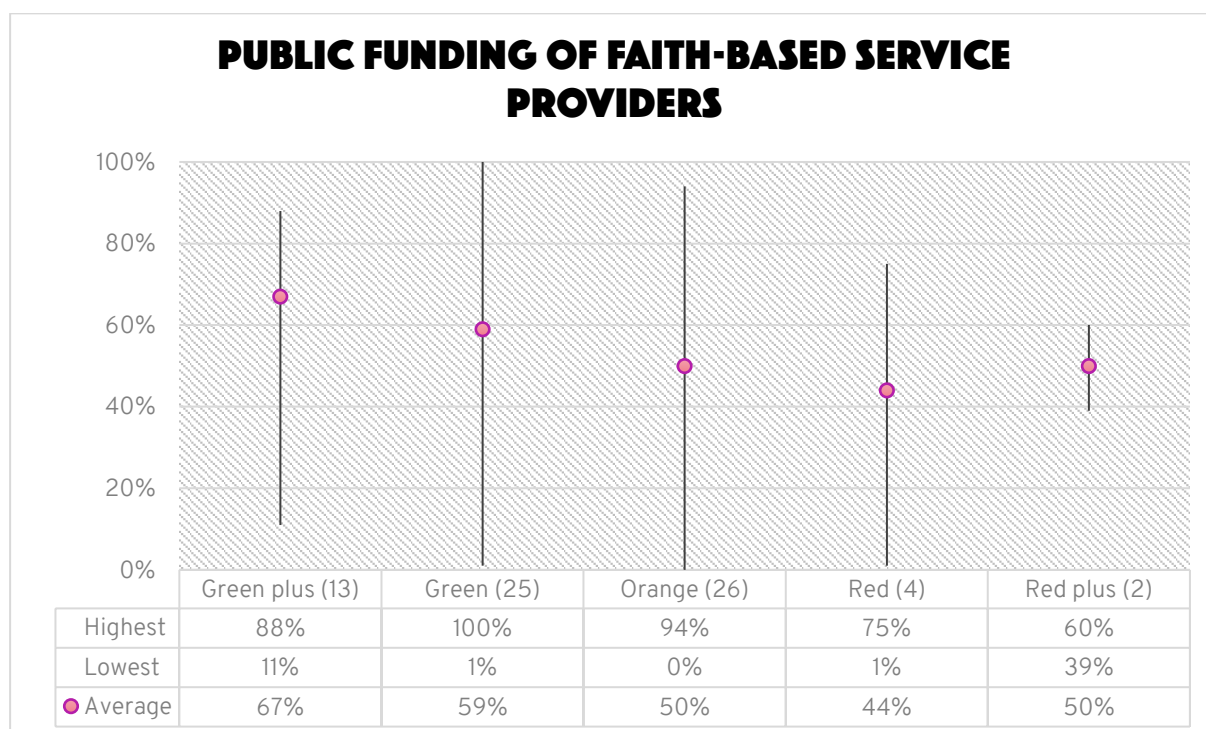
<sup>222</sup> Organisation no. 55.

<sup>223</sup> Organisation no. 69.

While government funding to charities increased by nearly 14% in the 2020 reporting period due to COVID-19 support measures,<sup>224</sup> public funding still accounts for a significant amount of the revenue derived by Australia's largest faith-based service providers.

Faith-based service providers that showed discrimination towards LGBTQ+ people could still derive as much as 75% of their annual revenue from government. The six faith-based service providers rated 'red' or 'red plus' derived, on average, 46% of their total annual revenues in the 2020 reporting period from government sources.

Figure 10: The proportion of revenues derived from government funding by rating



### A complex picture among some faith-based service providers

As stated above, many faith-based service providers were somewhat mixed in their position on LGBTQ+ inclusion. The picture was particularly complex for some faith-based service providers, especially those that were part of large charitable groups or affiliated closely with broader religious institutions.

Sometimes we observed a different approach to LGBTQ+ inclusion within a broader charitable group. 10 of the 70 largest faith-based service providers reported individually to the ACNC although they were related to or affiliated with other charities within the top 70. Five of these charities belonged to one larger healthcare and aged care service provider group with different companies and providers.<sup>225</sup> This group highlighted that even within a broader network of related charities, there could be different approaches to LGBTQ+ inclusion. Within this particular group, some charities were clear front-runners in terms of LGBTQ+ inclusion and were rated 'Green plus', while others were relatively silent on their position on LGBTQ+ inclusion and were rated 'Orange'.

Sometimes we observed service providers who took welcoming positions towards LGBTQ+ people but who were associated with religious bodies that had positions which would be read very differently by many LGBTQ+ people. For example, one service provider indicated that it was a warm and open organisation that embraced people, including

<sup>224</sup> Australian Charities and Not-for-profits Commission (2022) [Australian Charities Report – 8<sup>th</sup> Edition](#) at 18.

<sup>225</sup> Organisation nos. 2, 12, 14, 16 and 39.

those with different sexual orientations or gender identities. However, this provider belonged to a religious group which indicated positions on its website such as that legalising same-sex marriage had diminished the uniqueness of heterosexual marriage, and which described *'the inability to share sexually with the opposite gender'* as a loss *'caused by human sinfulness'*. While this religious body encouraged its followers to respond with *'understanding and care, rather than ... negative judgement'*, it did not seem to see its description of same-sex relationships as *'diminishing'* marriage or homosexuality as being *'caused by human sinfulness'* as amounting to passing negative judgment.<sup>226</sup>

Sometimes we even observed contradictions in approach within the *same* service provider. For example, one service provider that continues to exclude same-sex couples from its adoption services, actively seeks LGBTIQ+ identifying people to work in its youth and family services and expects aged care workers to demonstrate a commitment to supporting people from diverse backgrounds, including LGBTIQ+ people.<sup>227</sup>

A few faith-based providers have had a particularly mixed history with LGBTIQ+ communities. These have included faith-based tertiary education providers who struggled to accommodate visual displays of LGBTIQ+ inclusion on their campuses. For example, when pride flag stickers were torn down from the window of a student association office in one institution, the head of the organisation said she did not condone the sticker being removed in the way it was, although the university would not endorse the rainbow flag or approve it being placed on other parts of the campus.<sup>228</sup>

Meanwhile, some service providers have also had to actively indicate their support for LGBTIQ+ people in recent years to repair damaged relationships with the LGBTIQ+ community, particularly after previous conduct has been criticised.<sup>229</sup> Included among the measures taken by these faith-based providers to improve their standing with the LGBTIQ+ community were staff training on LGBTIQ+ inclusion, apologies for past statements and a more proactive demonstration of support by participation in LGBTIQ+ events and LGBTIQ+ specific partnerships.<sup>230</sup> These examples illustrate that repairing the reputation of a faith-based organisation perceived as homophobic or transphobic can take years, if it is in fact ever achieved.

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<sup>226</sup> Organisation no. 58.

<sup>227</sup> Organisation no. 30.

<sup>228</sup> P Taylor (2019) ['Rainbow flag politically charged, said Celia Hammond, vying for Liberal preselection in Curtin'](#), *The Australian*, 4 March.

<sup>229</sup> E.g. Organisation nos. 6, 19 and 27.

<sup>230</sup> Organisation nos. 19 and 27.



# PART II: EXEMPTIONS IN DISCRIMINATION LAWS IN AUSTRALIA

## WHAT THIS PART COVERS:

- I. Students
- II. Workers
- III. People relying on faith-based service providers for services and support
- IV. Interpreting religious exemptions

LGBTQ+ people can be legally discriminated against in education, employment and service provision by religious educational institutions and faith-based service providers because of exemptions in anti-discrimination laws across Australia. People who love, support or affirm LGBTQ+ people have even worse protections against LGBTQ+ discrimination.

The legal exemptions explored in this Part apply to students, workers and people who rely on services or support provided by faith-based service providers. They can apply to both LGBTQ+ people, as well as the people who love, support and affirm us, such as children in rainbow families and people with LGBTQ-affirming religious views.

While some jurisdictions perform much better than others, reforms are required in each jurisdiction in Australia to protect people from discrimination by religious educational institutions and faith-based service providers based on their sexual orientation or gender identity, or because they affirm or are personally associated with LGBTQ+ people.

Looking wholistically at the protections and exemptions explored in this Part:

- the **Commonwealth** performs the worst on every measure: providing LGBTQ+ people and the people who love, support and affirm us with the least protection from LGBTQ+ discrimination;
- laws in **New South Wales**, **Western Australia** and **South Australia** also need significant reform;
- **Queensland** sits in the middle but could rise to the top of the leaderboard with some reform; and
- laws in the **Northern Territory**, **Tasmania**, the **Australian Capital Territory** and **Victoria** offer the greatest protection overall against LGBTQ+ discrimination, although each jurisdiction could make some improvements.

Figure 11: Australia's best-to-worst LGBTQ+ discrimination protections applying to religious educational institutions and faith-based service providers by jurisdiction

|   | HOW ADEQUATE ARE PROTECTIONS FOR... | LGBTQ+ STUDENTS?         | LGBTQ+ WORKERS?    | LGBTQ+ PEOPLE ACCESSING SERVICES AND SUPPORT? | PERSONAL ASSOCIATES OF LGBTQ+ PEOPLE? | PEOPLE AFFIRMING LGBTQ+ PEOPLE? |
|---|-------------------------------------|--------------------------|--------------------|---|---------------------------------------|---------------------------------|
| 1 | Northern Territory                  | Good                     | Good               | Good  | Included*                             | Minor improvement needed        |
| 2 | Tasmania                            | Good                     | Good               | Good  | Included*                             | Improvement needed              |
| 3 | Australian Capital Territory        | Good                     | Good               | Good  | Included*                             | Improvement needed              |
| 4 | Victoria                            | Minor improvement needed | Good               | Improvement needed                            | Included*                             | Minor improvement needed        |
| 5 | Queensland                          | Good                     | Improvement needed | Poor  | Included*                             | Improvement needed              |
| 6 | South Australia                     | Minor improvement needed | Poor               | Poor  | Included*                             | Poor                            |
| 7 | Western Australia                   | Poor                     | Poor               | Poor  | Partly included*                      | Improvement needed              |
| 8 | New South Wales                     | Poor                     | Poor               | Poor  | Included*                             | Poor                            |
| 9 | Commonwealth                        | Poor                     | Poor               | Poor  | Not included*                         | Poor                            |

\* Exemptions for personal associates of LGBTQ+ people may apply in a similar way as for LGBTQ+ people.

## 4. STUDENTS

LGBTQ+ students in religious educational institutions can be legally discriminated against under Commonwealth, New South Wales and Western Australian laws based on their sexual orientation or gender identity. They also have unclear protections under South Australian law and substandard protections under Victorian law.

Additional exemptions allowing religious educational institutions and single-sex educational institutions to exclude students based on their religion or sex may also have a discriminatory effect on trans and gender diverse students and students who hold affirming beliefs towards LGBTQ+ people. Students with LGBTQ+ family members also have no or limited protections under Commonwealth and Western Australian laws.

Figure 12: LGBTQ+ discrimination protections for students in religious educational institutions by jurisdiction

| LAWS AT A GLANCE:   | CTH | ACT | NSW | NT  | QLD | SA      | TAS | VIC                        | WA |
|---|-----|-----|-----|-----|-----|---------|-----|----------------------------|----|
| Are <b>LGBTQ+ students</b> adequately protected from discrimination in religious schools?                     | No  | Yes | No  | Yes | Yes | Unclear | Yes | Yes, but needs improvement | No |
| Are <b>students with LGBTQ+ family members</b> adequately protected from discrimination in religious schools? | No  | Yes | No  | Yes | Yes | Unclear | Yes | Yes                        | No |
| Are <b>students</b> adequately protected from requirements to hold or observe anti-LGBTQ+ religious beliefs?  | No  | Yes | No  | Yes | Yes | No      | Yes | Yes                        | No |

### 4.1 Discrimination permitted against LGBTQ+ students

This section discusses exemptions that allow discrimination against LGBTQ+ students (including prospective students) in religious educational institutions, such as schools, colleges and universities.

#### COMMONWEALTH EXEMPTIONS

Under Commonwealth law, religious educational institutions are allowed to discriminate against students based on their sexual orientation or gender identity.<sup>231</sup> Discrimination is permitted if done ‘*in good faith in order to avoid injury to the religious susceptibilities of adherents*’ of the institution’s religion or creed.<sup>232</sup>

Although federal laws are expressed to operate concurrently with state and territory laws to the extent they are capable of doing so,<sup>233</sup> some have suggested that Commonwealth laws permitting religious educational institutions to discriminate against students may override stricter obligations in place under some state and territory laws.<sup>234</sup> The legal basis for this opinion is contested. However, if it is correct, then gaps in Commonwealth laws may leave LGBTQ+ students vulnerable to discrimination across Australia, even if state or territory jurisdictions have removed their own exemptions.

<sup>231</sup> SDA s 38(3). Discrimination is also permitted on the grounds of sex, marital or relationship status or pregnancy.

<sup>232</sup> SDA s 38(3).

<sup>233</sup> SDA s 10(3).

<sup>234</sup> [Letter dated 13 February 2023 to the Hon Mark Dreyfus MP from Dr Michael Stead and others](#) at 2.

## STATE AND TERRITORY EXEMPTIONS

In addition to the position under Commonwealth law, four states have laws that leave LGBTQ+ students vulnerable to discrimination in religious educational institutions.

### New South Wales

Under New South Wales law, all private educational authorities, not just those that are religious, are allowed to discriminate against LGBTQ+ students.<sup>235</sup> These exemptions apply unconditionally, meaning that educational institutions are permitted to discriminate without showing any justification for their conduct.

### Western Australia

Under Western Australian law, religious educational institutions may discriminate against students based on their gender history or sexual orientation.<sup>236</sup> Discrimination is permitted if done *‘in good faith in favour of adherents of... [the institution’s] religion or creed generally, but not in a manner that discriminates against a particular class or group of persons who are not adherents of that religion or creed’*.<sup>237</sup>

The interpretation of this proviso is unclear. While this exception suggests that it only permits discrimination in favour of religious adherents, how it applies to LGBTQ+ students who are affected by religious doctrines or teachings that have a discriminatory effect is untested.

Further, the position under Western Australian law is also affected by the requirement for transgender people to first be recognised as a ‘gender reassigned person’ prior to having any discrimination protections on the basis of their gender history.<sup>238</sup> This currently requires a person born in Western Australia to have undergone a medical or surgical reassignment procedure (such as gender affirming hormone treatment) and to meet the other requirements of the Gender Reassignment Board under the *Gender Reassignment Act 2000* (WA).<sup>239</sup> This is a requirement that most transgender young people are unlikely to be able to meet, given the age at which most of these treatments are likely to occur, if at all. Young transgender people born outside Western Australia, but who live in Western Australia, also cannot be protected by Western Australian discrimination laws as the gender recognition regulations do not recognise any of the corresponding state and territory gender recognition schemes currently in operation.<sup>240</sup> Accordingly, most transgender young people in Western Australia are unlikely to have protections from discrimination based on their gender identity under Western Australian law.

This exemption and the requirement for legal gender recognition prior to having discrimination protections based on gender identity are currently foreshadowed for reform.<sup>241</sup>

### South Australia

Under South Australian law, it is unclear whether LGBTQ+ students in religious schools are protected from discrimination. This is because, while South Australian law has a specific provision allowing discrimination against

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<sup>235</sup> NSW Act ss 38K(3) (transgender grounds) and 49ZO(3) (homosexuality grounds). Bisexual students may also be left unprotected, unless their discrimination is characterised as being on the basis of presumed homosexuality. Discrimination is also permitted in private educational institutions on the grounds of sex, marital or domestic status, disability or age: NSW Act ss 31A(3)(a) (sex), 46A(3) (marital or domestic status), 49L(3)(a) (disability) and 49ZYL(age). The law also explicitly misgenders trans people: NSW Act s 31A(4).

<sup>236</sup> WA Act s 73(3). Discrimination is also permitted on the grounds of sex, marital status, pregnancy, breast feeding, family responsibility or family status, religious or political conviction or publication of relevant details of the person on the Fines Enforcement Registrar’s website.

<sup>237</sup> WA Act s 73(3).

<sup>238</sup> WA Act ss 4 (definition of ‘gender reassigned person’) and 35AJ.

<sup>239</sup> *Gender Reassignment Act 2000* (WA) s 14.

<sup>240</sup> *Gender Reassignment Regulations 2001* (WA) r 3.

<sup>241</sup> The Law Reform Commission of Western Australia has recommended narrowing this exemption to the ground of religious conviction and restricting its application to where the discrimination conforms with the doctrines of the religion, is reasonably necessary to avoid injury to religious susceptibilities and is reasonable and proportionate in the circumstances: Law Reform Commission of Western Australia, WALRC, n1 at 187, rec 81. The Western Australian Government has broadly accepted the recommendations of the Western Australian Law Reform Commission and indicated that it expects to include in its reforms provisions that strengthen equal opportunity protections for LGBTQ+ staff and students in religious schools: The Hon J Quigley, Attorney General (2022) [‘WA’s anti-discrimination laws set for overhaul’](#), 16 August (**WA Attorney General statement re anti-discrimination laws**). See also The Hon J Quigley, Attorney General (2022) [‘Reforming sex and gender recognition laws in Western Australia’](#), 21 December (**WA Attorney General statement re gender recognition**).

staff in religious educational institutions in some circumstances,<sup>242</sup> there is no specific exemption concerning students.

The South Australian Equal Opportunity Commissioner has suggested that this omission may mean that religious schools can instead rely on the general exception for religious bodies.<sup>243</sup> If that is correct, then religious educational institutions are permitted to discriminate against students, including based on their gender identity or sexual orientation, where the discrimination conforms with religious precepts or where it is necessary to avoid injury to the religious susceptibilities of adherents.<sup>244</sup>

However, this interpretation of the law may not have been the intention of the South Australian Government when it introduced a specific exemption applying only to staff at religious educational institutions and not students.<sup>245</sup> Further, it is unclear whether a school established for educational purposes can be a body 'established for religious purposes' for the religious bodies' exemption to apply (see section 5.2 for a further discussion on the meaning of a 'religious body'). In any event, the drafting of the statute is less than ideal.

## Victoria

Under Victorian law, educational authorities can set discriminatory standards of dress, appearance and behaviour for students, provided the educational authority administering the school has taken into account the views of the school community in setting the standard.<sup>246</sup> This exception, which applies to both public and private schools, was not addressed when the Victorian Parliament removed exemptions applying to LGBTQ+ students in religious educational institutions.<sup>247</sup>

This exemption leaves a gap allowing a religious educational institution to impose standards of dress, appearance or behaviour that discriminate against LGBTQ+ students, such as rules which require transgender students to wear a uniform that does not match their gender identity or which prevents students who engage in lawful sexual behaviour outside marriage from being given leadership opportunities.

### REFORMS NEEDED:

3. Amend Commonwealth, New South Wales and Western Australian laws to remove exemptions that allow religious educational institutions to discriminate against LGBTQ+ students.
4. Amend South Australian laws to clarify that religious educational institutions cannot discriminate against LGBTQ+ students.
5. Amend Victorian laws to remove exemptions that allow educational institutions to set discriminatory standards of dress, appearance and behaviour for students. This amendment would address a gap applying to both public and private schools.

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<sup>242</sup> SA Act s 34(3).

<sup>243</sup> The former South Australian Equal Opportunity Commission has expressed concerns that s 50(1)(c) of the SA Act applies to discrimination against students in religious schools: see SALRI, n1 at 73. These concerns were also put forward by former South Australian Equal Opportunity Commissioner, Dr Niki Vincent: see S Richards, 'Call to end religious schools' exemption from anti-discrimination laws' *InDaily* (online, 11 October 2018). This is also the position taken by the Australian Association of Christian Schools: see Australian Association of Christian Schools (2020) 'AACS Submission to the Consultation of the *Equal Opportunity (Religious Bodies) Amendment Bill 2020 (SA)*', 27 November at 4.

<sup>244</sup> SA Act s 50(c).

<sup>245</sup> SALRI, n1 at 73-74. See also Equal Opportunity (Miscellaneous) Amendment Bill 2009 (SA), Second Reading Speech, House of Assembly, 30 April 2009, The Hon M.J. Atkinson (Attorney-General) at 2565-2566.

<sup>246</sup> Vic Act s 42(2).

<sup>247</sup> *Equal Opportunity (Religious Exceptions) Amendment Act 2021 (Vic)*.

## 4.2 Transgender and gender diverse students in single-sex schools

This section discusses exemptions that allow students to be excluded from single-sex educational institutions based on their sex, and the application of these exemptions to trans and gender diverse students whose sex assigned at birth may not match their gender identity.

### SINGLE-SEX SCHOOL EXEMPTIONS

Each jurisdiction in Australia has specific exemptions allowing single-sex educational institutions to exclude students of a different sex from enrolling in the institution.<sup>248</sup> In Victoria, the exemption for single-sex schools may also be able to be relied upon after enrolment.<sup>249</sup> Several jurisdictions also include specific exemptions allowing educational institutions to provide single-sex student accommodation.<sup>250</sup> Each of these exemptions apply to single-sex educational institutions, whether public or private and whether or not they are religiously affiliated. They apply in addition to the exemptions discussed in section 4.1 above and therefore provide single-sex schools with an additional basis to discriminate.

The better view is that these exemptions cannot be used by single-sex schools to exclude transgender students from a school which is consistent with their gender identity. This is because these exemptions only apply to the attribute of 'sex' (or 'gender'), and trans and gender diverse people are also protected by the prohibitions against discrimination based on gender identity which are not otherwise affected.<sup>251</sup> However, the legal position is less clear under Commonwealth, New South Wales, Northern Territory and Victorian laws because single-sex exemptions under these laws are framed without explicit limitation to the attribute of 'sex'.<sup>252</sup>

Further, despite a line of cases in other contexts which suggest that a person's legal sex may not be limited to their sex assigned at birth or defined by biological characteristics alone,<sup>253</sup> some have suggested that the protections based on 'sex' in anti-discrimination laws do not recognise transgender people in accordance with their gender identity. On this view, single-sex exemptions might allow girls' schools to exclude transgender female students, and vice versa for boys' schools. These issues are starting to be tested in the courts.<sup>254</sup> If, as a result of such litigation, a person's 'sex' for the purposes of anti-discrimination law is not based on self-identification but is instead defined by restrictive biological, medical or legal requirements, then these exemptions will apply in unintended ways to transgender young people who are unlikely to be able to meet such requirements for various reasons.<sup>255</sup> For example, a girls' school could then be able to refuse enrolment to a transgender girl but instead be required to accept enrolment from a transgender boy.

Finally, as set out in section 4.1, the position under Western Australian law is also affected by the requirement for transgender people to first be recognised as a 'gender reassigned person' prior to having any discrimination

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<sup>248</sup> SDA s 21(3); ACT Act s 36; NSW Act s 31A(3)(b); NT Act s 30(1); Qld Act s 41(a); SA Act s 37(3)(a)-(b); Tas Act ss 27(1)(b) and 61; Vic Act s 39; WA Act s 18(3).

<sup>249</sup> Vic Act s 39(a).

<sup>250</sup> SDA s 34(2); ACT Act s 39(2); NT Act s 40(2); Qld Act s 89(a); SA Act s 37(3)(c); Vic Act s 61; WA Act s 32(2).

<sup>251</sup> ACT Act s 36; NSW Act ss 31A(3)(b) and 31A(4); NT Act s 30(1); SA Act s 37(3); Tas Act s 27(1)(b); Vic Act s 39(a); WA Act s 18(3).

<sup>252</sup> SDA ss 21(3) and 34(2); NSW Act ss 31(3)(b) and 31(4); NT Act ss 30(1) and 40(2); Vic Act ss 39(a) and 61.

<sup>253</sup> *AB v Registrar of Births, Deaths and Marriages* (2007) 162 FCR 528 at [4]; *Kevin v Attorney-General (Cth)* (2001) 165 FLR 404 at [329] (Chisholm J), affirmed on appeal in *Attorney-General (Cth) v Kevin* (2003) 172 FLR 300; *Secretary, Department of Social Security v SRA* (1993) 43 FCR 299 at 304-305 (Black CJ, Heerey J agreeing), 325-326 (Lockhart J, Heerey J agreeing); *R v Harris* (1988) 17 NSWLR 158 at 193-194 (Mathews J, Street CJ agreeing). See also *Attorney-General for NSW v FJG* [2023] NSWCA 34 at [71] (Beech-Jones JA, Bell CJ and Ward P agreeing).

<sup>254</sup> *Tickle v Giggle for Girls Pty Ltd* [2023] FCA 553 at [14]-[19].

<sup>255</sup> Even if they wish to, young people may not be able to medically or legally affirm their gender. This includes for the following reasons:

- They are too young to access gender affirming healthcare, such as puberty suppressants or hormone treatments;
- They are old enough to access gender affirming healthcare but are not able to (including because of cost, waiting lists, availability in their areas, or the lack of parental consent);
- They may not be eligible for legal affirmation, including because of cost, knowledge or the lack of parental consent.

protections on the basis of their gender history.<sup>256</sup> Gender reassignment in Western Australia requires gender affirming medical or surgical treatment that most transgender young people are unlikely to have had. Therefore, most transgender young people in Western Australia are unlikely to have protections from discrimination based on their gender identity under Western Australian law. However, Western Australia's gender recognition laws and the requirement for legal gender recognition prior to having discrimination protections based on gender identity are currently foreshadowed for reform.<sup>257</sup>

#### REFORMS NEEDED:

6. Amend Commonwealth, New South Wales, Northern Territory and Victorian laws to clarify that exemptions which allow single-sex schools to exclude students based on their sex do not allow discrimination against transgender students, and in Victoria, also do not apply to students who are already enrolled. These exemptions apply to both public and private schools.

### 4.3 Exemptions based on religious belief

This section discusses exemptions that allow discrimination against students in religious educational institutions based on their religious belief or activity, including holding different beliefs to their educational institution. As illustrated below, these exemptions are discussed because LGBTQ+ discrimination can be reframed as a requirement placed on all students to hold certain religious beliefs regarding gender or sexuality, or to practice or refrain from practising certain activities based on religious requirements. These requirements can affect both LGBTQ+ and non-LGBTQ+ students who hold affirming views towards LGBTQ+ people, or who disagree with an institutional view on matters relating to sexuality or gender identity.

#### PROSPECTIVE STUDENTS

All jurisdictions except the Northern Territory allow religious educational institutions to exclude students from a different religion from enrolling in an institution,<sup>258</sup> or to exclude students of a different religion from an institution or program.<sup>259</sup>

#### ENROLLED STUDENTS

Once enrolled in a religious educational institution or program, some jurisdictions also allow discrimination against students based on their religious beliefs or practices, including their lack of particular religious beliefs or their refusal to engage in particular religious practices. These laws are:

- **Commonwealth, New South Wales and South Australian** laws which do not prohibit discrimination against students in religious educational institutions based on their religious beliefs or activities at all;<sup>260</sup> and
- **Western Australian** laws which allow religious educational institutions to discriminate against a student on the basis of their religious conviction if it is done *'in good faith in favour of adherents of*

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<sup>256</sup> WA Act ss 4 (definition of 'gender reassigned person') and 35AJ.

<sup>257</sup> WA Attorney General statement re gender recognition, n241.

<sup>258</sup> ACT Act s 46(1); Qld Act s 41(a); Tas Act s 51A. There is currently no Commonwealth or New South Wales legislation prohibiting religious educational institutions on the basis of religious belief, meaning that no exemptions are necessary to discriminate on this basis. South Australia only has a protection based on religious appearance or dress which does not apply to religious educational institutions: SA Act s 85ZE(5). The Northern Territory does not allow the exclusion of application based on religion.

<sup>259</sup> Vic Act s 39(a).

<sup>260</sup> South Australia has a limited protection against discrimination based on religious dress and appearance and New South Wales has a limited race-based protection based on ethno-religious origin.

*that religion or creed generally, but not in a manner that discriminates against a particular class or group of persons who are not adherents of that religion or creed’.*<sup>261</sup>

By contrast, laws in the Australian Capital Territory, Northern Territory, Queensland and Tasmania do not allow discrimination against enrolled students based on their religious beliefs or activities.<sup>262</sup>

Under Victorian law, religious educational institutions may discriminate against a student on the basis of their religious belief or activity (and only on this basis<sup>263</sup>), only if it is reasonable and proportionate in the circumstances and it either:

- conforms with the institution’s religious doctrines, beliefs or principles, or
- is necessary to avoid injury to the religious sensitivities of religious adherents.<sup>264</sup>

## THE SIGNIFICANCE OF THESE EXEMPTIONS

Discrimination based on religious belief, activity or conviction is not the same as discrimination based on sexual orientation or gender identity. The difference can be illustrated in the following example.

A Christian school may seek to enrol students only from Christian families. This is discrimination only based on religious belief and would be allowed in every state and territory except for the Northern Territory. But a Christian school may then go on to say, everyone who is enrolled at the school, must believe that marriage can only be between a man and woman in order to occupy a student leadership position. This requirement may amount to discrimination based on religious belief (or lack of belief), discrimination based on sexual orientation, or both, depending on the circumstances.

To protect students from being required to subscribe to religious beliefs that discriminate based on sexual orientation or gender identity, discrimination based on religious belief and activity must also be prohibited and/or limited (as Victoria does) to those requirements which are reasonable and proportionate and which do not constitute discrimination on other grounds, such as based on sexual orientation or gender identity.

### REFORMS NEEDED:

7. Amend Commonwealth, New South Wales, South Australian and Western Australian laws to prohibit discrimination against students in religious educational institutions based on their religious beliefs or activities, including where they hold different religious beliefs to their school on matters of sexuality and gender identity.

## 4.4 Students with LGBTQ+ family members

Every jurisdiction, except for the Commonwealth and Western Australia, prohibits discrimination against students where the discrimination is based on the sexual orientation or gender identity of a personal associate of the student.<sup>265</sup> These ‘personal association’ protections protect students who are discriminated against because their parents, relatives or friends are LGBTQ+.

<sup>261</sup> WA Act s 73(3).

<sup>262</sup> ACT Act ss 18(2) and 46(1); NT Act s 29(2); Qld Act ss 39 and 41; Tas Act ss 22(1)(b) and 51A(2).

<sup>263</sup> Vic Act s 83(3).

<sup>264</sup> Vic Act s 83(2).

<sup>265</sup> ACT Act s 7(1)(c); NSW Act ss 38B(1) and 49ZG(1); NT Act s 19(1)(r); Qld Act s 7(p); SA Act ss 29(2a)(e) and 29(3)(d); Tas Act s 16(s); Vic Act s 6(q); WA Act s 350(2).



However, there are gaps in protections in Commonwealth and Western Australian laws:

- **Commonwealth** law does not prohibit discrimination against students based on their association with an LGBTQ+ person; and
- **Western Australian** law does not prohibit discrimination against students based on their association with a transgender person (but does extend protection to students who face discrimination based on their association with a gay, lesbian or bisexual person).<sup>266</sup>

Further, in all remaining states and territories, discrimination protections for students based on their association with an LGBTQ+ person are limited to the same extent by each of the exemptions discussed above.

These gaps in protection are most likely to affect students living in rainbow families and students with LGBTQ+ siblings, as illustrated by the experience of Mark\*. Mark\* was unable to enrol his twin children – one of whom was transgender – in the same local Catholic school in 2019. Under laws that protect students against discrimination based on personal association, the cisgendered twin would also be protected from the LGBTQ+ discrimination that occurred (namely, that she was denied the opportunity to attend the same school as her brother on the basis that he was transgender).

#### **REFORMS NEEDED:**

8. Amend Commonwealth and Western Australian laws to prohibit discrimination based on ‘personal association’ with an LGBTQ+ person, such as an LGBTQ+ family member or friend.

## **4.5 Education and training of religious leaders**

The exemptions discussed above are separate to exemptions that apply to the education and training of a specific class of students, being those seeking ordination or appointment as priests, ministers of religion or members of an order. Every jurisdiction allows discrimination in respect of this type of education or training, although Tasmania limits it to discrimination based only on religious belief, affiliation or activity (and not other attributes).<sup>267</sup>

Given these specific exemptions, amendments to any of the education exemptions discussed in sections 4.1 – 4.3 of this report would not affect the ability of religious organisations to continue to educate and train religious leaders and members of religious orders as they see fit.

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<sup>266</sup> WA Act s 35O(2).

<sup>267</sup> SDA s 37(1)(b); ACT Act s 32(1)(b); NSW Act s 56(b); NT Act ss 51(b) and 51(ba); Qld Act s 109(1)(b); SA Act s 50(1)(b); Vic Act s 82(1)(b); WA Act s 72(b).

## 5. WORKERS

LGBTQ+ workers in religious educational institutions and faith-based service providers can be legally discriminated against under Commonwealth, New South Wales, Queensland, South Australian and Western Australian laws based on their sexual orientation or gender identity.

Additional exemptions allow religious educational institutions and faith-based service providers to discriminate against staff holding affirming beliefs towards LGBTQ+ people.

Figure 13: LGBTQ+ discrimination protections for staff in religious educational institutions and faith-based service providers by jurisdiction

| LAWS AT A GLANCE:  | CTH | ACT   | NSW | NT     | QLD | SA | TAS | VIC | WA |
|--|-----|---|-----|--------|-----|----|-----|-----|----|
| Are <b>LGBTQ+ workers</b> adequately protected from discrimination in religious schools and faith-based service providers? | No  | Yes   | No  | Yes    | No  | No | Yes | Yes | No |
| Are <b>workers</b> adequately protected from requirements to hold or observe anti-LGBTQ+ religious beliefs?                | No  | Yes, if employed by faith-based service providers     | No  | Likely | No  | No | No  | Yes | No |
|  |     | No, if employed by religious educational institutions |     |        |     |    |     |     |    |

### 5.1 Workers in religious educational institutions

#### DISCRIMINATION AGAINST LGBTQ+ WORKERS

This section discusses exemptions that allow discrimination against LGBTQ+ workers (including prospective staff) in religious educational institutions, including schools, colleges and universities.

##### Commonwealth exemptions

Under Commonwealth laws, religious educational institutions are allowed to discriminate against staff based on their sexual orientation or gender identity.<sup>268</sup> Discrimination is permitted if done ‘*in good faith in order to avoid injury to the religious susceptibilities of adherents*’ of the institution’s religion or creed.<sup>269</sup>

Although federal laws are expressed to operate concurrently with state and territory laws to the extent they are capable of doing so,<sup>270</sup> some have suggested that Commonwealth laws permitting religious educational institutions to discriminate against staff may override stricter obligations in place under some state and territory laws.<sup>271</sup> The legal basis for this opinion is contested. However, if it is correct then gaps in Commonwealth laws may leave LGBTQ+ workers vulnerable to discrimination across Australia even if state or territory jurisdictions have removed their own exemptions.

<sup>268</sup> SDA s 38(1)-(2). Discrimination is also permitted on the grounds of sex, marital or relationship status or pregnancy. See also FWA ss 153(2)(b), 195(2)(b), 351(2)(c) and 772(2)(b), which also applies to intersex status among other attributes.

<sup>269</sup> SDA s 38(1)-(2). See also FWA ss 153(2)(b), 195(2)(b), 351(2)(c) and 772(2)(b), which also applies to intersex status among other attributes.

<sup>270</sup> SDA s 10(3). See also FWA s 27(1A).

<sup>271</sup> Stead et al, n234 at 2.

Under the *Fair Work Act 2009* (Cth), gaps in protections under state and territory anti-discrimination laws may also enliven an exemption from protection under federal employment law.<sup>272</sup>

### State and territory exemptions

In addition to the position under Commonwealth laws, four states have laws that leave LGBTQ+ workers vulnerable to discrimination in religious educational institutions.

Under **New South Wales** law, all private educational authorities, not just those that are religious, are allowed to discriminate against LGBTQ+ staff.<sup>273</sup> These exemptions apply unconditionally, meaning that educational institutions are permitted to discriminate without showing any justification for their conduct.

Under **Queensland** law, religious educational institutions may discriminate against staff *'in a way that is not unreasonable'* if the worker *'openly acts in a way'* that is contrary to the employer's religious beliefs.<sup>274</sup> The requirement to act consistently with the employer's religious beliefs must be a genuine occupational requirement connected with the person's work, although it does not necessarily have to be in the course of that work.<sup>275</sup> This requirement can amount to discrimination on any basis apart from age, race or impairment.<sup>276</sup> Therefore, it allows discrimination based on the sexuality or gender identity of a worker. This provision is sometimes referred to as the 'don't ask, don't tell' provision.<sup>277</sup> The Queensland Government has committed to its repeal in principle.<sup>278</sup>

Under **South Australian** law, religious educational institutions may discriminate against staff based on their sexual orientation or gender identity,<sup>279</sup> and based on marital or domestic partnership status if the couple are same-sex domestic partners.<sup>280</sup> To use these exemptions, the institution must have a written policy which is given to those seeking work at the institution. The policy must also be available free of charge to students, parents or guardians and members of the public.<sup>281</sup> South Australian law also allows discrimination based on gender identity for the purposes of enforcing standards of appearance and dress reasonably required by the employer. This latter provision applies to all employers, not just religious or educational employers.<sup>282</sup>

Under **Western Australian** law, religious educational institutions may discriminate against staff based on their gender history or sexual orientation.<sup>283</sup> Discrimination is permitted if done *'in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed'*.<sup>284</sup> However, as discussed in section 4.1, the discrimination protections for transgender people based on 'gender history' only apply in the first place to those who have been recognised as a 'gender reassigned person' under the *Gender Reassignment Act 2000* (WA). Accordingly, reliance on

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<sup>272</sup> FWA s 351(2)(a).

<sup>273</sup> NSW Act ss 38C(3)(c) (transgender grounds), 49ZH(3)(c) (homosexuality grounds). Bisexual staff may also be left unprotected, unless their discrimination is characterised as being on the basis of presumed homosexuality. Discrimination is also permitted in New South Wales on the grounds of sex, marital or domestic status or disability: NSW Act ss 25(3)(c) (sex), 40(3)(c) (marital or domestic status) and 49D(3)(c) (disability).

<sup>274</sup> Qld Act ss 25(2)-(8).

<sup>275</sup> Qld Act s 25(3)(b).

<sup>276</sup> Qld Act s 25(6).

<sup>277</sup> QHRC, n1 at 380-381.

<sup>278</sup> The Queensland Human Rights Commission recommended repealing this provision: QHRC, n1, rec 39. The Queensland Government has accepted in principle all the recommendations of the Queensland Human Rights Commission: Queensland Government, [Final Queensland Government response to the Queensland Human Rights Commission's report Building Belonging: Review of Queensland's Anti-Discrimination Act 1991](#) (Qld Government Response to Building Belonging), 28 March 2023.

<sup>279</sup> SA Act s 34(3). These exemptions also apply to intersex status.

<sup>280</sup> SA Act s 85Z(2).

<sup>281</sup> SA Act ss 34(3)(c)-(d) and 85Z(2).

<sup>282</sup> SA Act s 34(4).

<sup>283</sup> WA Act s 73(1)-(2). Discrimination is also permitted on the grounds of sex, marital status, pregnancy, breast feeding, family responsibility or family status, religious or political conviction or publication of relevant details of the person on the Fines Enforcement Registrar's website.

<sup>284</sup> WA Act s 73(1)-(2).

the exception may not even be necessary to be able to discriminate against transgender people. These provisions are among those which are currently foreshadowed for reform.<sup>285</sup>

### REFORMS NEEDED:

9. Amend Commonwealth, New South Wales, Queensland, South Australian and Western Australian laws to remove exemptions that allow religious educational institutions to discriminate against LGBTQ+ staff.

## EXEMPTIONS BASED ON RELIGIOUS BELIEF

This section discusses exemptions that allow discrimination against workers (including prospective staff) in religious educational institutions based on their religious belief or activity, including holding different beliefs to their educational institution.

These exemptions are discussed because LGBTQ+ discrimination can be reframed as a requirement placed on all workers to hold certain religious beliefs regarding gender or sexuality, or to practice or refrain from practicing certain activities based on religious requirements. These requirements can affect both LGBTQ+ and non-LGBTQ+ workers who hold affirming views towards LGBTQ+ people, or who disagree with an institutional view on matters relating to sexuality or gender identity.

Examples of these requirements may be the requirement for staff at a religious educational institution to personally affirm a belief that marriage must only be between one man and one woman, like in the case involving Rachel Colvin, or to attend a church that condemns homosexuality as sinful, like in the case of Steph Lentz (see Part I, section 1 at 21-22).

### Jurisdictions with broad exemptions

Laws in seven jurisdictions allow discrimination against workers in religious educational institutions based on their religious beliefs or practices.

Under **Commonwealth** laws, religious educational institutions are allowed to discriminate against staff based on their religion:

- if done *'in good faith... in order to avoid injury to the religious susceptibilities of adherents of ... [the institution's] religion or creed'*;<sup>286</sup> and
- if the discrimination would not be unlawful under any anti-discrimination law in the place where it occurred (meaning that there is no protection for employees in South Australia and New South Wales, and limited protection where state and territory laws provide exemptions allowing religious discrimination).<sup>287</sup>

Under **Australian Capital Territory** law, religious educational institutions are allowed to discriminate against staff based on their religious conviction if *'the discrimination is intended to enable, or better enable, the institution to be*

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<sup>285</sup> The Law Reform Commission of Western Australia has recommended narrowing this exemption to the ground of religious conviction and restricting its application to where the discrimination conforms with the doctrines of the religion, is reasonably necessary to avoid injury to religious susceptibilities and is reasonable and proportionate in the circumstances: WALRC, n1 at 187, rec 81. The Western Australian Government has broadly accepted the recommendations of the Law Reform Commission and indicated that it expects to include in its reforms provisions that strengthen equal opportunity protections for LGBTQ+ staff and students in religious schools: WA Attorney General statement re anti-discrimination laws, n241.

<sup>286</sup> FWA ss 153(2)(b), 195(2)(b), 351(2)(c) and 772(2)(b).

<sup>287</sup> FWA s 351(2)(a).

conducted in accordance with [its] ... doctrines, tenets, beliefs or teachings', and the institution publishes a written policy which is readily accessible to prospective and current staff.<sup>288</sup>

**New South Wales** and **South Australian** laws do not prohibit discrimination against workers based on their religious beliefs or activities in religious educational institutions at all.<sup>289</sup>

Under **Queensland** law, religious educational institutions are allowed to discriminate against staff 'in a way that is not unreasonable' if the worker 'openly acts in a way' that is contrary to the employer's religious beliefs.<sup>290</sup> The requirement to act consistently with the employer's religious beliefs must be a genuine occupational requirement connected with the person's work, although it does not necessarily have to be in the course of that work.<sup>291</sup> This requirement can amount to discrimination on any basis apart from age, race or impairment.<sup>292</sup> Therefore, it allows discrimination based on the religious beliefs or activities of a worker.

Under **Tasmanian** law, religious educational institutions are allowed to discriminate against staff based on their religious belief or affiliation or religious activity 'if the discrimination is in order to enable, or better enable, the educational institution to be conducted in accordance with [its]... tenets, beliefs, teachings, principles or practices'.<sup>293</sup>

Under **Western Australian** law, religious educational institutions are allowed to discriminate against staff based on their religious conviction if done 'in good faith in order to avoid injury to the religious susceptibilities of adherents of ... [the institution's] religion or creed'.<sup>294</sup> Western Australian law also allows private educational institutions to discriminate against staff based on their religious conviction if their work duties involve or relate to participation in religious observance or practice.<sup>295</sup>

In addition to these exemptions, additional exemptions based on whether a person meets the genuine occupational qualifications and/or inherent requirements of a role exist under Commonwealth, Australian Capital Territory, Northern Territory, Queensland, South Australian and Tasmanian laws.<sup>296</sup> How these exemptions apply, particularly if the exemptions for religious educational institutions above are repealed or amended, is discussed in section 5.3 below.

### **Victoria – a proportionate exemption**

By contrast to each of the jurisdictions above, Victorian laws have a narrower set of exemptions that do not allow discrimination to be reframed on a religious basis in order to avoid the prohibitions against LGBTQ+ discrimination.

Victorian laws allow religious educational institutions to discriminate against staff on the basis of their religious belief or activity (and only on this basis<sup>297</sup>), if it is reasonable and proportionate in the circumstances and:

- having regard to the nature of the educational institution and its religious doctrines, beliefs or principles,<sup>298</sup> conformity with the institution's religious doctrines, beliefs or principles is an inherent requirement of the position; and

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<sup>288</sup> ACT Act ss 46(2), (4)-(5).

<sup>289</sup> South Australia has a limited protection against discrimination based on religious dress and appearance and New South Wales has a limited race-based protection based on ethno-religious origin.

<sup>290</sup> Qld Act ss 25(2)-(8).

<sup>291</sup> Qld Act s 25(3)(b).

<sup>292</sup> Qld Act s 25(6).

<sup>293</sup> Tas Act s 51(2).

<sup>294</sup> WA Act s 73(1)-(2).

<sup>295</sup> WA Act s 66(1)(a).

<sup>296</sup> FWA ss 153(2)(a), 195(2)(a), 351(2)(b) and 772(a) (inherent requirements exception); ACT Act s 33C (inherent requirements exception); NT Act s 35(1)(b)(i) (genuine occupational qualification); Qld Act s 25(1) (genuine occupational requirement); SA Act s 34(2) (genuine occupational requirement) and Tas Act s 51(1) (genuine occupational requirement, based on the grounds of religious belief or affiliation or religious activity).

<sup>297</sup> Vic Act s 83A(3).

<sup>298</sup> Vic Act s 83A(2).

- the staff member cannot meet that inherent requirement because of their religious belief or activity.<sup>299</sup>

Inherent requirement exemptions are discussed in section 5.3 below.

### REFORMS NEEDED:

10. Amend Commonwealth, Australian Capital Territory, New South Wales, Queensland, South Australian, Tasmanian and Western Australian laws to limit the ability of religious educational institutions to discriminate against staff based on their religious beliefs or activities, except where the required religious beliefs or activities are relevant to the role in question and the discrimination is reasonable and proportionate in the circumstances. To implement this recommendation in Commonwealth, New South Wales and South Australian laws, protections against discrimination based on religious belief and activity (including having no religious belief or refusing to engage in religious activities) also have to be included in anti-discrimination laws.

## 5.2 Workers in faith-based service providers

This section discusses exemptions that apply to employment by faith-based service providers that deliver services to the general public, such as healthcare, aged care, disability support or housing.

### ARE FAITH-BASED SERVICE PROVIDERS ‘RELIGIOUS BODIES’?

As discussed further below, most jurisdictions provide exemptions to ‘religious bodies’ under their anti-discrimination laws. This section assumes that a faith-based service provider can be a ‘religious body’ for the purposes of anti-discrimination law. However, whether a particular faith-based service provider is a religious body that can take advantage of the various religious bodies’ exemptions found in anti-discrimination laws is not straightforward. There are few cases testing these exemptions, and the courts and tribunals in New South Wales, Victoria and Queensland that have considered these provisions have sometimes provided different, and at times contradictory, perspectives on how they should apply.

The religious bodies’ exemptions in each law also differ in both subtle and significant ways. Depending on the law, ‘religious bodies’ are usually defined as those bodies that are established ‘for religious purposes’<sup>300</sup> or ‘to propagate religion’.<sup>301</sup> In assessing whether a body is ‘established’ for religious purposes or to propagate religion, case law in New South Wales and Victoria has suggested that the body’s purpose must be assessed at the time of the alleged discrimination.<sup>302</sup> However, some laws also have unique formulations of the organisations that they are intended to apply to, or have no explicit definition of a religious body at all.<sup>303</sup> Absent clear provisions,<sup>304</sup> this leaves it unclear whether exemptions for religious bodies can apply to bodies that have dominant non-religious purposes, such as educational or commercial purposes.

<sup>299</sup> Vic Act s 83A(1).

<sup>300</sup> SDA s 37(1)(d); NT Act s 51(d); Qld 109(1)(d); SA Act s 50(1)(ba)–(c) and WA Act s 72(d).

<sup>301</sup> NSW Act s 56.

<sup>302</sup> *Christian Youth Camps Ltd v Cobaw Community Services Ltd* [2014] VSCA 75 (**Cobaw VCA**) at [221]–[223] (Maxwell P, Neave JA agreeing at [360]); *OV & OW* [2010] NSWCA 155 (**OV & OWNSWCA**) at [35]–[36] (Basten JA and Handley AJA, Allsop agreeing at [1], [9]).

<sup>303</sup> E.g. FWA ss 153(2)(b), 195(2)(b), 351(2)(c) and 772(2)(b) (‘institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings or a particular religion or creed’); Vic Act s 81 (‘a body established for a religious purposes; or ... an entity that establishes, or directs, controls or administers, an educational or other charitable entity that is intended to be, and is, conducted in accordance with religious doctrines, beliefs or principles’); NSW Act s 59A (‘faith-based organisation’). In the ACT, the definition of a ‘religious body’ was recently removed: see *Discrimination Amendment Act 2023* (ACT) s 9.

<sup>304</sup> E.g. SDA s 37(2); ACT Act s 32(3).

For example:

- In New South Wales, Wesley Mission was found to be a religious body even though propagating religion was not the organisation's sole purpose.<sup>305</sup> In reaching that conclusion, the Tribunal recognised the 'indirect approach' that may be taken to the propagation of religion through charitable institutions.<sup>306</sup> In this case, Wesley Mission was acting as a foster care provider.
- In Victoria, Christian Youth Camps (CYC) – a body connected to the Christian Brethren religion and the operator of an adventure resort – was found not to be a religious body because of the significant secular services it provided.<sup>307</sup> Instructive to the outcome in this case were factual findings that the CYC did not advertise its association with the Church and imposed no restrictions of any kind on who could use its facilities.<sup>308</sup> In fact, church camps constituted a very small part of its operations and CYC otherwise offered its facilities to a large range of customer groups that did not belong to the Church, such that one judge described it as having moved from the field of religious activity into the field of secular activity.<sup>309</sup>
- In Queensland, the St Vincent de Paul Society was found not to be a religious body despite being a 'society of lay faithful', having a significant spiritual objective, and having a close association with the Catholic Church.<sup>310</sup> The reasons for this finding were not given further elaboration by the Tribunal.

The conclusions in each of the cases above are difficult to reconcile with each other, even accounting for the subtle differences in the terms used in each statutory exemption. The purpose and character of the body, and how its religious purpose and character is evidenced before the decision-maker, may make a difference in whether it can be characterised as a religious body notwithstanding other non-religious purposes or activities undertaken.

Accordingly, whether a particular faith-based service provider will be entitled to rely on these exemptions will depend on both the exemption in question and the particular facts of the case.

## DISCRIMINATION AGAINST LGBTQ+ WORKERS

This section discusses exemptions that allow discrimination against LGBTQ+ workers (including prospective staff) by faith-based service providers.

### Commonwealth exemptions

Under Commonwealth laws, faith-based service providers may be allowed to discriminate against staff based on their sexual orientation or gender identity under general exemptions for religious bodies.<sup>311</sup> Discrimination is permitted where it 'conforms to the doctrines, tenets or beliefs' or is 'necessary to avoid injury to the religious susceptibilities of adherents' of the organisation's religion.<sup>312</sup>

Under the *Fair Work Act 2009* (Cth), gaps in protections under Commonwealth, state and territory laws may also enliven an exemption from protection under federal employment law.<sup>313</sup>

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<sup>305</sup> *OV v QZ (No 2)* [2008] NSWADT 115 (1 April 2008) (**OV v QZ NSWADT**) at [68]-[79]. This finding was not disturbed on appeal: *Members of the Board of the Wesley Mission Council v OV and OW* (No 2) [2009] NSWADTAP 57 (**OV & OW NSWADT (2009)**) at [8]; *OV & OW NSWCA*.

<sup>306</sup> *OV v QZ NSWADT* at [69]-[70].

<sup>307</sup> *Cobaw Community Health Services v Christian Youth Camps Ltd (Anti-Discrimination)* [2010] VCAT 1613 (**Cobaw VCAT**) at [254]. This finding was upheld on appeal: *Cobaw VCA* at [244]-[254] (Maxwell P, Neave JA agreeing at [360], Redlich JA agreeing at [440]).

<sup>308</sup> *Cobaw VCA* at [266]-[269] per Maxwell P (Neave JA agreeing at [360]; Redlich JA agreeing at [440] and [565]).

<sup>309</sup> *Cobaw VCA* at [266]-[269] per Maxwell P (Neave JA agreeing at [360]; Redlich JA agreeing generally at [440]).

<sup>310</sup> *Walsh v St Vincent de Paul Society Queensland (No 2)* [2008] QADT 32 (**Walsh**) at [76].

<sup>311</sup> SDA s 37(1)(d). Discrimination is also permitted on the grounds of marital or relationship status, family responsibilities, breastfeeding, or pregnancy. See also FWA ss 153(2)(b), 195(2)(b), 351(2)(c) and 772(2)(b).

<sup>312</sup> While the formulation under the FWA is slightly different, the exemption in FWA s 351(2)(a) may be relied on to import the exemptions found in the SDA or under state and territory laws.

<sup>313</sup> FWA s 351(2)(a).

## State and territory exemptions

In addition to the position under Commonwealth laws, four states have laws that leave LGBTQ+ staff employed by faith-based service providers vulnerable to discrimination.

Under **New South Wales** law, faith-based service providers are allowed to discriminate against staff based on their sexual orientation or gender identity under general exemptions for religious bodies.<sup>314</sup> The exemptions apply to discrimination *‘that conforms to the doctrines ... or is necessary to avoid injury to the religious susceptibilities of the adherents’* of the organisation’s religion.<sup>315</sup>

Under **Queensland** law, faith-based service providers may discriminate against staff *‘in a way that is not unreasonable’* if the worker *‘openly acts in a way’* that is contrary to the employer’s religious beliefs and the work *‘genuinely and necessarily involves adhering to and communicating the body’s religious beliefs’*.<sup>316</sup> The requirement to act consistently with the employer’s religious beliefs must be a genuine occupational requirement connected with the person’s work, although it does not necessarily have to be in the course of that work.<sup>317</sup> This requirement can amount to discrimination on any basis apart from age, race or impairment.<sup>318</sup> It therefore allows discrimination based on the sexuality or gender identity of a worker. Although Queensland laws protect unpaid workers from discrimination, this exemption also applies to these workers.<sup>319</sup> This exemption is among those foreshadowed for reform.<sup>320</sup>

Under **South Australian** law, faith-based service providers may be allowed to discriminate against staff based on their sexual orientation or gender identity under the general exemption for religious bodies.<sup>321</sup> Discrimination is permitted under this exemption if it *‘conforms with the precepts ... or is necessary to avoid injury to the religious susceptibilities of adherents’* of the organisation’s religion.<sup>322</sup> As discussed above, South Australia also permits discrimination on the ground of gender identity for the purposes of enforcing standards of appearance or dress that are reasonably required for employment.<sup>323</sup> Although South Australian laws protect unpaid workers from discrimination, these exemptions also extend to these workers.<sup>324</sup>

Under **Western Australian** law, faith-based service providers may be permitted to discriminate against staff based on their sexual orientation or gender history under general exemptions for religious bodies.<sup>325</sup> The exemption applies if the discrimination *‘conforms to the doctrines, tenets or beliefs ... or is necessary to avoid injury to the religious susceptibilities of adherents’* of the organisation’s religion.<sup>326</sup> However, as discussed in section 4.1, the discrimination protections for transgender people based on ‘gender history’ only apply in the first place to those who have been recognised as a ‘gender reassigned person’ under the *Gender Reassignment Act 2000* (WA). Accordingly, reliance on the exception may not even be necessary to be able to discriminate against transgender people. These provisions are among those foreshadowed for reform.<sup>327</sup>

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<sup>314</sup> NSW Act s 56(d).

<sup>315</sup> NSW Act s 56(d).

<sup>316</sup> Qld Act ss 25(2)-(8).

<sup>317</sup> Qld Act s 25(3)(b).

<sup>318</sup> Qld Act s 25(6).

<sup>319</sup> Qld Act Schedule 1 (definition of ‘work’).

<sup>320</sup> The Queensland Human Rights Commission recommended repealing this provision: QHRC, n1, rec 39. The Queensland Government has accepted in principle all the recommendations of the Queensland Human Rights Commission: Qld Government response to *Building Belonging*, n278.

<sup>321</sup> SA Act s 50(1)(c). See also SA Act s 50(1)(ba).

<sup>322</sup> SA Act s 50(1)(c).

<sup>323</sup> SA Act s 34(4).

<sup>324</sup> SA Act s 5 (definitions of ‘employer’ and ‘unpaid worker’).

<sup>325</sup> WA Act s 72(d).

<sup>326</sup> WA Act s 72(d).

<sup>327</sup> The Law Reform Commission of Western Australia has recommended narrowing this exemption to the ground of religious conviction for religious bodies providing government funded or commercial (for profit) goods and services and restricting its application to where the discrimination conforms



## REFORMS NEEDED:

11. Amend Commonwealth, New South Wales, Queensland, South Australian and Western Australian laws to remove exemptions that allow faith-based service providers to discriminate against LGBTQ+ staff.

## EXEMPTIONS BASED ON RELIGIOUS BELIEF

This section discusses exemptions that allow discrimination by faith-based service providers against workers (including prospective staff) based on their religious belief or activity, including holding different beliefs to their employer.

As stated above, these exemptions are discussed because LGBTQ+ discrimination can be reframed as a requirement placed on all workers to hold certain religious beliefs regarding gender or sexuality, or to practise or refrain from practising certain activities based on religious requirements. These requirements can affect both LGBTQ+ and non-LGBTQ+ workers who hold affirming views towards LGBTQ+ people, or who disagree with an organisation's view on matters relating to gender or sexuality.

### Jurisdictions with broad exemptions

Laws in seven jurisdictions allow discrimination by faith-based service providers against workers based on their religious beliefs or practices.

Under **Commonwealth** laws, faith-based service providers are allowed to discriminate against staff based on their religion:

- if done 'in good faith... in order to avoid injury to the religious susceptibilities of adherents of ... [the institution's] religion or creed';<sup>328</sup> and
- if the discrimination would not be unlawful under any anti-discrimination law in the place where it occurred (meaning that there is no protection for employees in South Australia and New South Wales, and limited protections where state and territory laws provide exemptions allowing religious discrimination).<sup>329</sup>

Under **Australian Capital Territory** law, faith-based service providers may discriminate against workers on the grounds of their religious conviction where the discrimination conforms to the doctrines, tenets or beliefs of the employer's religion, is necessary to avoid injury to the religious susceptibilities of adherents of that religion, and where the employer has a published policy that is readily accessible to the public.<sup>330</sup> Additionally, faith-based health service providers are permitted to discriminate against staff based on their religious convictions if their work duties involve or relate to religious teaching or practice.<sup>331</sup> Although it is not clear, there is an argument that the broader exception available for employment by religious bodies does not apply to faith-based health service providers, given the latter narrower exception exists allowing religious discrimination only in roles that involve or relate to religious teaching or practice (such as a hospital chaplain).

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with the doctrines of the religion, is reasonably necessary to avoid injury to religious susceptibilities and is otherwise reasonable and proportionate in the circumstances: WALRC, n1 at 177-8, recs 76-7. The Western Australian Government has broadly accepted the recommendations of the Law Reform Commission: WA Attorney General statement re anti-discrimination laws, n241.

<sup>328</sup> FWA ss 153(2)(b), 195(2)(b), 351(2)(c) and 772(2)(b).

<sup>329</sup> FWA s 351(2)(a).

<sup>330</sup> ACT Act s 32(1)(e).

<sup>331</sup> ACT Act s 44(b).

**New South Wales** and **South Australian** laws do not prohibit discrimination against workers based on their religious beliefs or activities in religious bodies at all.<sup>332</sup>

Under **Queensland** law, faith-based service providers may discriminate against staff *‘in a way that is not unreasonable’* if the worker *‘openly acts in a way’* that is contrary to the employer’s religious beliefs and the work *‘genuinely and necessarily involves adhering to and communicating the body’s religious beliefs’*.<sup>333</sup> The requirement to act consistently with the employer’s religious beliefs must be a genuine occupational requirement connected with the person’s work, although it does not necessarily have to be in the course of that work.<sup>334</sup> This requirement can amount to discrimination on any basis apart from age, race or impairment.<sup>335</sup> It therefore allows discrimination based on the religious beliefs or activities of a worker. This exemption is among those foreshadowed for reform.<sup>336</sup>

Under **Tasmanian** law, faith-based service providers are permitted to discriminate against staff based on their religious belief, affiliation or activity under general exemptions for religious observance.<sup>337</sup> The exemption applies if the discrimination *‘is carried out in accordance with the doctrine of a particular religion and is necessary to avoid offending the religious sensitivities of any person of that religion’*.<sup>338</sup> Tasmania is unique in providing this exception to any ‘person’ not just a religious body. Tasmania also allows discrimination against staff based on their religious belief, affiliation or activity if *‘the participation of the person in the teaching, observance or practice of a particular religion is a genuine occupational qualification or requirement in relation to the employment’*.<sup>339</sup>

Under **Western Australian** law, faith-based service providers may be permitted to discriminate against staff based on their religious convictions under general exemptions for religious bodies.<sup>340</sup> The exemption applies if the discrimination *‘conforms to the doctrines, tenets or beliefs ... or is necessary to avoid injury to the religious susceptibilities of adherents’* of the organisation’s religion.<sup>341</sup> Additionally, faith-based health service providers are permitted to discriminate against staff based on their religious convictions if their work duties involve or relate to religious observance or practice.<sup>342</sup>

In addition to these exemptions, additional exemptions based on whether a person meets the genuine occupational qualifications and/or inherent requirements of a role exist under Commonwealth, Australian Capital Territory, Northern Territory, Queensland, South Australian and Tasmanian laws.<sup>343</sup> How these exemptions apply, particularly if the exemptions for religious bodies above are repealed or amended, is discussed in section 5.3 below.

### **Victoria – a proportionate exemption**

By contrast to the above exemptions, exemptions for religious bodies under Victorian laws are intended to prevent discrimination from being reframed to avoid the prohibitions against LGBTQ+ discrimination.

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<sup>332</sup> South Australia has a limited protection against discrimination based on religious dress and appearance and New South Wales has a limited race-based protection based on ethno-religious origin.

<sup>333</sup> Qld Act ss 25(2)-(8).

<sup>334</sup> Qld Act s 25(3)(b).

<sup>335</sup> Qld Act s 25(6).

<sup>336</sup> The Queensland Human Rights Commission recommended repealing this provision: QHRC, n1, rec 39. The Queensland Government has accepted in principle all the recommendations of the Queensland Human Rights Commission: *Qld Government Response to Building Belonging*, n278.

<sup>337</sup> Tas Act s 52(d).

<sup>338</sup> Tas Act s 52(d).

<sup>339</sup> Tas Act s 51(1).

<sup>340</sup> WA Act s 72(d).

<sup>341</sup> WA Act s 72(d).

<sup>342</sup> WA Act s 66(1)(b).

<sup>343</sup> FWA ss 153(2)(a), 195(2)(a), 351(2)(b) and 772(a) (inherent requirements exception); ACT Act s 33C (inherent requirements exception); NT Act s 35(1)(b)(i) (genuine occupational qualification); Qld Act s 25(1) (genuine occupational requirement); SA Act s 34(2) (genuine occupational requirement) and Tas Act s 51(1) (genuine occupational requirement, based on the grounds of religious belief or affiliation or religious activity).

Under **Victorian** law, faith-based service providers may be allowed to discriminate against staff based on their religious belief or activity (and only on this basis<sup>344</sup>), if it is reasonable and proportionate in the circumstances and:

- having regard to the nature of the faith-based service provider and its religious doctrines, beliefs or principles,<sup>345</sup> conformity with the service provider's religious doctrines, beliefs or principles is an inherent requirement of the position, and
- the staff member cannot meet that inherent requirement because of their religious belief or activity.<sup>346</sup>

Inherent requirement exemptions are discussed in section 5.3 below.

### REFORMS NEEDED:

12. Amend Commonwealth, Australian Capital Territory, New South Wales, Queensland, South Australian, Tasmanian and Western Australian laws to limit the ability of religious bodies to discriminate against staff based on their religious beliefs or activities, except where the required religious beliefs or activities are relevant to the role in question and the discrimination is reasonable and proportionate in the circumstances. To implement this recommendation in Commonwealth, New South Wales and South Australian laws, protections against discrimination based on religious belief and activity (including having no religious belief or refusing to engage in religious activities) also have to be included in anti-discrimination laws.

## 5.3 Inherent requirements and genuine occupational qualifications

This section discusses exemptions that allow employers to discriminate against workers (including prospective staff) either based on the inherent requirements or genuine occupational qualifications of a role.

These exemptions have an important function in ensuring employers can hire people who are able to and/or have the appropriate qualifications to perform the work required of them. However, if these exemptions allow an employer to characterise having a particular sexual orientation, gender identity and/or certain religious beliefs as being an 'inherent requirement' or 'genuine occupational qualification' of a role, they may provide another pathway for LGBTQ+ discrimination in employment by religious educational institutions and faith-based service providers. This risk is best illustrated in the experience of Steph Lentz.

### WHAT ARE INHERENT REQUIREMENTS OR GENUINE OCCUPATIONAL QUALIFICATIONS?

Before setting out the relevant exemptions, it is important to first identify the meaning of the terms 'inherent requirements' and 'genuine occupational qualifications' – noting that each law discussed below varies.

Inherent requirements are generally understood as those requirements which are essential to or defining characteristics of a role and which go to the employee's ability to perform the tasks required of them. However, these requirements are not necessarily confined to an employee's physical capacity but can go to the context in which the work will be performed, informed by how the employer arranges its business and the terms and conditions of service.<sup>347</sup> For this reason, the religious character of an employer may be relevant to whether the requirement for an

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<sup>344</sup> Vic Act s 82A(3).

<sup>345</sup> Vic Act s 82A(2).

<sup>346</sup> Vic Act s 82A(1).

<sup>347</sup> *X v Commonwealth* [1999] HCA 63 (*X v Cth*) at [31]-[37] per McHugh J and [106]-[109] per Gummow and Hayne JJ; *Qantas Airways Ltd v Christie* [1998] HCA 18 (*Christie*) at [33]-[40] per Gaudron J (with Brennan CJ agreeing at [1]), [72]-[87] per McHugh J, [106]-[107], [114] per Gummow J. See also *Shizas v Commissioner of Police* [2017] FCA 61 (*Shizas*) at [136].

employee to share its employer's religious views, including on matters of sexuality or gender identity, is inherent to (in the sense of being essential to or a defining characteristic of) a particular role.

Genuine occupational qualifications go to considerations of whether a person's protected attribute makes them better suited to perform a particular role, for example, for reasons of authenticity or empathy.<sup>348</sup> In this regard, the religious needs of service users may make an employee with a particular attribute better suited to performing work for a religious employer tasked with meeting those needs.

However, while legal commentators describe different policy intentions behind 'inherent requirements' and 'genuine occupational qualifications' exceptions, some jurisprudence has merged the two concepts,<sup>349</sup> and legislation in Queensland, South Australia and Tasmania uses phrases that evoke aspects of each concept.<sup>350</sup>

Nevertheless, whether a requirement is inherent to a particular role and/or whether an occupational qualification is genuine are not matters entirely up to the employer to determine. It appears clear that, at least in respect of an inherent requirement exception, an employer cannot make a requirement essential when, in truth, it is not, or organise its business simply to permit discrimination.<sup>351</sup>

## RELEVANT EXCEPTIONS

Laws in five jurisdictions have broader 'inherent requirements', 'genuine occupational qualifications' or similar exceptions that may leave religious educational institutions and faith-based service providers able to discriminate against LGBTQ+ people or people with LGBTQ-affirming religious beliefs. When the specific religious exemptions discussed above are amended, the following exemptions must also be considered alongside any reforms to ensure that they do not provide an alternative loophole which permits LGBTQ+ discrimination.

### Jurisdictions with broader exceptions

Under the **Commonwealth** *Fair Work Act 2009*, an employer may discriminate against an employee if having a particular religion is an inherent requirement of a particular position.<sup>352</sup> It is not clear whether this provision could be used by a religious educational institution or faith-based service provider to discriminate against a person who holds LGBTQ-affirming religious beliefs. However, case law has emphasised that this exception relies on the reasons that the employer genuinely believed at the time of taking the adverse action against the employee, rather than whether objectively the employee can in fact perform the inherent requirements of a particular position.<sup>353</sup> This makes this exception broader in effect than similar exceptions under anti-discrimination laws.

Under **Queensland** law, employing persons of a particular religion to teach in a school established for students of that religion is expressly contemplated by the 'genuine occupational requirements' exemption.<sup>354</sup> However, how specific a school can be as to the nature of those beliefs is not clear. Further, this exception is in addition to the exceptions discussed above which allow a religious educational institution or religious body to discriminate, 'in a way which is not unreasonable', if a person openly acts in a way which is contrary to the employer's religious beliefs.<sup>355</sup>

Under **South Australian** law, an employer may discriminate against an employee where it is a genuine occupational requirement that the person has a particular sexual orientation or gender identity.<sup>356</sup>

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<sup>348</sup> N Rees et al (2018) *Australian Anti-Discrimination and Equal Opportunity Law*, 3<sup>rd</sup> ed, Sydney: Federation Press at [11.2.32].

<sup>349</sup> Rees et al, n348 at [11.2.32]-[11.2.33]; *Chivers v Queensland (Queensland Health)* [2014] QCA 141 at [40]; *Ruiz v Credit Corp Group Limited* [2015] QCAT 342; *Butterworth v Independence Australia Services* [2015] VCAT 2056 at [211]-[215].

<sup>350</sup> Qld Act s 25(1); SA Act s 34(2); Tas Act s 51(1).

<sup>351</sup> *Christie* at [34] per Gaudron J; *X v Cth* at [37] per McHugh J.

<sup>352</sup> FWA ss 153(2)(a), 195(2)(a), 351(2)(b) and 772(a).

<sup>353</sup> *Shizas* at [151]-[152], [174], [180]-[181]; *Western Union Business Solutions (Australia) Pty Ltd v Robinson* [2019] FCAFC 181 at [165] per O'Callaghan and Thawley JJ.

<sup>354</sup> Qld Act s 25(1).

<sup>355</sup> Qld Act s 25(2)-(8).

<sup>356</sup> SA Act s 34(2).

Under **Tasmanian** law, an employer may discriminate against an employee on the grounds of their religious belief, affiliation or activity where participation in the teaching, observance or practice of a particular religion is a genuine occupation qualification or requirement in relation to the employment.<sup>357</sup>

Under **Northern Territory** law, an employer may discriminate against an employee based on a genuine occupational qualification, or where the person is unable to adequately perform the inherent requirements of the work (including after any special needs are accommodated).<sup>358</sup> These exceptions apply to all protected attributes.

#### **Australian Capital Territory and Victoria – proportionate exceptions**

By contrast to the above exemptions, Australian Capital Territory and Victorian laws have narrower exemptions.

The **Australian Capital Territory** has two carefully circumscribed ‘inherent requirements’ and ‘genuine occupational qualifications’ exceptions.<sup>359</sup> To rely on either exception, an employer must show that any discrimination is reasonable, proportionate and justifiable in the circumstances.<sup>360</sup> Further, the ‘genuine occupational qualification’ exception cannot be used to impose a requirement that an employee have a particular religious conviction.<sup>361</sup> These and other limitations make it unlikely that a religious educational institution or faith-based service provider in the Australian Capital Territory could rely on these exceptions to discriminate against a person based on their sexual orientation, gender identity and/or LGBTQ-affirming religious beliefs.

**Victorian** law, which maintains the distinction between an ‘inherent requirement’ and ‘genuine occupational requirement’, has a carefully circumscribed ‘inherent requirement’ exception for employment by religious educational institutions and religious bodies, as discussed above.

#### **REFORMS NEEDED:**

13. Amend Commonwealth, Queensland, South Australian, Tasmanian and Northern Territory laws to ensure that ‘inherent requirements’, ‘genuine occupational qualifications’ and similar exemptions cannot be used by religious educational institutions and faith-based service providers as an alternative pathway to discriminate against staff based on their sexual orientation or gender identity, or because they hold LGBTQ-affirming religious beliefs.

## **5.4 Religious observance and practice**

In addition to each of the exceptions discussed above, each jurisdiction has exemptions relating to religious observance and practice that may be relevant to the treatment of staff in religious educational institutions and faith-based service providers. In many cases, these exceptions are consistent with the international human rights law obligations discussed in Part III and we do not suggest that the exceptions discussed here should all be removed or replaced. Rather, these exceptions demonstrate that religious autonomy over religious observance and practice can be preserved without reliance on the broader exceptions applying to staff discussed above.

With some variation, each jurisdiction at least allows for discrimination in relation to the selection or appointment of persons to exercise functions connected to religious observance or practice.<sup>362</sup> While Tasmanian law limits this

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<sup>357</sup> Tas Act s 51(1).

<sup>358</sup> NT Act s 35(b).

<sup>359</sup> ACT Act ss 33B and 33C.

<sup>360</sup> ACT Act ss 33B(1)(b) and 33C(b).

<sup>361</sup> ACT Act s 33B(2).

<sup>362</sup> SDA s 37(1)(c); ACT s 32(1)(c); NSW Act s 56(c)-(d); NT Act s 51(c)-(d); Qld Act s 109(c); SA Act s 50(1)(ba)-(c); Tas Act s 52(c); Vic Act s 82(1)(c); WA Act s 72(c); each incorporated into federal employment law at least by FWA s 351(2)(a).

discrimination to the grounds of religious belief, affiliation or activity (and gender if religious doctrines require it),<sup>363</sup> Commonwealth, Northern Territory, Queensland and Victorian laws extends these exceptions to the selection or appointment of any person *participating* in religious observance or practice regardless of which attribute is being discriminated against.<sup>364</sup> More broadly, under s 56(c) of the NSW Act, religious bodies may appoint persons '*in any capacity*', and this '*appointment*' does not have to be connected to religious observance or practice.<sup>365</sup>

In *OV & OW*, the NSW Court of Appeal considered the meaning of the word '*appointment*' in the context of s 56(c) of the NSW Act. In that case, the Court indicated that s 56(c) could apply to the appointment of an employee to a particular office or to carry out particular activities on behalf of a religious body.<sup>366</sup> While this interpretation relates to the broad exemption in s 56(c) of the NSW Act which allows appointments '*in any capacity*', it suggests that exemptions governing religious observance and practice can apply to allow religious bodies to select or appoint people from among their staff to exercise religious functions or perform religious practices, such as leading prayers or participating in religious ceremonies, as they wish. In *Walsh*, the words '*selection*' or '*appointment*' also did not prevent the Tribunal's consideration of whether the religious observance or practice exception applied to a volunteer worker who was required to perform some functions with spiritual aspects (such as leading prayers).<sup>367</sup> These cases tend to show that the exceptions for religious observance and practice can be used to preserve religious autonomy in employment matters without the need for broader exemptions.

Uniquely, South Australian law exempts from its anti-discrimination obligations the '*administration*' of religious bodies in accordance with the precepts of their religion.<sup>368</sup> The scope of this exemption is unclear, but the second reading speech suggests that it was not intended to apply to the treatment of students or the hiring of staff, given specific provisions allowing religious educational institutions to discriminate against staff on the basis of sexuality were instead inserted to replace an existing exemption which had until then applied broadly to any religious institution.<sup>369</sup> That exemption had allowed religious institutions, including religious educational institutions, to discriminate against same-sex couples and people based on their sexuality '*in the course of the administration of that institution*'.<sup>370</sup>

Finally, for completeness, all jurisdictions also either exclude the ordination and appointment of priests, ministers of religion or members of a religious order from the scope of their anti-discrimination obligations altogether, or in the case of Tasmania, allow discrimination in such ordinations and appointments on the grounds of gender and religious belief, affiliation or activity.<sup>371</sup> These exemptions are less relevant to workers but mean that religious institutions are free to select their own religious leaders, who often sit at the apex of governance structures in religious educational institutions and faith-based service providers, as they wish.

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<sup>363</sup> Tas Act ss 27(1)(a) and 52(c).

<sup>364</sup> SDA s 37(1)(c); NT Act s 51(c) (see also s 51(d)); Qld Act s 109(c); Vic Act s 82(1)(c); WA Act s 72(c)

<sup>365</sup> NSW Act s 56(c).

<sup>366</sup> *OV & OW* NSWCA at [69]–[70] per Basten JA and Handley AJA (Allsop P agreeing).

<sup>367</sup> *Walsh* at [73] and [77].

<sup>368</sup> SA Act s 50(1)(ba).

<sup>369</sup> Equal Opportunity (Miscellaneous) Amendment Bill 2009 (SA), Second Reading Speech, House of Assembly, 30 April 2009, The Hon M.J. Atkinson (Attorney-General) at 2565–2566.

<sup>370</sup> *Equal Opportunity Act 1984* (SA) s 50(2) (as at 1 October 2009).

<sup>371</sup> SDA s 37(1)(a); ACT Act s 32(1)(a); NSW Act s 56(a); NT Act s 51(a); Qld Act s 109(a); SA Act s 50(1)(a); Tas Act ss 27(1)(a) and 52(a); Vic Act s 82(1)(a); WA Act s 72(a); each incorporated into federal employment law at least by FWA s 351(2)(a).

### REFORMS NEEDED:

14. Repeal sections 56(c) of the NSW Act and 50(1)(ba) of the SA Act and replace them with targeted exemptions allowing religious bodies (including religious educational institutions) to select or appoint people of their own faith to exercise religious functions or participate in religious observance or practice consistently with religious traditions.
15. Following the reforms in recommendations 9 – 14, monitor the use of religious observance or practice exemptions in each jurisdiction to consider whether any limitations are necessary on their use by religious educational institutions or faith-based service providers to adequately protect an individual staff member's freedom of thought, conscience and religion.

## 6. PEOPLE RELYING ON FAITH-BASED SERVICE PROVIDERS FOR SERVICES AND SUPPORT

LGBTQ+ people seeking access to services, goods and accommodation from faith-based service providers can be legally discriminated against under Commonwealth, New South Wales, Queensland, South Australian and Western Australian laws based on their sexual orientation or gender identity. Meanwhile, laws in the Australian Capital Territory, Northern Territory, Tasmania and Victoria offer stronger protections.

Figure 14: LGBTQ+ discrimination protections for people relying on services and support provided by faith-based service providers by jurisdiction

| LAWS AT A GLANCE:  | CTH                  | ACT | NSW | NT  | QLD | SA | TAS | VIC    | WA |
|--|----------------------|-----|-----|-----|-----|----|-----|--------|----|
| Are LGBTQ+ people adequately protected from discrimination when seeking access to services, goods or accommodation from faith-based service providers? | No, except aged care | Yes | No  | Yes | No  | No | Yes | Partly | No |

### 6.1 Understanding the complexity of the law

This section discusses exemptions that allow discrimination against LGBTQ+ people who rely on faith-based service providers for services and support, such as healthcare, aged care, housing and financial support services.

However, given the diversity of faith-based service providers and the broad range of services, goods, accommodation and other support they provide, it can be complex to identify which anti-discrimination protections and relevant exemptions may apply. This section explores some of this complexity before the next section looks at specific exemptions that apply to faith-based service providers.

### IDENTIFYING THE AREA OF PROTECTION

Each jurisdiction prohibits discrimination across various areas of public life. The areas (and the protections afforded in each area) vary across jurisdictions, but the main areas of protection are in:

- the provision of goods and services;
- the supplying of residential and business accommodation;
- access to premises or facilities;

- the disposal of interests in land.<sup>372</sup>

If the government outsources functions or powers to a faith-based service provider, the provider may also be prohibited from discriminating in the specific area of the ‘administration of laws and government programs’, which is included under some but not all anti-discrimination laws.<sup>373</sup> Only Commonwealth, Australian Capital Territory, Northern Territory, Queensland and Tasmanian laws prohibit discrimination in the administration of laws and government programs.

The lack of consistency in the areas of protection across jurisdictions means that the same service can be characterised in different ways under different laws, and this can have an impact on whether a specific exemption applies. For example, providing refuge to a person experiencing homelessness might be characterised as the provision of a service under one law, the supplying of accommodation under another law, or as falling under both areas (i.e. both an accommodation service and the supplying of accommodation). Yet different exemptions with different requirements may apply to each area. This makes it complex to determine whether an exception really applies if the same service could be characterised in a different way under another part of the law which does not have a relevant exemption.

## NON-RELIGIOUS EXEMPTIONS MAY ALSO APPLY

Importantly, even if a faith-based service provider cannot rely on a specific religious exemption, they may be able to avail themselves of a range of exemptions that apply to other organisations. For example:

- every jurisdiction provides various exceptions allowing voluntary bodies, small clubs and not-for-profit associations to discriminate in the admission of members and the provision of benefits, facilities or services to their members.<sup>374</sup> The protections and definitions vary from law to law, but generally apply to exclude or limit the operation of anti-discrimination laws from community-based groups and associations that are small or do not operate for profit;
- every jurisdiction except the Australian Capital Territory provides an exemption to charities allowing them to give effect to charitable instruments (such as bequests) that would otherwise discriminate;<sup>375</sup>
- every jurisdiction provides various special measures exceptions which can be used to redress historical disadvantage for particular groups.<sup>376</sup> Laws in the Australian Capital Territory, Northern Territory, Queensland, Tasmania and Victoria also have provisions dealing with accommodating the special needs of people with any of the attributes protected by their laws;<sup>377</sup>

<sup>372</sup> See e.g. SDA ss 22-25 (goods, services and facilities; accommodation; land; clubs); ACT Act ss 19-22 and 23A-23B (access to premises; goods, services and facilities; accommodation; clubs; sporting activities; competitions); NSW Act ss 38M-38O and 49ZP-49ZR (goods and services; accommodation; registered clubs); NT Act ss 28, 41 and 46 (goods, services and facilities; accommodation; clubs); Qld Act ss 45-46, 76-77, 81-83 and 93-95 (goods and services; disposition of land; accommodation; club membership and affairs); SA Act ss 35, 38, 39 and 40 (associations; disposing of an interest in land; goods and services; accommodation); Tas Act s 22 (provision of facilities, goods and services; accommodation; membership and activities of clubs); Vic Act ss 44, 50, 52-53, 57, 64-65 and 71 (goods and services; disposal of land; accommodation; access to public premises; applications for club membership and against club members; sport); WA Act ss 35AK-35AP and 35X-35ZB (access to places and vehicles; goods, services and facilities; accommodation; land; clubs; sport).

<sup>373</sup> SDA s 26; ACT Act s 23C; NT Act s 49A; Qld Act s 101; Tas Act s 22(1)(f).

<sup>374</sup> SDA s 39; ACT Act ss 26(1)(c) and 31; NSW Act s 57; NT Act s 47 (exception in respect of clubs); Qld Act ss 46(2) and 93-95 (prohibitions in respect of clubs exclude not-for-profit organisations); SA Act s 35 (discrimination in membership and benefits provided to members of an association); Tas Act ss 22(1)(e), 32 and 40 (membership and activities of clubs are limited to clubs with more than 30 members with exceptions for race and age); Vic Act ss 64-69 (prohibitions in respect of clubs are limited to unlicensed clubs with more than 30 members and which operate at least partly from their own funds); WA Act s 71.

<sup>375</sup> SDA s 36; NSW Act s 55; NT Act s 52; Qld Act s 110; SA Act ss 45, 64, 80, 85N and 85Zi; Tas Act s 23; Vic Act s 80; WA Act s 70. The Law Reform Commission of Western Australia has recommended restricting the exemption to acts that are consistent with the stated purpose of the relevant charity and reasonable and proportionate to the public benefit that the charity is trying to achieve: WALRC, n1 at 163, rec 70.

<sup>376</sup> SDA s 7D; ACT s 27; NSW Act s 126A; NT Act s 57; Qld Act ss 104-105; SA Act ss 47 and 85ZK; Tas Act ss 25 and 26; Vic Act ss 12 and 88; WA Act ss 31, 35K, 35ZD, 51, 66R and 66ZP.

<sup>377</sup> ACT s 27(1)(b); NT Act s 24; Qld Act s 104; Tas Act ss 25-26; Vic Act s 88.



- every jurisdiction allows organisations to obtain temporary exemptions.<sup>378</sup>

These complexities mean that whether a particular faith-based service provider is allowed to discriminate requires careful consideration of the particular facts of the case and the law in question.

## **FAITH-BASED SERVICE PROVIDERS AS RELIGIOUS BODIES?**

Finally, as discussed in section 5.2 above, most jurisdictions provide exemptions to religious bodies and there have been conflicting legal authorities as to if and when these exemptions apply to faith-based service providers. Accordingly, whether a particular faith-based service provider is entitled to rely on these exemptions will depend on both the exemption in question and the facts of the case, including how they arrange their operations.

Further, as discussed in section 5.4, most jurisdictions provide specific exemptions insofar as the discrimination involves selecting or appointing persons to participate in religious observance or practice.<sup>379</sup> Faith-based service providers providing services that can be characterised as religious observance or practice can avail themselves of these exceptions. The ordination and appointment of religious leaders is also generally left to the discretion of religious bodies.<sup>380</sup>

## **REVIEWING EACH LAW AS A WHOLE**

Given the complexity, this section of the report starts by focussing on exemptions that are uniquely relevant to faith-based service providers. However, unlike previous sections, it is necessary to consider all the exemptions in each law, taken together as a whole, as this tells the full story of when faith-based service providers are allowed to discriminate in the delivery of their services, goods and accommodation, against whom and on what basis. This becomes more apparent when we discuss necessary reforms later in this report.

In this section, looking at all the exemptions together (rather than in separate sections based on whether they discriminate specifically against LGBTQ+ people or others more generally) is important for two reasons.

First, many laws provide general exemptions which are available to any organisation delivering goods, services or accommodation. Faith-based service providers may be able to rely on these exemptions in the same way as other non-religious organisations, and they tell part of the story of when faith-based service providers can provide specific services to people who belong to their religious communities to meet specific needs.

Secondly, most of the religious bodies' exemptions discussed in this section apply to all religious bodies across all forms of goods, services, facilities and/or accommodation, and do not distinguish between religious bodies providing services to their religious communities versus those providing services to the general public. For example, the same exception for religious bodies might regulate all these vastly different forms of access to goods, services, facilities and/or accommodation associated with religious bodies:

- whether a place of worship can have segregated entrances or spaces for men and women;
- whether a convent or temple can reserve its accommodation for people of a particular faith and gender, such as nuns or monks;
- whether a burial plot can be reserved for people of a particular faith;
- whether a church can refuse to hire its hall to a particular group that does not share its religious beliefs;
- whether a health service at a large faith-based hospital could be refused to a person simply because they are pregnant or transgender;

<sup>378</sup> SDA s 44; ACT Act s 109; NSW Act s 126; NT Act s 59; Qld Act s 113; SA Act s 92; Tas Act ss 56-57; Vic Act s 89; WA Act s 135.

<sup>379</sup> SDA s 37(1)(c); NT Act s 51(c) (see also s 51(d)); Qld Act s 109(c); Vic Act s 82(1)(c); WA Act s 72(c). See also NSW Act s 56(c) and SA Act s 50(1)(ba).

<sup>380</sup> SDA s 37(1)(a); ACT Act s 32(1)(a); NSW Act s 56(a); NT Act s 51(a); Qld Act s 109(a); SA Act s 50(1)(a); Tas Act s 52(a); Vic Act s 82(1)(a); WA Act s 72(a).

- whether a faith-based hostel or refuge could offer its accommodation only to cisgender women who are homeless or seeking refuge;
- whether a faith-based agency could refuse a same-sex couple from applying to be foster carers or adoptive parents.

For these reasons, unlike the preceding sections on students and workers, it is much more difficult to isolate and discuss separate exemptions as relevant to one ground or another. Instead, this section looks at the law in each jurisdiction as a whole to determine the overall question of whether a faith-based service provider is permitted to discriminate against LGBTQ+ people, whether directly or indirectly, in ways that go beyond meeting justified religious needs.

## 6.2 Discrimination against LGBTQ+ people

This section discusses exemptions that allow discrimination by faith-based service providers against LGBTQ+ people in the provision of services, goods, accommodation and other forms of support.

### COMMONWEALTH EXEMPTIONS

#### Exemptions in the provision of services, goods and accommodation

Under Commonwealth law, faith-based service providers may be allowed to discriminate against people accessing services, goods or facilities based on their sexual orientation or gender identity under the general exemption for religious bodies.<sup>381</sup> Discrimination under this exemption is permitted on each of the protected attributes covered by the SDA where it ‘conforms to the doctrines, tenets or beliefs’ or is ‘necessary to avoid injury to the religious susceptibilities of adherents’ of the organisation’s religion. However, this exemption does not apply to the provision of aged care by Commonwealth-funded aged care providers.<sup>382</sup>

Commonwealth law also specifically allows religious bodies to discriminate against LGBTQ+ people in the provision of accommodation, including business or residential accommodation.<sup>383</sup> This exemption is unqualified, meaning the discrimination can be for any reason. It also applies to most of the attributes covered by the SDA, including sex, intersex status, marital or relationship status and pregnancy.

In respect of the protected attributes covered by the SDA, faith-based service providers are also able to:

- select or appoint people to participate in any religious observance or practice;<sup>384</sup>
- rely on other general exemptions, such as for voluntary bodies,<sup>385</sup> charities,<sup>386</sup> single-sex spaces and services,<sup>387</sup> and preventing organisations from being required to request information or keep records about non-binary genders;<sup>388</sup>
- apply for temporary exemptions.<sup>389</sup>

Commonwealth law does not prohibit discrimination against people based on their religious beliefs or activities in the provision of services, goods or accommodation. Accordingly, faith-based service providers may discriminate against

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<sup>381</sup> SDA s 37(1)(d). Discrimination is also permitted on each of the attributes protected by the SDA, including sex, marital or relationship status, pregnancy and intersex status.

<sup>382</sup> SDA s 37(2).

<sup>383</sup> SDA ss 4 (definition of ‘accommodation’) and 23(3)(b).

<sup>384</sup> SDA s 37(1)(c).

<sup>385</sup> SDA s 39.

<sup>386</sup> SDA s 36.

<sup>387</sup> SDA ss 7D, 21(3) (education), 23(3)(c) (accommodation), 25(4) (clubs), 32 (services) and 34(2) (student accommodation).

<sup>388</sup> SDA s 43A.

<sup>389</sup> SDA s 44.

any person with different or no religious beliefs, including beliefs relating to matters of sexuality or gender, when delivering services, goods or accommodation.

### Exemptions specific to marriage

Commonwealth law also allows certain religious people to refuse to solemnise a marriage between LGBTQ+ people, namely:

- ministers of religion, where the refusal *‘conforms to the doctrines, tenets or beliefs’* of their religious body or organisation or is *‘necessary to avoid injury to the religious susceptibilities of adherents’* of their religion, or where the minister’s religious beliefs do not allow them to solemnise the marriage;<sup>390</sup>
- religious marriage celebrants, where their beliefs do not allow them to solemnise the marriage;<sup>391</sup> and
- Defence Force chaplains, where the refusal *‘conforms to the doctrines, tenets or beliefs’* of their religious body or organisation or is *‘necessary to avoid injury to the religious susceptibilities of adherents’* of their religion, or where the minister’s religious beliefs do not allow them to solemnise the marriage.<sup>392</sup>

These exemptions extend to the personal religious beliefs of an individual not necessarily tethered to any institutional doctrine, tenet or belief or religious susceptibilities. As of 10 January 2024, there were approximately 23,870 ministers of religion and 570 religious marriage celebrants authorised to solemnise marriages in Australia, compared with approximately 9,730 civil celebrants and 260 state and territory officers authorised to solemnise marriages in Australia.<sup>393</sup>

Commonwealth law also makes it lawful for religious bodies to refuse to make a facility available, or to provide goods or services, for the purposes of the solemnisation of a marriage (including purposes intrinsic to or directly associated with a marriage).<sup>394</sup> The refusal must either *‘conform... to the doctrines, tenets or beliefs’* or be *‘necessary to avoid injury to the religious susceptibilities of adherents’* of the organisation’s religion.<sup>395</sup> The effect of this provision is to override any state or territory anti-discrimination law that generally prohibits discrimination in the provision of goods, services or facilities to the extent that they apply to faith-based service providers and other religious bodies.

The only other Commonwealth anti-discrimination law that provides religious bodies with a specific exemption is the *Age Discrimination Act 2004* (Cth). It allows discrimination based on age which *‘conforms to the doctrines, tenets or beliefs... or is necessary to avoid injury to the religious sensitivities of adherents’* of the organisation’s religion.<sup>396</sup>

## STATES WITH BROAD EXEMPTIONS

In addition to the position under Commonwealth law, four states have laws that leave LGBTQ+ people seeking services, goods and accommodation particularly vulnerable to discrimination by faith-based service providers. New South Wales, Queensland, South Australian and Western Australian laws have the broadest exemptions for faith-based service providers apart from the Commonwealth.

### New South Wales

Under New South Wales law, faith-based service providers may be allowed to discriminate against people accessing services, goods or accommodation based on their sexual orientation or gender identity under general exemptions for

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<sup>390</sup> SDA s 40(2A); *Marriage Act 1961* (Cth) s 47.

<sup>391</sup> SDA s 20(2AA); *Marriage Act 1961* (Cth) s 47A.

<sup>392</sup> SDA s 40(2AB); *Marriage Act 1961* (Cth) s 81.

<sup>393</sup> <https://marriage.ag.gov.au/> [accessed 10 January 2024].

<sup>394</sup> *Marriage Act 1961* (Cth) s 47B.

<sup>395</sup> *Marriage Act 1961* (Cth) s 47B(1).

<sup>396</sup> *Age Discrimination Act 2005* (Cth) s 35.

religious bodies.<sup>397</sup> The exemptions apply to discrimination based on any protected attribute *'that conforms to the doctrines ... or is necessary to avoid injury to the religious susceptibilities of the adherents'* of the organisation's religion.<sup>398</sup>

New South Wales law also specifically allows faith-based organisations to discriminate on the grounds of sexual orientation and gender identity in the provision of adoption services.<sup>399</sup> However, this exemption does not permit discrimination against a child who is up for adoption.<sup>400</sup> With the decision in *OV & OW*<sup>401</sup>, the unintended effect of this exemption may have been to provide faith-based service providers with a narrower exemption when providing adoption services to children than they enjoy when they provide foster care services, given the general religious body exemption remains in place and could extend to both prospective parents and children placed in care.<sup>402</sup>

New South Wales law does not prohibit discrimination against people based on their religious beliefs or activities in the provision of services, goods or accommodation.<sup>403</sup> Accordingly, faith-based service providers may discriminate against any person with different or no religious beliefs, including beliefs relating to matters of sexuality or gender, when delivering services, goods or accommodation.

Faith-based service providers are also able to:

- provide access to facilities, services or opportunities to meet the special needs of people with a particular ethno-religious origin;<sup>404</sup>
- rely on other general exemptions, such as for voluntary bodies,<sup>405</sup> charities,<sup>406</sup> single-sex spaces and services,<sup>407</sup> and aged care facilities established for a particular sex or race;<sup>408</sup>
- apply for temporary exemptions.<sup>409</sup>

## Queensland

Under Queensland law, faith-based service providers may be allowed to discriminate against people accessing services, goods and accommodation based on their sexual orientation or gender identity either under general exemptions for religious bodies or under a specific exemption for accommodation that is *'under the direction or control of a body established for religious purposes'*.<sup>410</sup> The exemptions apply to discrimination based on any protected attribute that accords with *'the doctrine of the religion concerned'* and is *'necessary to avoid offending the religious sensitivities'* of religious adherents.<sup>411</sup> 'Accommodation' is defined broadly and includes many forms of residential and

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<sup>397</sup> NSW Act s 56(d).

<sup>398</sup> NSW Act s 56(d).

<sup>399</sup> NSW Act s 59A.

<sup>400</sup> NSW Act s 59A(2).

<sup>401</sup> *OV & OW* NSWCA.

<sup>402</sup> Section 59A of the NSW Act was introduced to coincide with adoption equality for same-sex couples in New South Wales: *Adoption Amendment (Same Sex Couples) Act 2010* (NSW) Schedule 2. At the time, *OV & OW* NSWCA had not yet been finally decided and the exemption was introduced on the urging of Anglican and Catholic faith-based service providers who threatened to withdraw their adoption services if they were required to facilitate adoption to same-sex couples: see NSW Standing Committee on Law and Justice (2009) [Adoption by same-sex couples](#) at [6.43]-[6.52].

<sup>403</sup> New South Wales has a limited race-based protection based on ethno-religious origin. A special needs exception also applies in respect of race-based discrimination: NSW Act s 21.

<sup>404</sup> NSW Act s 21.

<sup>405</sup> NSW Act s 57.

<sup>406</sup> NSW Act s 55.

<sup>407</sup> NSW Act ss 31A(3)(b)-31A(4) (education), 33(2) (gendered skills) and 34A(3)-(5) (single-sex registered clubs and single services provided to club members).

<sup>408</sup> NSW Act s 59.

<sup>409</sup> NSW Act s 126.

<sup>410</sup> Qld Act ss 90 and 109(1)(d).

<sup>411</sup> Qld Act s 109(1)(d).

business premises, including houses, hostels and camping sites.<sup>412</sup> Given the exemptions apply to any protected attribute, the same exemptions can also be used to discriminate against people based on their religious beliefs or activities. However, the Queensland Human Rights Commission has recommended narrowing these exemptions and limiting them only to discrimination on the grounds of religious belief and activity; a recommendation which the Queensland Government has agreed to in principle.<sup>413</sup>

Faith-based service providers are also able to:

- select or appoint people to participate in any religious observance or practice;<sup>414</sup>
- restrict access to land or a building of cultural or religious significance to people of a particular sex, age, race or religion if the restriction accords with the culture or doctrine of the religion and is necessary to avoid offending the cultural or religious sensitivities of people of the culture or religion;<sup>415</sup>
- do any act not inconsistent with the Act that benefits a group with a protected attribute;<sup>416</sup>
- rely on other general exemptions, such as for non-profit associations<sup>417</sup>, charities<sup>418</sup> and single-sex education, accommodation and club services<sup>419</sup>;
- apply for temporary exemptions.<sup>420</sup>

### South Australia

Under South Australian law, faith-based service providers may be allowed to discriminate against people accessing services, goods and accommodation based on their sexual orientation or gender identity under general exemptions for religious bodies.<sup>421</sup> Discrimination is permitted under this exemption on the grounds of sex, sexual orientation, gender identity and intersex status if it *'conforms with the precepts ... or is necessary to avoid injury to the religious susceptibilities of adherents'* of the organisation's religion.<sup>422</sup>

South Australian law also allows discrimination in the provision of assisted reproductive treatment on the basis of sexual orientation or gender identity where that treatment is to be provided by a person who has registered a religious objection.<sup>423</sup>

South Australian law does not prohibit discrimination against people based on their religious beliefs or activities in the provision of services, goods or accommodation.<sup>424</sup> Accordingly, faith-based service providers may generally

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<sup>412</sup> Qld Act Schedule 1 (definition of 'accommodation').

<sup>413</sup> The Queensland Human Rights Commission has recommended narrowing these exemptions to the ground of religious belief or activity and restricting their application to where the discrimination conforms with the doctrines, tenets or beliefs of the religious body and is reasonable and proportionate in all the circumstances: QHRC, n1 at 400, rec 38. The Queensland Government has accepted in principle all the recommendations of the Queensland Human Rights Commission: Qld Government Response to *Building Belonging*, n278.

<sup>414</sup> Qld Act s 109(1)(c).

<sup>415</sup> Qld Act ss 48 and 80.

<sup>416</sup> Qld Act s 104.

<sup>417</sup> Qld Act s 46(2).

<sup>418</sup> Qld Act s 110.

<sup>419</sup> Qld Act ss 30 (accommodation), 41 (education), 89 (accommodation for students), 91 (accommodation with charitable purposes), (clubs to prevent or reduce disadvantage suffered by a group) or 98 (reasonable sex discrimination in benefits provided to club members).

<sup>420</sup> Qld Act s 113.

<sup>421</sup> SA Act s 50(1)(c). This exemption also applies to discrimination on the ground of sex and intersex status.

<sup>422</sup> SA Act s 50(1)(c).

<sup>423</sup> SA Act s 5(2a); *Assisted Reproductive Treatment Act 1988* (SA) ss 8(2)(ba) and 8(3). This exemption appears to misunderstand that the registered 'persons' providing assisted reproductive technology are in fact clinics, rather than individual clinicians, and therefore unlikely to have a religious objection.

<sup>424</sup> SA Act ss 85ZF(1), 85ZG(1) and 85ZH(1).

discriminate against any person with different or no religious beliefs, including beliefs relating to matters of sexuality or gender, when delivering services, goods or accommodation.

Faith-based service providers are also able to:

- administer themselves in accordance with the precepts of their religion (although, as discussed in section 5.4 above, the scope of this exemption is unclear);<sup>425</sup>
- rely on other general exemptions, such as for charities<sup>426</sup> and single-sex spaces and services<sup>427</sup>;
- apply for temporary exemptions.<sup>428</sup>

## Western Australia

Under Western Australian law, faith-based service providers may be allowed to discriminate against people accessing services, goods and facilities based on their sexual orientation or gender history under general exemptions for religious bodies.<sup>429</sup> The exemption applies to discrimination based on any protected attribute if it ‘*conforms to the doctrines, tenets or beliefs ... or is necessary to avoid injury to the religious susceptibilities of adherents*’ of the organisation’s religion.<sup>430</sup> Given the exemption applies to any protected attribute, the same exemption can also be used to discriminate against people based on their religious convictions.

Western Australian law also specifically allows religious bodies to discriminate against people based on their sexual orientation or gender history in the provision of accommodation, including business or residential accommodation.<sup>431</sup> This exemption is unqualified, meaning the discrimination can be for any reason. An identical exemption also exists enabling discrimination against people based on their religious convictions, meaning that religious bodies can exclude people with different or religious convictions from accommodation they provide.<sup>432</sup>

Western Australian law also has an exemption that may allow aged care accommodation providers to discriminate on the basis of sexual orientation and possibly gender history, but not against ‘*gender reassigned persons*’.<sup>433</sup> This exemption also allows aged care accommodation providers to restrict admission or provide benefits, facilities or services only to persons with a particular religious conviction.<sup>434</sup>

Faith-based service providers are also able to:

- appoint or select persons to participate in any religious observance or practice;<sup>435</sup>
- rely on other general exemptions, such as for voluntary bodies,<sup>436</sup> charities<sup>437</sup> and single-sex spaces and services<sup>438</sup>;

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<sup>425</sup> SA Act s 50(1)(ba).

<sup>426</sup> SA Act s 45.

<sup>427</sup> SA Act ss 35(2) (benefits provided to members by associations), 37(3) (single-sex education or accommodation), 39(2) (gendered skills) and 40(4) (not-for-profit accommodation).

<sup>428</sup> SA Act s 92.

<sup>429</sup> WA Act s 72(d).

<sup>430</sup> WA Act s 72(d).

<sup>431</sup> WA Act ss 4(1) (definition of ‘accommodation’), 35AM(3)(b) and 35Z(3)(b).

<sup>432</sup> WA Act s 63(3)(b).

<sup>433</sup> WA Act s 74.

<sup>434</sup> WA Act s 74.

<sup>435</sup> WA Act s 72(1)(c).

<sup>436</sup> WA Act s 71.

<sup>437</sup> WA Act s 70.

<sup>438</sup> WA Act ss 18(3) (single-sex education), 21(3) (accommodation provided by a charitable or voluntary body), 22(3)-(5) (single-sex clubs and single-sex services provided to club members), 30 (single-sex services), 31(b) (special needs) and 32 (single-sex student accommodation).

- apply for temporary exemptions.<sup>439</sup>

Finally, as discussed in section 4.1, the discrimination protections for transgender people based on ‘gender history’ only apply to those who have been recognised as a ‘gender reassigned person’ under the *Gender Reassignment Act 2000* (WA). Accordingly, many transgender people may have no protection against discrimination based on their gender history under Western Australian law.

Reforms to Western Australian anti-discrimination laws are currently foreshadowed which include a reconsideration of some of these exemptions.<sup>440</sup>

## STATES AND TERRITORIES WITH MORE PROPORTIONATE EXEMPTIONS

By contrast, four states and territories have narrower exemptions that attempt to draw a clearer line between discrimination by faith-based service providers which meets the genuine needs of religious communities, and discrimination based on sexual orientation or gender identity which is not justified. The jurisdictions are the Australian Capital Territory, Northern Territory, Tasmania and Victoria.

### Australian Capital Territory

Under (recently passed but yet to commence) Australian Capital Territory law, faith-based service providers cannot discriminate based on sexual orientation or gender identity when they provide goods, services or facilities to the public.<sup>441</sup> Faith-based service providers can discriminate based on sexual orientation or gender identity only in:

- the provision of residential or business accommodation provided ‘for members of a relevant class of people’;<sup>442</sup>
- the selection or appointment of people involved in religious observance or practice;<sup>443</sup> and
- the delivery of goods, services or facilities other than to the general public, provided that the discrimination ‘conforms to the doctrines, tenets or beliefs ... and is necessary to avoid injury to the religious susceptibilities of adherents’ of the organisation’s religion.<sup>444</sup>

However, faith-based service providers can discriminate on the basis of a person’s religious conviction (and only on this basis) when providing goods, services and facilities to the public if:

- the discrimination ‘conforms to the doctrines, tenets or beliefs ... and is necessary to avoid injury to the religious susceptibilities of adherents’ of the organisation’s religion; and
- the provider has a published policy that is readily accessible to the public about how it provides goods, services and facilities.<sup>445</sup>

Faith-based service providers are otherwise obliged to comply with the same obligations and can take advantage of the same exceptions as other organisations, including the exception allowing the provision of access to facilities, services or opportunities to meet the special needs of a relevant class of people in a reasonable way.<sup>446</sup>

In this way, Australian Capital Territory law draws a line between service delivery provided by faith-based service providers to the public or which does not form part of religious observance or practice, and goods, services, facilities

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<sup>439</sup> WA Act s 135.

<sup>440</sup> The Law Reform Commission of Western Australia has recommended narrowing religious bodies exemptions, especially for religious bodies providing government funded or commercial (for profit) goods and services: WALRC, n1 at 177-8, recs 76-7. The Western Australian Government has broadly accepted the recommendations of the Law Reform Commission: WA Attorney General statement re anti-discrimination laws, n241.

<sup>441</sup> ACT Act s 32(1)(d).

<sup>442</sup> ACT Act s 32(1)(ea).

<sup>443</sup> ACT Act s 32(1)(c).

<sup>444</sup> ACT Act s 32(1)(f).

<sup>445</sup> ACT Act s 32(1)(d).

<sup>446</sup> ACT Act s 27.

and accommodation provided by religious and faith-based bodies specifically to members of their religious communities. Broader exemptions apply to the latter class than the former.

### Northern Territory

Under Northern Territory law, faith-based service providers cannot discriminate based on sexual orientation or gender identity in the provision of goods, services and facilities, in supplying accommodation, or when administering any program on behalf of the Northern Territory government unless a general exemption applies or where:

- the accommodation provided is wholly within or directly attached to a religious place of worship, is not government funded, and the discrimination accords with doctrines of the religion and is necessary to avoid offending the religious sensitivities of religious adherents;<sup>447</sup>
- the discrimination involves the selection or appointment of people to participate in any religious observance or practice;<sup>448</sup>
- the discrimination is done by a body established for religious purposes as part of any religious observance or practice.<sup>449</sup>

Faith-based service providers may also restrict access to land, a building or a place of cultural or religious significance to people of a particular sex, age, race or religion if the restriction accords with the culture or doctrine of the religion and is necessary to avoid offending the cultural or religious sensitivities of people of the culture or religion.<sup>450</sup>

Faith-based service providers are otherwise obliged to comply with the same obligations and can take advantage of the same exceptions as other organisations, including the duty to reasonably accommodate a special need.<sup>451</sup>

In this way, Northern Territory law carves out places of worship as well as religious observance or practice for specific exemptions, but otherwise ensures that faith-based service providers must comply with the same legal obligations and can benefit from the same exemptions as other goods, services or accommodation providers.

### Tasmania

Under Tasmanian law, faith-based service providers cannot discriminate based on sexual orientation or gender identity in the provision of goods, services and facilities, in supplying accommodation or when administering any program on behalf of the Tasmanian government.<sup>452</sup> Instead, Tasmanian law provides a range of religious exemptions alongside general exemptions which allow:

- discrimination based on gender (but not other attributes) if required by the doctrine of a religious institution;<sup>453</sup>
- discrimination based on race including ethno-religious origin (but not other attributes) in relation to places of cultural or religious significance, provided that the discrimination accords with religious doctrines or cultural customs, and the discrimination is necessary to avoid offending the cultural or religious sensitivities of any person of the cultural or religion;<sup>454</sup>
- discrimination based on religious belief, affiliation or activity (but not other attributes) in relation to participation in any religious observance or practice, or any act that is 'carried out in accordance

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<sup>447</sup> NT Act ss 40(3) and 40(5).

<sup>448</sup> NT Act s 51(c).

<sup>449</sup> NT Act s 51(d).

<sup>450</sup> NT Act s 43.

<sup>451</sup> NT Act s 24.

<sup>452</sup> Tas Act s 22(1).

<sup>453</sup> Tas Act s 27(1)(a).

<sup>454</sup> Tas Act s 42.



*with the doctrine of a particular religion... and is necessary to avoid offending the religious sensitivities of any person of that religion*;<sup>455</sup>

- discrimination in any area if it is for the purpose of carrying out a scheme for the benefit of a disadvantaged group or to meet the special needs of a particular group;<sup>456</sup>
- discrimination in any program, plan or arrangement designed to promote equal opportunity for a disadvantaged group or to meet the special needs of a group;<sup>457</sup>
- giving effect to instruments that confer charitable benefits on particular groups.<sup>458</sup>

In this way, Tasmanian law provides exemptions that allow faith-based service providers to discriminate:

- *positively* to meet the special needs of their adherents; and
- *adversely* against others on the basis of gender, race or religion (but not sexual orientation, gender identity or other grounds) in more limited and specific ways that are linked to places of worship, religious practice and observance, or religious doctrines.

The broadest exemption in Tasmania may allow faith-based service providers to discriminate against people with different religious beliefs or no religious beliefs (including beliefs about matters concerning sexuality or gender) if requirements for accessing services, goods or accommodation are framed reasonably and do not have the effect of disadvantaging LGBTQ+ people more than non-LGBTQ+ people.

## Victoria

Under Victorian law, faith-based service providers may be allowed to discriminate against people accessing services based on their sexual orientation or gender identity under general exemptions for religious bodies.<sup>459</sup> However, this exemption has been limited to discrimination which is *'reasonable and proportionate in the circumstances'* and which either *'conforms with the doctrines, beliefs and principles ... or is reasonably necessary to avoid injury to the religious susceptibilities'* of the organisation's religion.<sup>460</sup> Further, this exemption is not available to goods or services (including accommodation services) provided by faith-based service providers with funding from the Victorian Government.<sup>461</sup> In that case, a faith-based service provider is only permitted to discriminate based on religious belief or activity (and only on this basis<sup>462</sup>) if the discrimination is *'reasonable and proportionate in the circumstances'* and it either conforms *'with the doctrines, beliefs or principles... or is reasonably necessary to avoid injury to the religious sensitivities of adherents'* of the organisation's religion.<sup>463</sup>

Faith-based service providers may also be able to rely on other exemptions to:

- select or appoint people to participate in any religious observance or practice;<sup>464</sup>
- establish special services, benefits or facilities that meet the special needs of people with a particular attribute, such as people with a particular religious belief;<sup>465</sup>

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<sup>455</sup> Tas Act s 52(c)-(d).

<sup>456</sup> Tas Act s 25.

<sup>457</sup> Tas Act s 26.

<sup>458</sup> Tas Act s 23.

<sup>459</sup> Vic Act s 82(2).

<sup>460</sup> Vic Act s 82(2).

<sup>461</sup> Vic Act s 82B.

<sup>462</sup> Vic Act s 82B(2).

<sup>463</sup> Vic Act s 82B(1).

<sup>464</sup> Vic Act s 82(1)(c).

<sup>465</sup> Vic Act s 88.

- refuse accommodation to people based on sex, age, race or religious belief in accommodation established mainly for the welfare of people of a particular sex, age, race or religious belief;<sup>466</sup>
- give effect to instruments conferring charitable benefits on a particular group.<sup>467</sup>

In this way, Victorian law largely uses government funding as a proxy for drawing a line between religious service delivery and public service delivery, with more latitude to discriminate where Victorian Government funding is not provided. While government funding may be a relevant consideration, the main issue with Victoria's proxy line is the person relying on the service, good or accommodation has no way of knowing whether it is Victorian government funded, or not. It also ignores Commonwealth sources of funding.

### REFORMS NEEDED:

16. Amend Commonwealth, Australian Capital Territory, New South Wales, Queensland, South Australian, Victorian and Western Australian laws to:
  - a. limit the ability of faith-based service providers to discriminate based on sexual orientation or gender identity whenever they provide goods, services, facilities or accommodation to the general public;
  - b. prohibit discrimination based on religious belief or activity by faith-based service providers whenever they provide goods, services, facilities or accommodation to the general public other than when it:
    - i. is reasonable and proportionate to meet the genuine needs of members of their religious communities;
    - ii. forms part of any religious observance or practice; or
    - iii. is connected to a site of religious significance, such as a place of worship.

To implement this recommendation in Commonwealth, New South Wales and South Australian laws, protections against discrimination based on religious belief and activity (including having no religious belief or refusing to engage in religious activities) also have to be included in anti-discrimination laws. Only minor reforms are required in the Australian Capital Territory to implement this recommendation.

## 7. INTERPRETING RELIGIOUS EXEMPTIONS

This section discusses how commonly framed elements of the religious exemptions discussed above have been interpreted by Australian courts and tribunals.

Many of the religious exemptions rely on a religious educational institution or faith-based service provider showing that their alleged discriminatory acts satisfy either one or both of two commonly used legal standards, namely that the discrimination:

- conforms to the doctrines of the organisation's religion (the **religious conformity** test); and/or
- is necessary to avoid injury (or offence) to the religious susceptibilities (or sensitivities) of religious adherents (the **religious susceptibilities or sensitivities** test).

<sup>466</sup> Vic Act s 60.

<sup>467</sup> Vic Act s 80.

These legal standards have been given some consideration by Australian courts and tribunals, particularly in two important lines of cases: *Cobaw* and *OV & OW*.<sup>468</sup>

However, there is a relatively small number of decisions that illuminate the application of these legal tests, and legislative provisions in each jurisdiction have legally significant differences, meaning that cases in one jurisdiction may not speak to the correct interpretation in another jurisdiction.

Some jurisdictions also have other requirements or tests that must be met, which are also discussed in this section.

## 7.1 Religious conformity tests

As set out in sections 4.1 to 6.2 of this report, for many of the religious exemptions to apply, the challenged act or practice must be shown to conform to the religious doctrines of the religious body.<sup>469</sup> In some jurisdictions, conformity with the ‘tenets’, ‘beliefs’, ‘principles’ or ‘precepts’ of the religion are instead or also relevant.<sup>470</sup> Because of these textual differences, the exact words of the particular exemption relied upon is the starting point for any analysis, with judicial commentary suggesting that terms such as ‘doctrines’, ‘beliefs’ or ‘principles’ may mean different things.<sup>471</sup>

One judge of the Victorian Court of Appeal has suggested that exemptions for bodies established for religious purposes are impliedly limited to acts or practices connected with the body’s religious purpose.<sup>472</sup> That is, if the act or practice is not intrinsically religious, even if it is religiously motivated, then questions of doctrinal conformity do not arise.<sup>473</sup> However, while not ultimately deciding the point, the NSW Court of Appeal has expressed doubt about this line of interpretation in *OV & OW*.<sup>474</sup>

### Identifying the relevant religion and doctrines

Putting these issues to one side, a key step in determining whether the exemption applies is to identify the relevant religion of the body in order to then determine its applicable doctrines.<sup>475</sup> It is generally accepted that the relevant religion is the particular denomination or branch of the religion that the body identifies with.<sup>476</sup>

The authorities then identify the doctrines of the relevant religion by relying on the evidence put forward, usually by the religious body seeking to rely on the exemption.<sup>477</sup> It is the doctrines of the religion as at the time of the alleged discrimination that are relevant.<sup>478</sup>

### Religious conformity

Finally, the meaning and degree of religious ‘conformity’ required to make out an exemption has been approached differently by different decision-makers.

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<sup>468</sup> The *Cobaw* case was heard first by the Victorian Civil and Administrative Tribunal (*Cobaw* VCAT) then by the Victorian Court of Appeal (*Cobaw* VCA). Special leave was refused by the High Court of Australia in 2014: *Christian Youth Camps Limited v Cobaw Community Health Services Limited and Ors* [2014] HCATrans 289 (12 December 2014). The *OV & OW* case was first heard by the New South Wales Administrative Decisions Tribunal (*OV v QZ* NSWADT), then appealed to the Appeal Panel of the Administrative Decisions Tribunal (*Members of the Board of the Wesley Mission Council v OW and OV* [2009] NSWADTAP 5 and *OV & OW* NSWADT (2009)) before being heard on appeal by the New South Wales Court of Appeal (*OV & OW* NSWCA). It was remitted to the New South Wales Administrative Decisions Tribunal for final determination: *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293 (*OV & OW* NSWADT (2010)).

<sup>469</sup> See e.g. SDA s 37(1)(d); ACT Act ss 32(d)-(f); NSW Act s 56(d); NT Act ss 43(1)(a) and 40(3)(b)(i); SA Act ss 50(1)(ba)-(c); Tas Act ss 27(1)(a), 42(a)(ii) and 52(d); Vic Act ss 82(2)(a), 82A(1)(a) and 82B(1)(d); WA Act s 72(d).

<sup>470</sup> See e.g. SDA s 37(1)(d); ACT Act ss 32(1)(d)-(f); SA Act s 50(1)(c); Vic Act s 82(2); WA Act s 72(d).

<sup>471</sup> *Cobaw* VCA at [488] (Redlich JA). The majority in *Cobaw* rejected the application of the s 77 exemption and did not consider this point.

<sup>472</sup> *Cobaw* VCA at [263] (Maxwell P).

<sup>473</sup> *Cobaw* VCA at [263] and [269] (Maxwell P, Neave JA agreeing at [360]).

<sup>474</sup> *OV & OW* NSWCA at [62] (Basten JA and Handley AJA) and [14] (Allsop P).

<sup>475</sup> *OV & OW* NSWCA at [32]-[35] (Basten JA and Handley AJA, Allsop P agreeing at [1] and [9]).

<sup>476</sup> *OV & OW* NSWCA at [40]-[41]; *Cobaw* VCAT at [256]-[262] (undisturbed on appeal).

<sup>477</sup> See e.g. *OV & OW* NSWADT (2010) at [34].

<sup>478</sup> *OV & OW* NSWCA at [54].

In New South Wales, the relevant Tribunal has described the conformity test as ‘*singularly undemanding*’ in that it merely requires the discriminatory act to be in conformity with the doctrine ‘*not affirmatively that it breached it*’.<sup>479</sup> In the *OV & OW* case, the accepted doctrine was that ‘[a] *monogamous heterosexual partnership within marriage... [was] both the norm and ideal*’,<sup>480</sup> such that a faith-based service provider which had rejected a same-sex couple from applying to become foster carers did not contradict, and in that sense ‘conformed’ with, this religious doctrine. It did not matter that the agency otherwise accepted unmarried heterosexual couples and singles as part of its foster care program.<sup>481</sup>

In Victoria, religious ‘conformity’ appears to have been given a stricter interpretation and application, requiring the religious body to show that its doctrine required it to act as it did.<sup>482</sup> In the *Cobaw* case, the specific doctrines requiring sexual activity to be confined to marriage and prohibiting sexual activity between members of the same sex was said not to require the Christian Brethren to avoid contact with people who were not of their faith or who did not subscribe to their beliefs.<sup>483</sup> Accordingly, had the relevant body been a religious body, then its actions in refusing a booking for a youth group affirming same-sex attracted young people would not have conformed with any relevant religious doctrine that proscribed conduct relating to non-believers of that religion. To the contrary, according to at least two judges of the Victorian Court of Appeal, the evidence was that conformity with Scriptures would have required adherents to be tolerant of difference, and in particular, of people whom they might regard as sinners.<sup>484</sup>

## 7.2 Religious susceptibilities or sensitivities tests

The second commonly found test required for many of the religious exemptions to apply is that the challenged act or practice must be necessary to avoid injury to the religious susceptibilities of the religion’s adherents.<sup>485</sup> In some provisions however, the formulation is subtly different. For example, the act or practice must be necessary to avoid ‘offending’ the ‘*religious sensitivities*’ of religious adherents instead of causing ‘*injury*’ to ‘*religious susceptibilities*’,<sup>486</sup> or not be necessary but be ‘*reasonably necessary*’<sup>487</sup> or done in ‘*good faith*’<sup>488</sup> to avoid injury to religious susceptibilities or sensitivities.

The significance of these textual differences has not been fully tested but the judicial commentary suggests that:

- the injury need not be to the religious susceptibilities of *all* adherents but must be to a ‘*significant proportion of the group*’<sup>489</sup> or ‘*common to adherents of the religion*’<sup>490</sup>;
- the nature of the injury may need to amount to more than ‘*mere offence*’. It may need to have a ‘*real and direct impact*’ on religious sensitivities, such that it amounts to ‘*an affront to the reasonable expectations of adherents that the body be able to conduct itself in accordance with the doctrines to which they subscribed and the beliefs which they held*’.<sup>491</sup> Avoiding injury may involve a ‘*respect for, or not treating with disrespect, those matters intimately or closely connected with, or of real significant to, the beliefs or practices of the adherents of the religion*’;<sup>492</sup>

<sup>479</sup> *OV & OVNSWADT* (2010) at [35].

<sup>480</sup> *OV & OVNSWADT* (2010) at [18], [34].

<sup>481</sup> *OV & OVNSWADT* (2010) at [19].

<sup>482</sup> *Cobaw VCAT* at [315]; *Cobaw VCA* at [286]-[287] (Maxwell P, Neave JA agreeing at [360]).

<sup>483</sup> *Cobaw VCAT* at [321].

<sup>484</sup> *Cobaw VCA* at [280]-[290] (Maxwell P, Neave JA agreeing at [360]).

<sup>485</sup> See e.g. SDA s 37(1)(d); ACT Act s 32(d)-(f); NSW Act s 56(d); SA Act s 50(1)(c); WA Act s 72(d).

<sup>486</sup> See e.g. Qld Act s 109(1)(d); Tas Act s 52(2).

<sup>487</sup> See e.g. Vic Act ss 82(2)(b), 82B(1)(d) and 83(2)(b).

<sup>488</sup> See e.g. SDA s 38; FWA ss 153(2)(b)(ii), 195(2)(b)(ii), 351(2)(c)(ii) and 772(2)(b)(iii).

<sup>489</sup> *OV & OVNSWCA* at [12] (Allsop P, in obiter).

<sup>490</sup> *Cobaw VCAT* at [329].

<sup>491</sup> *Cobaw VCAT* at [328]; *Cobaw VCA* at [301]-[302] (Maxwell P, Neave JA agreeing at [360]).

<sup>492</sup> *Cobaw VCAT* at [330].

- if the act or practice must be ‘*necessary*’ to avoid injury, this may require that there be no alternative other than engaging in the challenged act or practice, and the necessity of the act or practice may need to be judged objectively (i.e. from the perspective of what a reasonable person would consider necessary, not what the religious body subjectively considers necessary to avoid injury);<sup>493</sup>
- if the act or practice need only be done in ‘*good faith*’ to avoid injury, this may not require anything other than ‘*honest action and fidelity*’<sup>494</sup> to a belief that the action will avoid injury; and
- the closer the activities said to cause injury or offence are to places of religious observance or to participation in religious activities, the stronger the basis for this test to apply.<sup>495</sup>

Importantly, each of the above commentaries relates to provisions that have important differences across jurisdictions, and none of the above statements are strictly binding or have received broader judicial consensus.

Finally, depending on the specific exemption, the religious susceptibilities or sensitivities test may be an additional or alternative requirement to the religious conformity test. That is, in a few provisions it may be necessary to show that the alleged discriminatory act or practice meets *both* the religious conformity test and the religious susceptibilities or sensitivities test,<sup>496</sup> instead of only one of these tests.

### 7.3 Other tests and requirements

In addition to the religious conformity and religious susceptibilities or sensitivities tests, some religious exemptions place additional or alternative requirements for religious exemptions to apply.

For example:

- some exemptions require the alleged discriminatory acts or practices to be ‘*reasonable and proportionate*’ in the circumstances, usually in addition to either the religious conformity test or religious susceptibilities or sensitivities test (or both);<sup>497</sup>
- some exemptions require the publication of a policy for the exemption to apply;<sup>498</sup>
- some religious educational institution exemptions use a ‘*better enables*’ test, such as that the discrimination is ‘*intended to enable, or better enable, the institution to be conducted in accordance with ... the doctrines, tenets, beliefs or teachings*’ of the religion;<sup>499</sup>
- the South Australian religious educational institution and association exemptions use a ‘*founded on the precepts*’ of a religion test;<sup>500</sup>
- the Victorian religious employment exemptions use the religious conformity test in the context of an ‘*inherent requirement of the position*’ test;<sup>501</sup>
- some religious exemptions only apply to discrimination based on specific attributes<sup>502</sup> or in specific areas,<sup>503</sup> rather than at large; and

<sup>493</sup> *Cobaw VCAT* at [332]; *Cobaw VCA* at [291]-[294] (Maxwell P, Neave JA agreeing at [360]); see also at [424]-[425], [427] (Neave JA); and at [531] (Redlich JA) (considering the phrase ‘reasonably necessary’). But see also at [519]-[527] and [533]-[534] (Redlich JA).

<sup>494</sup> See e.g. *Bropho v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16 at [87]-[88], [93] per French J.

<sup>495</sup> *Cobaw VCA* at [305]-[306] (Maxwell P, Neave JA agreeing at [360]).

<sup>496</sup> See e.g. ACT Act ss 32(1)(d)-(f); Qld Act s 109(1)(d), NT Act ss 40(3) and 43(1); Tas Act s 52(d).

<sup>497</sup> See e.g. Vic Act ss 82(2), 82A(1)(c), 82B(1)(e) and 83(2).

<sup>498</sup> See e.g. ACT Act ss 32(1)(d)-(e) and 46; SA Act s 34(b)-(d).

<sup>499</sup> ACT s 46(2)(b). See also Tas Act s 51(2).

<sup>500</sup> SA Act ss 34(3)(a) and 35(2b).

<sup>501</sup> Vic Act ss 82A(1)(a) and 83A(1)(a).

<sup>502</sup> See e.g. SDA s 38; ACT Act s 32(d)-(e); Tas Act s 52; Vic Act s 82(2), 82A(3), 82B(3), 83(3) and 83A(3).

<sup>503</sup> See e.g. ACT Act s 32(d)-(e); NSW Act s 59A; NT Act s 51(d); Qld Act s 90.

- exemptions may define which religious bodies may rely upon them in different, and sometimes broader, ways.<sup>504</sup>

Some general observations can be made about these additional tests and requirements, although few have been judicially considered.

### **Requirement for a policy**

Neither of the laws requiring the publication of a policy for an exemption to apply specify what the policy must contain, meaning that the form and content of any policy is entirely left to the religious educational institution or body to determine.<sup>505</sup> However, these laws do stipulate the minimum requirement that the policy should be publicly available.<sup>506</sup>

As discussed in Part I, section 2.2 (at 35), we found no evidence showing that these written policy requirements reduced LGBTQ+ discrimination.

### **The ‘better enables’ and ‘founded on the precepts’ tests**

The ‘better enables’ tests used in the Australian Capital Territory and Tasmanian laws and the ‘founded on the precepts’ test used in South Australian law are all framed more broadly than the standard religious conformity tests. Through different and additional words that import greater latitude and subjectivity, they lower the legal standard of scrutiny that applies to discrimination by religious educational institutions.

### **‘Reasonable and proportionate’ test**

The additional ‘reasonable and proportionate’ test first introduced in Victorian law<sup>507</sup> has increasingly attracted support from law reform bodies,<sup>508</sup> and has also been used in recent reforms in the Australian Capital Territory (albeit not in the context of religious exemptions).<sup>509</sup>

The benefit of the test is that it imports an objective legal standard which looks at the circumstances from all sides. When an act or practice would otherwise discriminate against another person, the test considers whether the discrimination should be allowed by reference to whether it is reasonable and proportionate in all the circumstances.

The Queensland Human Rights Commission has recommended that the test be inserted into certain religious exemptions in Queensland law with a list of non-exhaustive considerations that inform its application, including:

- the importance of the relevant conduct in protecting the ethos of the religious organisation and the religious susceptibilities of adherents of that religion;
- whether the religious organisation is a public entity under the *Human Rights Act* when engaging in the conduct;
- if the religious organisation operates in a commercial manner when engaging in the conduct;
- the reasonable availability of alternative services;
- whether the services are essential services;
- the rights and interests of the person receiving, or proposed to receive, goods and services or accommodation.<sup>510</sup>

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<sup>504</sup> See e.g. FWA ss 153(2)(b), 195(2)(b), 351(2)(c) and 772(2)(b); Qld Act s 90(a); Vic Act s 81(b).

<sup>505</sup> See e.g. ACT Act ss 32(1)(d)-(f) and 46(4); SA Act s 34(3).

<sup>506</sup> See e.g. ACT Act ss 32(1)(d)-(f) and 46(4); SA Act s 34(3).

<sup>507</sup> See e.g. Vic Act ss 82(2), 82A(1)(c), 82B(1)(e), 83(2) and 83A(1)(c).

<sup>508</sup> See e.g. QHRC, n1, recs 38 and 39; WALRC, n1, recs 71, 72, 76-77, 79, 81, 92 and 95. See also Australian Law Reform Commission (2023) [Consultation Paper: Religious Educational Institutions and Anti-Discrimination Laws](#) at 25, 27-28.

<sup>509</sup> See e.g. ACT Act s 28(2)(c).

<sup>510</sup> QHRC, n1 at 29, rec 38.2.

Finally, by inserting a *‘reasonable, proportionate and justifiable in the circumstances’* test in most of its exemptions except for the religious bodies and religious educational institutions exemptions,<sup>511</sup> the Australian Capital Territory may have left its laws vulnerable to authorising discrimination by religious educational institutions and religious bodies which is unreasonable, disproportionate and unjustifiable. This omission ought to be corrected.

### **Other requirements**

Where relevant, the other tests and requirements are discussed elsewhere in this section, including:

- the meaning of the attribute of ‘sex’ (see section 4.2 discussing single-sex exemptions);
- the relevant distinction between the attributes of sexual orientation and gender identity on the one hand, and religious beliefs relating to sexuality or gender on the other (see sections 4.3, 5.2 and 6.2 discussing exemptions based on religious belief and how these interact with LGBTQ+ discrimination);
- the meaning of ‘inherent requirements’ and ‘genuine occupational qualifications’ (see section 5.3); and
- the types of faith-based bodies to which an exemption may apply (see section 5.2 discussing whether faith-based service providers are ‘religious bodies’).

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<sup>511</sup> See *Discrimination Amendment Act 2023* (ACT) ss 6, 9, 10, 15 and 20.

# PART III: DRAWING ON INTERNATIONAL LAW AND PRACTICE

## WHAT THIS PART COVERS:

- I. International human rights obligations
- II. International comparisons

The right to equality and non-discrimination and the freedom of thought, conscience and religion are fundamental human rights recognised by international law. International human rights law provides a framework for assessing whether Australian anti-discrimination laws properly recognise and respect human rights, including when these rights intersect. The experience of comparable overseas jurisdictions in resolving disputes about these rights can also provide Australia with guidance on how its laws can more faithfully implement its human rights obligations. The overseas cases reveal that, beyond general principles, facts matter. A range of factors have been considered in deciding competing rights claims, with some being more persuasive than others.

This section explores international human rights law and practice that can help Australia craft its own anti-discrimination laws to recognise and respect everyone's human rights, including when they intersect. This section also reveals which considerations have been more persuasive than others in overseas cases deciding whether LGBTQ+ discrimination should be permitted in various faith-based settings.

## 8. INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

Australia's anti-discrimination laws go towards implementing its international human rights obligations to equality before the law and equal protection of the law, and the right to effective remedies for people who have suffered contraventions of their human rights.<sup>512</sup> This relationship between our domestic anti-discrimination laws and international human rights law is important. It provides both a constitutional basis for our federal anti-discrimination framework,<sup>513</sup> as well as guardrails for framing domestic anti-discrimination laws to ensure they resolve interacting human rights claims in a manner which complies with international human rights law.

This section principally focuses on the intersection between rights to equality and non-discrimination, and the freedom of thought, conscience and religion, as these are the rights which are commonly considered in the relevant cases dealing with LGBTQ+ discrimination in faith-based settings. However, other rights can also be invoked depending on the circumstances, such as rights to privacy,<sup>514</sup> health,<sup>515</sup> education,<sup>516</sup> work (including just and favourable conditions of work),<sup>517</sup> an adequate standard of living (including food, clothing and housing),<sup>518</sup> taking part

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<sup>512</sup> *International Covenant on Civil and Political Rights (ICCPR)* arts 2 and 26. See also *ILO Discrimination (Employment and Occupation) Convention 1958 (No 111)* arts 1-3.

<sup>513</sup> Australian Constitution s 51(xxix); SDA s 9(10); FWA ss 3(a), 9(5), 527C, 771 and 789HA. See also *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

<sup>514</sup> See e.g. ICCPR art 17.

<sup>515</sup> *International Covenant on Economic, Social and Cultural Rights (ICESCR)* art 12.

<sup>516</sup> ICESCR arts 13-14.

<sup>517</sup> ICESCR arts 6-7.

<sup>518</sup> ICESCR art 11(1).



in cultural life,<sup>519</sup> the freedom to associate,<sup>520</sup> and the freedom of expression.<sup>521</sup> All these rights must be extended to every person without discrimination of any kind.<sup>522</sup>

Each of these rights are recognised in the foundational human rights instruments, the *International Covenant on Civil and Political Rights* and the *International Convention on Economic, Social and Cultural Rights*. However, many have also been given further elaboration in other human rights treaties, including on the rights of women<sup>523</sup> and the rights of children.<sup>524</sup> This section draws on international jurisprudence to briefly summarise key rights and interpretative principles that are relevant to a consideration of LGBTQ+ discrimination in faith-based settings.

## 8.1 Equality and non-discrimination

Under international human rights law, all persons have the right to non-discrimination and equality before the law, as well as equal protection of the law.<sup>525</sup> These protections extend to people on the basis of sexual orientation and gender identity.<sup>526</sup> Women (whether cis or trans) and children are also specifically protected from discrimination on the basis of sexual orientation and gender identity in the enjoyment of their rights under specific international human rights instruments dealing with women's and children's rights.<sup>527</sup>

Australia is required to have laws that prohibit discrimination and guarantee to all persons equal and effective protection against discrimination.<sup>528</sup> Australia is also required to provide effective remedies in the event of a contravention of human rights, including access to and enforcement of remedies through courts and tribunals.<sup>529</sup> Accordingly, our anti-discrimination laws are part of the way that Australia implements its international human rights obligations to equal protection of the law and effective remedies for breaches of human rights, such as contraventions of rights to work, education, health and an adequate standard of living without discrimination.<sup>530</sup>

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<sup>519</sup> ICESCR art 15(1)(a).

<sup>520</sup> ICCPR art 22(1).

<sup>521</sup> ICCPR art 19.

<sup>522</sup> ICCPR art 2(1); ICESCR art 2(2). See also UN Committee on Economic, Social and Cultural Rights (**UN ESCRC**), *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009 at [20].

<sup>523</sup> *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*.

<sup>524</sup> *Convention on the Rights of the Child (CRC)*.

<sup>525</sup> ICCPR arts 2(1) and 26; UN Human Rights Committee (**UN HRC**), *General Comment No. 18: Non-discrimination*, 10 November 1989 (**HRC General Comment No 18**) at [1]. See also CEDAW arts 2, 10-13; CRC art 2.

<sup>526</sup> *Toonen v Australia*, CCPR/C/50/D/488/1992, UN Human Rights Committee, 31 March 1994 at [8.7]; *Young v Australia*, CCPR/C/78/D/941/2000, UN Human Rights Committee, 18 September 2003 (**Young v Australia**) at [10.4]; *X v Colombia*, CCPR/C/89/D/1361/2005, UN Human Rights Committee, 30 March 2007 at [7.2]; *C v Australia*, CCPR/C/76/D/900/1999, UN Human Rights Committee, 13 November 2002 (**C v Australia**) at [8.5]; *G v Australia*, CCPR/C/119/D/2172/2012, UN Human Rights Committee, 17 March 2017 at [7.15].

<sup>527</sup> CEDAW art 2; CRC art 2; *Rosanna Flamer-Caldera v Sri Lanka*, CEDAW/C/81/D/134/2018, UN Committee on the Elimination of Discrimination Against Women (**CEDAW Committee**), 24 March 2022 at [9.2]; *General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women* at [18] and [31]; CEDAW Committee, *General recommendation No. 33 on women's access to justice*, 3 August 2015 at [8]; CEDAW Committee, *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, 14 July 2017 at [12]; CEDAW Committee, *General recommendation No. 36 on the right of girls and women to education*, 27 November 2017 at [45]-[46(i)]; CEDAW Committee, *General recommendation No. 39 on the rights of Indigenous women and girls*, 31 October 2022 at [22]; CEDAW Committee, *Concluding Observations on the eighth periodic report of Australia*, CEDAW/C/AUS/CO/8, 25 July 2018 at [4(d)], [49(e)] and [50(e)]; UN Committee on the Rights of the Child (**UN CRC**), *General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, 1 July 2003 (**CRC General Comment No 4**) at [2]; UN CRC, *General Comment No. 3: HIV/AIDS and the rights of the child*, 17 March 2003 (**CRC General Comment No 3**) at [8]; *General comment No. 15: On the right of the child to the enjoyment of the highest attainable standard of health*, 17 April 2013 (**CRC General Comment No 15**) at [8]; UN CRC, *General Comment No. 20: On the implementation of the rights of the child during adolescence*, 6 December 2016 (**CRC General Comment No 20**) at [34].

<sup>528</sup> ICCPR art 26.

<sup>529</sup> ICCPR art 2(3); UN HRC, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 29 March 2004 (**HRC General Comment No 31**) at [15] and [17].

<sup>530</sup> See ICESCR arts 6-7, 11(1) and 12-14, together with art 2(2).

Discrimination includes any distinction, exclusion, restriction or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.<sup>531</sup>

However, non-discrimination does not mean identical treatment in every instance.<sup>532</sup> Differential treatment may not otherwise constitute discrimination if the criteria for the differentiation is reasonable and objective, and if the aim is to achieve a purpose which is legitimate under relevant human rights law.<sup>533</sup> The principle of equality also sometimes requires nation states to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination.<sup>534</sup>

## 8.2 Freedom of thought, conscience and religion

International law also protects freedom of thought, conscience and religion,<sup>535</sup> including for children.<sup>536</sup> Because all rights are to be respected and recognised without discrimination of any kind, everyone has the right to freedom of thought, conscience and religion, irrespective of their sexual orientation or gender identity, or the sexual orientation or gender identity of their parents or legal guardians.<sup>537</sup>

### THE CONTENT OF THE FREEDOM

Under the freedom of thought, conscience and religion, people have a right to hold a particular religious view, but equally have the right *not* to profess any particular religion or belief, and to change religions.<sup>538</sup> The freedom of *thought* and the freedom of *conscience* are protected equally with the freedom of religion and belief.<sup>539</sup>

The freedom of thought, conscience and religion applies to theistic, non-theistic and atheistic beliefs, is not limited to traditional religions and includes newly established religions and religious minorities.<sup>540</sup> The fact that a religion is recognised as a state religion, or is established as official or traditional, must not result in any disadvantage for adherents of other religions or non-believers.<sup>541</sup>

There is a distinction between the right to *have or adopt* a religion or belief, and the right to *manifest* that religion or belief (i.e. through worship, observance, practice and/or teaching).<sup>542</sup> The distinction is relevant insofar as the right to have or adopt a religion or belief is protected unconditionally, whereas there can be limitations on the right to manifest a religion or belief if those limitations are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others (as discussed further below).<sup>543</sup>

With regards to the permitted limitations:

- the fundamental rights and freedoms of others include the right to equality and non-discrimination, described in section 8.1 above;<sup>544</sup>

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<sup>531</sup> HRC General Comment No 18 at [7].

<sup>532</sup> HRC General Comment No 18 at [8].

<sup>533</sup> HRC General Comment No 18 at [13].

<sup>534</sup> HRC General Comment No 18 at [10].

<sup>535</sup> ICCPR art 18.

<sup>536</sup> CRC art 14(1).

<sup>537</sup> ICCPR art 2(1); CRC art 2(1). See also *Yogyakarta Principles and Yogyakarta Principles Plus 10*, principle 21.

<sup>538</sup> UN HRC, *General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993 (**HRC General Comment No 22**) at [2] and [5].

<sup>539</sup> HRC General Comment No 22 at [1].

<sup>540</sup> HRC General Comment No 22 at [2].

<sup>541</sup> HRC General Comment No 22 at [9].

<sup>542</sup> ICCPR, art 18(1); HRC General Comment No 22 at [3].

<sup>543</sup> ICCPR, art 18(3); HRC General Comment No 22 at [3].

<sup>544</sup> HRC General Comment No 22 at [8].

- limitations may be applied only for those purposes for which they are prescribed and must be directly related and proportionate to the specific need on which they are predicated;<sup>545</sup>
- limitations must not be imposed for discriminatory purposes or applied in a discriminatory manner; and
- the right to manifest religion or belief does not extend to the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, which must be prohibited by states.<sup>546</sup>

With regards to the expressive content of the right, a person can manifest their religion or belief individually or in community with others and in public or private.<sup>547</sup> The freedom to manifest religion or belief encompasses a broad range of acts including:

- **worship:** ritual and ceremonial acts, building places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest;
- **observance and practice:** the observance of dietary regulations, the wearing of distinctive clothing or head-coverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group; and
- **teaching:** freedom to choose religious leaders, priests and teachers, establish seminaries or religious schools and prepare and distribute religious texts or publications.<sup>548</sup>

With regards to activities seeking to propagate religion or proselytise, there is a line between missionary activities, which are accepted as a legitimate expression of the religion or belief of the missionary, and the freedom of religion and beliefs of others which will be offended by forcible or coerced forms of attempts at religious conversion.<sup>549</sup> This is unlikely to be offended where all involved parties are adults, able to reason on their own, and if there is no relationship of dependency or hierarchy between the missionary and the person receiving the missionary activity.<sup>550</sup>

## PARENTAL LIBERTIES AND THE RIGHTS OF THE CHILD

Parents and legal guardians have the liberty to ensure the religious and moral education of their children,<sup>551</sup> and are recognised as having primary responsibility for the upbringing and development of their children.<sup>552</sup> However, this liberty must be interpreted with regard to principles of the universality and interrelatedness of human rights,<sup>553</sup> which include the best interests of the child as a primary consideration in all actions concerning children,<sup>554</sup> and a child's right to education,<sup>555</sup> among others. Parental rights and responsibilities exist to facilitate children being able

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<sup>545</sup> HRC General Comment No 22 at [8].

<sup>546</sup> HRC General Comment No 22 at [7]. See also ICCPR art 20.

<sup>547</sup> HRC General Comment No 22 at [4].

<sup>548</sup> HRC General Comment No 22 at [4].

<sup>549</sup> UN Special Rapporteur of the Commission on Human Rights on freedom of religion or belief (**UN Special Rapporteur on Religion or Belief**), *Elimination of all forms of religious intolerance*, A/60/399, 30 September 2005 at [64] and [66]-[68].

<sup>550</sup> UN Special Rapporteur on Religion or Belief, n549 at [67]. See also HRC General Comment No 22 at [5].

<sup>551</sup> ICCPR art 18(4); ICESCR art 13(3); CRC art 14(2); HRC General Comment No 22 at [8].

<sup>552</sup> CRC art 18(1).

<sup>553</sup> UN HRC, *General Comment No. 34, Article 19 (Freedom of opinion and expression)*, 29 July 2011 at [32]. See also UN General Assembly, *Vienna Declaration and Programme of Action*, 25 June 1993 art 5.

<sup>554</sup> CRC arts 3, 9, 18, 20, 21, 37 and 40. See also UN General Assembly, *Declaration on the Rights of the Child*, 20 November 1959 arts 2 and 7; *Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*, 1 May 1995 art 4(b); CEDAW arts 5 and 16; *Convention on the Rights of Persons with Disabilities (CRPD)* arts 7 and 23.

<sup>555</sup> ICESCR arts 13 and 14; CRC art 28; CEDAW art 10; CRPD art 24; *Convention on the Elimination of Racial Discrimination* arts 5 and 7. While the ICCPR does not contain a comprehensive right to education clause, the principles of equality and non-discrimination in arts 2 and 26 are not limited to ICCPR rights and the obligation to ensure that education is not discriminatory applies: see HRC General Comment No 18 at [12].

to exercise their rights, and may be limited.<sup>556</sup> Parents' direction and guidance must be 'appropriate', for the purpose of supporting their child to exercise their rights, consistent with a child's evolving capacities, and their child's best interests must be the parents' 'basic concern'.<sup>557</sup> Critically, the best interests of the child is a paramount consideration which must be given greater weight and priority when balancing competing or conflicting rights and interests of other parties, including parents.<sup>558</sup> Interpreting a child's best interests must be consistent with all rights under the Convention on the Rights of the Child, including the obligation to protect children from all forms of violence and discrimination, and the requirement to give due weight to a child's views, such as for corporal punishment where parents cannot rely on religious beliefs or traditions to justify practices which violate a child's rights and conflict with a child's human dignity.<sup>559</sup>

Children's rights must be protected without discrimination – individually, and as a group<sup>560</sup> – including based on sex and sexual orientation.<sup>561</sup> Children are not a homogeneous group and characteristics such as sex, sexual orientation, religion and beliefs must be considered.<sup>562</sup> As children grow and develop, their increasing levels of agency in exercising their rights and expressing their views must be respected,<sup>563</sup> including their own freedoms of thought, conscience and religion, and freedom of expression.<sup>564</sup> Importantly, when a child develops the capacity to understand and make their own decisions, their independent rights are enlivened, and the legitimacy of parental influence wanes.<sup>565</sup> Children must be free to choose their own religion or to not have a religion, with access to diverse information about different religions, cultures and beliefs.<sup>566</sup> Practices which forcibly expose students to religious instruction against their will are in violation of the right to freedom from coercion that would impair their freedom to have or adopt a religion or belief of their choice.<sup>567</sup> While preserving religious and cultural values and traditions as part of a child's identity must be considered, practices that are inconsistent or incompatible with a child's other

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<sup>556</sup> CRC arts 5 and 14(2). See O Khazova (2019) 'International Children's Rights Law: Child and the Family' in *International Human Rights of Children*, 1<sup>st</sup> ed, Singapore: Springer at 169-170.

<sup>557</sup> CRC arts 5 and 18(1); UN Committee on the Rights of the Child, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration*, CRC/C/GC/14, 1 February 2013 (**CRC General Comment No 14**) at [25]. See N Harris (2009) 'Playing Catch-Up in the Schoolyard? Children and Young People's 'Voice' and Education Rights in the UK', *International Journal of Law, Policy and Family* 23(3) at 341.

<sup>558</sup> CRC art 3(1); CRC General Comment No 14 at [4], [6], [25], [32], [37], [39] and [40]. See also, UN Committee on the Rights of the Child, *General Comment No. 13: The Right of the Child to Freedom from All Forms of Violence*, CRC/C/GC/13, 18 April 2011 at [53] and [56]; CRC General Comment No 15 at [31]; UN Special Rapporteur on the right to education (**UN Special Rapporteur on Education**) *Securing the right to education: advances and critical challenges*, A/HRC/53/27, 17 May 2023 at [50]; N Peleg (2019) 'International Children's Rights Law: General Principles' in U Kilkelly and T Liefwaard (eds.), *International Human Rights of Children*, 1<sup>st</sup> ed, Singapore: Springer at 139; J Tobin (2010) 'Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation', *Harvard Human Rights Journal* 23(1) at 37–39.

<sup>559</sup> CRC arts 19 and 37; UN CRC, *General Comment No. 8: The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment*, 2 March 2007 (**CRC General Comment No 8**) at [18], [26], [28] and [29]. See also, *R. (on the application of Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246.

<sup>560</sup> CRC General Comment No 14 at [6], [10], [19], [23] and [32].

<sup>561</sup> CRC art 2; CRC General Comment No 4 at [6]; CRC General Comment No 3 at [8]. See also, *Rex (Isherwood and others) v Welsh Ministers* [2023] PTSR 901 at [198].

<sup>562</sup> CRC General Comment No 14 at [52]–[79].

<sup>563</sup> CRC arts 5 and 14(2); UN Committee on the Rights of the Child, *General Comment No. 12: The right of the child to be heard*, CRC/C/GC/12, 20 July 2009 at [84]–[85], [91]–[92]. UN Committee on the Rights of the Child, *General Comment No. 7 (2005): Implementing Child Rights in Early Childhood*, CRC/C/GC/7/Rev.1, 20 September 2006 at [17].

<sup>564</sup> CRC art 14. See also, UN Special Rapporteur on Education, n558 at [79(h)]; S Langlaude (2008) 'Children and Religion under Article 14 UNCRC: A Critical Analysis', *International Journal of Children's Rights* 16(4) at 452.

<sup>565</sup> CRC General Comment No 20 at [43]: '[I]t is the child who exercises the right to freedom of religion, not the parent, and the parental role necessarily diminishes as the child acquires an increasingly active role in exercising choice throughout adolescence'. See also CRC General Comment No 8 at [2], [37] and [47]. See also J Tobin (2016) 'Fixed Concepts but Changing Conceptions Understanding the Relationship Between Children and Parents under the CRC' in M Ruck et al (eds.), *Handbook of Children's Rights*, 1<sup>st</sup> ed, New York: Routledge at 63–64; S Langlaude (2007) 'The Right of the Child to Religious Freedom in International Law', *Queen's University Belfast Law Research Paper*, Belfast: Martinus Nijhoff Publishers at 54; J Oliva and H Hall (2013) 'Religious-decision making and the capacity of children in the United Kingdom', *Laicidad y Libertades* 13(1) at 144; Langlaude, n564 at 493–502.

<sup>566</sup> CRC arts 17 and 29(1).

<sup>567</sup> UN Special Rapporteur on Religion or Belief, *Report of the Special Rapporteur on freedom of religion or belief*, A/HRC/16/53, 15 December 2010 at [53].

human rights cannot be in a child's best interests.<sup>568</sup> Cultural identity cannot excuse or justify the perpetuation by decision-makers and authorities of traditions or cultural values that deny a child their rights.<sup>569</sup>

The best interests of the child is a comprehensive obligation encompassing all public and private social welfare institutions' actions concerning children,<sup>570</sup> and extends to decisions by religious educational institutions.<sup>571</sup> When assessing a child's best interests, decision makers must take into account a range of factors including: a child's views and identity; their safety, care, protection and wellbeing; and right to protection against all forms of physical or mental violence, injury or abuse, such as peer pressure, bullying and degrading treatment.<sup>572</sup> Governments have an obligation to guarantee the right of every child to physical, psychological and emotional safety in pursuing education, which is much broader than just religious and moral education.<sup>573</sup> Parents can choose to send their children to private religious schools,<sup>574</sup> but there is no requirement for governments to provide public funding for private religious schools.<sup>575</sup> All schools – public and private – must uphold children's rights, be '*child-centred, child-friendly and empowering*', comply with state-approved minimum educational standards, adapt to the needs of changing societies, respond to the needs of students within diverse social and cultural settings, and ensure the school environment promotes understanding, peace, tolerance and equality and does not allow bullying or other exclusionary practices.<sup>576</sup> Where, as is the case in Australia, significant public funding is directed to private religious schools and school choice is limited by region or locality to the extent that private schools have a de facto monopoly, there is a particular obligation on governments to ensure human rights are guaranteed.<sup>577</sup> Here, governments and decision-makers must adopt minimum standards to safeguard rights and wellbeing of children across public and private schools, as children generally cannot exercise choice over the school they attend.

## RELIGIOUS ORGANISATIONS

While the freedom of thought, conscience and religion is a *human* right with a communal aspect – i.e. it can be enjoyed in community with others – it is a right owed directly to each individual and not legal entities. However, the European Court of Human Rights has, in some cases, allowed corporations to rely on a similar right found in the European Convention on Human Rights in order to bring a complaint directly as a representative on behalf of its members. The autonomous existence of religious communities, organised as they may be through corporate or other structures, are preserved to allow individuals to exercise communally their individual freedoms of thought, conscience and religion.<sup>578</sup> However, not all bodies with religious or philosophical objects are recognised as bodies capable of possessing and exercising rights in their own capacity as representatives of their members.<sup>579</sup>

### 8.3 The interaction between rights claims

International human rights law requires a balancing of rights, to ensure that discriminatory conduct is not permitted unless there is a legitimate purpose for the conduct, and the means by which that purpose is achieved is

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<sup>568</sup> CRC General Comment No 14 at [57].

<sup>569</sup> CRC General Comment No 14 at [57].

<sup>570</sup> CRC art 3; CRC General Comment No 14 at [25]-[26].

<sup>571</sup> CRC art 3; CRC General Comment No 14 at [13]-[14], [26].

<sup>572</sup> CRC arts 3(2), 12 & 19; CRC General Comment No 14 at [73].

<sup>573</sup> CRC arts 3, 19(1) and 28(2). See also, UN Special Rapporteur on Education, n558 at [62]; UN CRC, *General Comment No 1: Article 29(1): The Aims of Education*, CRC/GC/2001/1, 17 April 2001 (**CRC General Comment No 1**) at [2]; UN ESCRC *General Comment No. 13: The Right to Education*, E.C.12/1999/10, 8 December 1999 (**UN ESCRC General Comment No 13**) at [6].

<sup>574</sup> CRC art 29(2); ICESCR arts 13(3) and (4); UN ESCRC General Comment No 13 at [30].

<sup>575</sup> CRC art 29(2). See also L Lundy and P O'Lynn (2019) 'The Education Rights of Children' in U Kilkelly and T Liefwaard (eds.), *International Human Rights of Children*, 1<sup>st</sup> ed, Singapore: Springer at 272-273; *The Belgian Linguistics Case* (1968) 1 EHRR 293.

<sup>576</sup> CRC art 29(2); ICESCR arts 13(3) and (4); UN ESCRC General Comment No 13 at [30]; CRC General Comment No 1 at [2] and [19].

<sup>577</sup> UN Special Rapporteur on Religion or Belief, n567 at [56].

<sup>578</sup> See e.g. *X and Church of Scientology v Sweden* (Application no 7805/77) 5 May 1979 at 68; *Omkananda and the Divine Light Zentrum v Switzerland* (Application no 8118/77) 19 March 1981 at 117; *Hasan v Bulgaria* (2002) 34 EHRR 55 at [62]. See also *Cobaw VCA* at [320]-[321] per Maxwell P, [413] per Neave JA and at [484] per Redlich JA.

<sup>579</sup> *Kustannus Oy Vapaa Ajatteliija v Finland* (Application no 2047/92) 15 April 1996 at 11-12.

proportionate.<sup>580</sup> Conversely, rights to non-discrimination do not require identical treatment of all persons in all circumstances.<sup>581</sup> Not every distinction will amount to prohibited discrimination, as long as it is based on reasonable and objective criteria.<sup>582</sup>

The distinction between *having or adopting* a religion or belief, and *manifesting* that religion or belief, is relevant to the limitations on the freedom of thought, conscience and religion. There are no limitations on the right to *have or adopt* a religion or belief of one's choice<sup>583</sup> and no one can be compelled to reveal their thoughts or adherence to a religion or belief.<sup>584</sup> However, the right to *manifest* religion or belief (i.e. through worship, observance, practice and / or teaching) must be considered alongside the fundamental rights and freedoms of others.<sup>585</sup>

The right to manifest religion or belief is limited in order to protect the right to equality and non-discrimination.<sup>586</sup> Restrictions on the freedom of thought, conscience and religion are permitted where the limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or (as above) the fundamental rights and freedoms of others.<sup>587</sup> Generally, the closer conduct is to religious worship, observance, practice and teaching, the stronger the argument for privileging the interests of a religious collective, however constituted, over the interests of an individual with a different religious conviction.<sup>588</sup>

## 9. INTERNATIONAL COMPARISONS

**While international human rights law sets out the principles, cases overseas can show how these principles apply in practice. When resolving disputes about LGBTQ+ discrimination and religion, decision-makers overseas have undertaken a proportionality analysis which considers a range of factors. Some factors, such as the public nature of the services, the impact of the discrimination and whether the discriminatory conduct is closely connected with religious practice, are more persuasive than others. However, overall, the rights of LGBTQ+ people to equality and non-discrimination have generally prevailed over countervailing religious beliefs in comparable overseas jurisdictions, except the United States.**

This section briefly summarises the jurisprudence of comparable overseas jurisdictions which have decided LGBTQ+ discrimination claims intersecting with religiously-based rights claims. In Canada, the United Kingdom, South Africa and the European Court of Human Rights, the rights of LGBTQ+ people to equality and non-discrimination have generally prevailed over countervailing religious beliefs. The opposite is true in the United States of America. In all cases, the overseas experience provides some guidance on the considerations which have been more persuasive in deciding whether LGBTQ+ discrimination should be permitted in faith-based settings.

In reading this summary, it is important to recognise that the human rights framework in each jurisdiction varies considerably and the courts' approach in each jurisdiction depends on the application of local laws, as well as the circumstances of the particular case.

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<sup>580</sup> HRC General Comment No 18 at [13].

<sup>581</sup> HRC General Comment No 18 at [8]; *C v Australia* at [5.3].

<sup>582</sup> *Young v Australia* at [10.4].

<sup>583</sup> HRC General Comment No 22 at [3].

<sup>584</sup> ICCPR art 18(2); HRC General Comment No 22 at [3].

<sup>585</sup> ICCPR art 18(3); see also CRC art 14(3); HRC General Comment No 18 at [8].

<sup>586</sup> HRC General Comment No 22 at [8].

<sup>587</sup> ICCPR art 18(3); HRC General Comment No 22 at [8].

<sup>588</sup> HRC General Comment No 22 at [4]. See e.g. *Case of Eweida and Others v The United Kingdom* (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) 27 May 2013 at [81]-[82] (***Eweida v UK***); *Ladele v London Borough of Islington* [2009] EWCA Civ 1357 (the UK Court of Appeal decision before *Eweida v UK*); *Skugar and Others v Russia* (Application no 40010/04) 3 December 2009.

## 9.1 Overseas examples

Comparable overseas jurisdictions have decided a number of cases involving LGBTQ+ discrimination taking place in a context where the freedom of religion is asserted.

Examples include:

- the refusal of a Catholic high school to allow a gay student to bring his boyfriend to the school prom based on Catholic teachings;<sup>589</sup>
- the denial of accreditation to a religiously-based law school which would have required its students to refrain from any ‘sexual intimacy except between married heterosexual couples’, including in the privacy of their own homes;<sup>590</sup>
- the deregistration by a university of a religious student organisation that refused to allow people in same-sex relationships to be part of the executive leadership team;<sup>591</sup>
- the refusal of a school board to approve supplementary educational resources that depicts same-sex families due to concerns about offending the religious beliefs of some parents;<sup>592</sup>
- the dismissal of gay and lesbian employees by churches, religious schools and faith-based organisations based on the employees’ sexual orientation or same-sex relationship;<sup>593</sup>
- the denial of accommodation to same-sex couples because of the accommodation owners’ religious beliefs;<sup>594</sup>
- the refusal by commercial providers to provide services (such as websites, photography, printed materials, flowers or cakes) to same-sex couples, or gay and lesbian organisations, based on the religious beliefs of the business owners;<sup>595</sup>
- the dismissal of public officials and authorised celebrants who refuse to officiate civil marriages between same-sex couples or make adoption orders favouring same-sex couples;<sup>596</sup>
- the refusal of faith-based providers to assess or recommend same-sex couples as foster carers or adoptive parents of children;<sup>597</sup>

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<sup>589</sup> *Hall (Litigation guardian of) v Powers* [2002] OJ No 1803 at [23].

<sup>590</sup> *Law Society of British Columbia v Trinity Western University* [2018] 2 SCR 293, 340 at [73] (*Trinity Western University SCC (2018)*). See also *Trinity Western University v Law Society of Upper Canada* [2018] 2 SCR 453; *Trinity Western University v Nova Scotia Barristers’ Society* [2015] NSSC 25 and *Trinity Western University v British Columbia College of Teachers* [2001] 1 SCR 772 (*Trinity Western University SCC (2001)*).

<sup>591</sup> *Business Leaders in Christ v The University of Iowa*, No. 19-1696 (8<sup>th</sup> Cir. 2021) (*Business Leaders in Christ*).

<sup>592</sup> *Chamberlain v Surrey School District No. 36* [2002] 4 SCR 710 (*Chamberlain*).

<sup>593</sup> *Vriend v Alberta* [1998] 1 SCR 493 (*Vriend*). See also *Demkovich v St. Andrew the Apostle Parish* 973 F.3d 718 (*Demkovich*); *Ontario Human Rights Commission v Christian Horizons* (2010) ONSC 2105 (*Christian Horizons*); *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* [2008] ZAGPHC 269 (*Strydom*). See further *R (on the application of Amicus) v Secretary of State for Trade and Industry* [2004] EWHC 860 (Admin) (*EU Directive Case*).

<sup>594</sup> *Black and Morgan v Wilkinson* [2013] EWCA Civ 820 (*Black and Morgan v Wilkinson*); *Bull and another v Hall* [2013] UKSC 73 (*Bull v Hall*); *Cervelli v Aloha Bed & Breakfast* 415 P.3d 919 (Haw. Ct. App. 2018) (*Cervelli*); *Eadie and Thomas v Riverbend Bed and Breakfast and others* (No. 2), 2012 BCHRT 247 (*Riverbend Bed and Breakfast*); *Robertson v Goertzen* (2010) NTHRAP 1 at 9 (*Robertson v Goertzen*).

<sup>595</sup> *303 Creative LLC v Elenis* 600 U.S. \_\_\_\_ (2023) (*303 Creative*); *Elane Photography, LLC v. Willock* 309 P.3d 53 (N.M. 2013) (*Elane Photography*); *HRC v Brillinger* (2004) 185 O.A.C 366 (CA) (*Brillinger*); *Klein dba Sweetcakes by Melissa v Oregon Bureau of Labor and Industries* 317 Or App 138 (2022) (*Klein dba Sweetcakes*); *Lee v Ashers Baking Company Ltd and others* [2018] UKSC 49 (*Lee v Ashers Baking*); *Lexington-Fayette Urban County Human Rights Commission v Hands On Originals* No. 2015-CA-000745-MR (Ky. Ct. App. May. 12, 2017) (*Hands On Originals*); *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. \_\_\_\_ (2018) (*Masterpiece Cakeshop*) at 32; *Telescope Media Group, et al v Rebecca Lucero, et al*, Civil Action No.17-cv-03352 (8<sup>th</sup> Cir. 2019) (*Telescope Media*); *Washington v Arlene’s Flowers, Inc.* 441 P.3d 1203 (Wash. 2019) (*Arlene’s Flowers*).

<sup>596</sup> *Eweida v UK* at [102]-[103]. See also *Dichmont Estate v Newfoundland and Labrador (Government Services and Lands)*, 2021 NLSC 9 (*Dichmont*); *Kisilowsky v Her Majesty the Queen*, 2016 MBQB 224 (*Kisilowsky*); *M.J. v. Nichols*, 2008 63 CHRR 145 (*M.J. v Nichols*) (The Saskatchewan Court of Queen’s Bench dismissed Nichols’ appeal: *Nichols v. M.J.*, 2009 SKQB 299); *Page v Lord Chancellor & Anor* [2021] EWCA Civ 254 (*Page*).

<sup>597</sup> *Marouf v Azar* 391 F. Supp. 3d 23 (DC 2019) (*Marouf*); *New Hope Family Services, inc v Poole* No. 19-1715 (2d Cir. 2020) (*New Hope Family Services*); *Fulton v City of Philadelphia, Pennsylvania* 593 U.S. \_\_\_\_ (2021) (*Fulton*); *The Queen (on the Application of Cornerstone (North East) Adoption and Fostering Services Ltd) v HM Chief Inspector of Education, Children’s Services and Skills (Ofsted)* [2021] EWCA Civ 1390 (*Cornerstone*).

- the refusal of physicians or faith-based health providers to provide fertility services to gays or lesbians, or provide gender affirming healthcare to transgender people;<sup>598</sup>
- the refusal of a counsellor employed by a private company to provide counselling to same-sex couples on account of his ‘*orthodox Christian belief about marriage and sexual relationships*’;<sup>599</sup> and
- the termination of a Christian doctor employed as a health and disabilities assessor who refused to address transgender service users by their correct pronouns based on his religious beliefs.<sup>600</sup>

## 9.2 Anti-LGBTQ+ religious beliefs as worthy of consideration

Like cases in Australia,<sup>601</sup> the starting point internationally is that courts and tribunals have been prepared to accept that certain practices or attitudes which are hostile or discriminatory towards LGBTQ+ people may nonetheless engage rights claims based on the freedom of thought, conscience and religion. That is, religious beliefs which may be regarded by LGBTQ+ people as disrespectful or demeaning may still be treated as worthy of protection or, at least, deserving of further scrutiny.<sup>602</sup>

Common religious beliefs raised in overseas cases involving LGBTQ+ discrimination go to the asserted sinfulness of same-sex sexuality and conduct,<sup>603</sup> and/or affirming genders other than those assigned at birth.<sup>604</sup> Whether there are anti-LGBTQ+ religious beliefs that are so antithetical to the human rights system such that they are not ‘*worthy of respect in a democratic society*’<sup>605</sup> is a question which has been skirted around in the United Kingdom. However, short of beliefs pursuing totalitarianism, advocating Nazism, or espousing violence and hatred in the gravest of forms, decision-makers in the United Kingdom have not yet found any anti-LGBTQ+ religious beliefs to have reached that disqualifying threshold.<sup>606</sup>

On the other hand, courts have reprimanded parties who have taken an entrenched or hostile position towards people with religious beliefs condemning LGBTQ+ people.<sup>607</sup> For example, in *Ngole*, the English and Welsh Court of Appeal found that a university acted disproportionately by failing to consider less restrictive measures than barring from social work a student who had expressed anti-LGBTQ+ religious views on social media.<sup>608</sup> This was the case even though the Court of Appeal accepted that maintaining public confidence in the relevant profession was a legitimate aim of professional regulation restricting speech done in private.<sup>609</sup>

Similarly, in *Masterpiece Cakeshop*, the failure of the Colorado Civil Rights Commission to approach with neutrality the sincerely-held religious beliefs of a Christian baker who refused to make a wedding cake for a gay couple was treated as a violation of his First Amendment rights.<sup>610</sup> In that case, the United States Supreme Court refrained from

<sup>598</sup> *Hammons v University of Maryland Medical System Corporation et al* Civ: DKC 20-2088 (2021) (**Hammons**); *Minton v Dignity Health* 39 Cal Rptr 3d 616 (Cal App 2019) (**Minton**); *North Coast Women’s Care v Superior Court* 189 P3d 959 (**North Coast Women’s Care**) at 967.

<sup>599</sup> *Eweida v UK* at [107]-[108].

<sup>600</sup> *Mackereth v The Department for Work and Pensions* [2022] EAT 99 at [15] (**Mackereth**).

<sup>601</sup> *Cobaw VCA*; *Hordyk*; *OV & ONSWCA*.

<sup>602</sup> *303 Creative*; *Bull v Hall*; *Mackereth*; *New Hope Family Services*; *Riverbend Bed and Breakfast*; *Smith and Chymyshyn v Knights of Columbus and others* (2005) BCHRT 544 (**Knights of Columbus**); *Trayhorn v The Secretary of State for Justice* [2017] UKEAT 0304 (**Trayhorn**). Also see *Kluge v Brownsburg Community School Corp* No 21-2475 (7<sup>th</sup> Cir. 2021) (**Kluge**) (but note that this decision was vacated following the US Supreme Court’s clarification in *Groff*).

<sup>603</sup> *Cornerstone*; *Eweida v UK*; *Knights of Columbus*; *Riverbend Bed and Breakfast*.

<sup>604</sup> *Kluge*; *Mackereth*.

<sup>605</sup> *Grainger Plc v Nicholson* [2010] IRLR 4 at [28].

<sup>606</sup> *Mackereth* at [15] and [118]-[120]. See also *Forstater v CDG Europe & Ors* [2022] ICR 1 at [110]-[111] (reversing an earlier decision of the Central London Employment Tribunal).

<sup>607</sup> See e.g. *Klein dba Sweetcakes* at [161]; *Masterpiece Cakeshop* at 32; *Ngole, R (on the application of) v The University of Sheffield* [2019] EWCA Civ 1127 (**Ngole EWCA**) at [5]. But see also *Arlene’s Flowers*.

<sup>608</sup> *Ngole* at [134]-[137]; reversing in part *Ngole, R (On the Application Of) v University of Sheffield* [2017] EWHC 2669 (**Ngole EWHC**).

<sup>609</sup> *Ngole* EWCA at [104]-[106].

<sup>610</sup> *Masterpiece Cakeshop* at 32 (7:2, with Ginsburg and Sotomajor JJ dissenting). See also *Business Leaders in Christ*; *Dichmont v. Newfoundland and Labrador* 2015 NLTD(G) 14.



finding which rights claim should ultimately prevail. However, there is now a pending appeal in the Colorado Supreme Court after the same baker refused to make a cake for a transgender customer who informed the shop that the blue-and-pink cake she ordered was to celebrate her birthday and gender affirmation.<sup>611</sup>

### 9.3 Proportionality assessments in resolving competing rights claims

Having identified that a religiously-based rights claim has been engaged, overseas decision-makers generally do not stop their inquiry there. The critical question then becomes how these competing claims interact with the rights of LGBTQ+ people to equality and non-discrimination.

In deciding how to resolve that interaction, comparable overseas courts and tribunals seek to determine whether LGBTQ+ discrimination may be justified because of countervailing religious beliefs or interests in a particular case. There are numerous formulations of these tests at the local level but all involve some proportionality assessment of competing objectives and interests.<sup>612</sup>

One of the difficulties in undertaking a comparison of the approach in overseas jurisdictions are differences in the legal systems and questions that the courts are being asked to decide in each case.<sup>613</sup> Despite these differences, two general observations can be made on the approach taken in different jurisdictions. The first is that the United States is a jurisdictional outlier in many respects. The second is that few cases contend with the equal enjoyment of the freedom of thought, conscience and religion by LGBTQ+ people themselves. These themes are now explored.

#### THE UNITED STATES AS A JURISDICTIONAL OUTLIER

The United States of America is a jurisdictional outlier when considering the approach of courts and tribunals in Canada, South Africa, the United Kingdom and the European Court of Human Rights.

Decision-makers in Canada, South Africa, the United Kingdom and the European Court of Human Rights tend to place greater emphasis on the fundamental importance of non-discrimination and equality. In these jurisdictions, many decisions have found that discrimination against LGBTQ+ people could not be justified on the basis of countervailing religious beliefs with only few exceptions.<sup>614</sup>

By contrast, courts in the United States tend to give more precedence to religiously-based claims, informed by a legal system which guarantees freedoms of religion, speech and 'expressive association' in the First Amendment to the United States Constitution,<sup>615</sup> and which requires that incursions to these freedoms be given stringent forms of legal scrutiny.<sup>616</sup> Justices sometimes disagree on when the First Amendment freedoms should be limited to enable a

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<sup>611</sup> *Scardina v Masterpiece Cakeshop, Inc* 528 P.3d 926 (Colo. App. 2023) (a petition for writ of certiorari was granted by the Colorado Supreme Court in October 2023: *Masterpiece Cakeshop, Inc v Scardina* (Case No. 23SC116)).

<sup>612</sup> See, e.g. 303 *Creative* at 24 – 30, 50-51; *Black and Morgan v Wilkinson* at [38]; *Christian Horizons*; *Fulton* at 14; *Cornerstone* at [108], [120], [142] -[145]; *Ewedra v UK* at [83]; *Hall v Powers* at [48]-[50]; *Knights of Columbus* at [52]; *Trayhorn* at [82]-[92]; *Trinity Western University SCC* (2018) at [35]-[42].

<sup>613</sup> Some of the key differences include:

- the area of law in which the dispute arises, such as Constitutional law, administrative law or the application of an anti-discrimination law;
- who is driving the litigation and whether religiously-based rights claims are being raised as an answer to a claim or by the claimant;
- whether LGBTQ+ people who are affected by the discrimination are before the court.

<sup>614</sup> The exceptions are *Lee v Ashers Baking*; *Brillinger*, in part; *Ngole EWCA*; *Reverend Canon Pemberton v Reverend Richard Inwood* [2016] UKEAT 0072 (*Pemberton*).

<sup>615</sup> The First Amendment to the United States Constitution provides: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances'.

<sup>616</sup> See e.g. 303 *Creative* at 26; *Fulton* at 1873. See also *Bear Creek Bible Church v Equal Employment Opportunity Commission* 571 F Supp 3d 571, 616-7 (ND Tex 2021) (*Bear Creek Bible Church*); *Demkovich*; *New Hope Family Services*; *Telescope Media*.

subordinate law or policy to stand which furthers anti-discrimination objectives,<sup>617</sup> but not always.<sup>618</sup> Still, arguments advocating for the protection of LGBTQ+ people from discrimination over countervailing religious beliefs have prevailed in a few cases in the United States.<sup>619</sup>

The difference in approach between the United States and other jurisdictions is illustrated by two cases involving faith-based foster care service providers. In *Fulton*, the United States Supreme Court agreed that the First Amendment prevented the City of Philadelphia from refusing a contract to a Catholic foster care agency because of the agency's refusal to certify same-sex couples as foster carers.<sup>620</sup> By contrast, in *Cornerstone*, the English and Welsh Court of Appeal unanimously rejected a similar argument in a judicial review concerning an Evangelical Christian foster care agency. In *Cornerstone*, Jackson LJ (with whom Asplin and Davies LJJ agreed) expressly addressed *Fulton* and said that the United Kingdom's equalities and human rights legislation did not give the same prominence to the rights of religious organisations.<sup>621</sup> Instead, the Court of Appeal found that interference with the freedom of thought, conscience and religion was proportionate to the aim of ensuring services provided in the public sphere were conducted in a non-discriminatory way.<sup>622</sup>

### Employment discrimination

There is also case law suggesting that the United States may be taking a different approach to other jurisdictions in employment discrimination cases.

Drawn from the First Amendment, the United States Supreme Court has affirmed a 'ministerial exception' that prevents federal employment anti-discrimination laws from applying to employees in religious organisations who exercise religious functions.<sup>623</sup> The ministerial exception has been held to apply to teachers whose employment functions involve religious duties, such as religious instruction, and not only those conferred with the title of a 'minister'.<sup>624</sup> It has also applied to a music director hired by a Catholic parish church who was barred in his claim alleging a hostile work environment based on his sexual orientation and physical condition.<sup>625</sup> While the extent to which the ministerial exemption may apply to teachers or general staff at a religious school or college has not been finally determined,<sup>626</sup> it appears to provide a complete immunity to any federal discrimination claim wherever it is held to apply.

By contrast, cases in the United Kingdom, Canada and South Africa illustrate the much narrower scope for applying employment exemptions, even in strictly religious institutions.

For example, in *Strydom*, the Transvaal Provincial Division of the High Court of South Africa found it unlawful for a church to fire a music teacher after they found he was engaged to a man.<sup>627</sup>

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<sup>617</sup> See e.g. 303 *Creative* at 10-11; *Fulton* at 4-15; *Demkovich* (7:3, with Hamilton, Rovner and Wood J dissenting). See also *Boy Scouts of America v Dale* 530 US 640 (2000) (*Boy Scouts of America*) (5:4, with Stevens, Souter, Ginsburg and Breyer JJ dissenting). See also *Telescope Media* (2:1, with Kelly J dissenting in part).

<sup>618</sup> *Fulton* (Roberts CJ, with Barrett, Kavanaugh and Breyer (in part) JJ concurring and Alito, Thomas and Gorsuch JJ concurring). See also *Bear Creek Bible Church* (O'Connor J); *Business Leaders in Christ* (Smith J with Benton and Kobes JJ agreeing). But in the other direction, see *Cervelli* (Nakamura CJ with Fujise and Reifurth JJ agreeing).

<sup>619</sup> *Cervelli* (affirmed on appeal); *Arlene's Flowers*; *Elane Photography*; *Klein dba Sweetcakes*. See also *Minton* (note that the Supreme Court denied leave to appeal from this decision).

<sup>620</sup> *Fulton* at 4-15 per Roberts CJ (Breyer, Sotomayor, Kagan, Kavanaugh and Barrett JJ agreeing). Alito, Thomas and Gorsuch JJ also concurred in the outcome, in a separate opinion.

<sup>621</sup> *Cornerstone* at [128] per Jackson LJ (Asplin and Davies LJJ agreeing).

<sup>622</sup> *Cornerstone* at [123] and [141]-[147] per Jackson LJ (Asplin and Davies LJJ agreeing).

<sup>623</sup> *Hosanna-Tabor Evangelical Lutheran Church & School v EEOC*, 565 U.S. 171 (2012) (*Hosanna-Tabor*) at 181-187; *Our Lady of Guadalupe School v Morrissey-Berru* and *St James School v Biel* 591 U.S. \_\_\_\_ (2020) (*Our Lady of Guadalupe*) at 9-22, 34.

<sup>624</sup> *Our Lady of Guadalupe* (7:2, with Sotomayor and Ginsburg JJ dissenting).

<sup>625</sup> *Demkovich* at 727-728 (7:3, with Hamilton, Rovner and Wood JJ dissenting).

<sup>626</sup> *Gordon College et al v Margaret DeWeese-Boyd* 595 U.S. \_\_\_\_ (2022) (Statement of Alito J, with Thomas, Kavanaugh and Barrett JJ joining) at 1.

<sup>627</sup> *Strydom*.

In Canada, the dismissal of a gay teacher from a Christian college provided the context for the Canadian Supreme Court to ‘read in’ sexual orientation as a protected attribute into Alberta’s anti-discrimination laws, although the Court did not ultimately have to decide whether the ‘*private fundamentalist Christian college*’ could legitimately refuse to employ a gay teacher.<sup>628</sup> However, in *Christian Horizons*, the Superior Court of Justice of Ontario found that it was not a reasonable occupational requirement for a Christian woman to be required to refrain from entering a same-sex relationship in order to keep her job as a support worker at an Evangelical Christian charity providing services to people with disabilities.<sup>629</sup> Influential to the finding were the non-religious tasks required of the job (which included cooking, cleaning, doing laundry, helping residents eat and wash, and taking them to appointments) and that services were provided to people without reference to their religion or creed.<sup>630</sup> Anti-discrimination laws in Canada differ from territory to territory.<sup>631</sup>

Finally, in the *EU Directive* case, the English and Welsh High Court of Justice said that a statutory exception allowing discrimination in employment on the basis of sexual orientation ‘*for the purposes of an organised religion*’ could not apply to organisations which merely espoused an ethos based on religion or belief, such as a faith school or other religious organisation of that nature.<sup>632</sup> Further, the requirement for the discrimination to be in conformity with the religious doctrines of the religious institution was an objective test.<sup>633</sup> Demonstrating the narrowness of its scope, the exception was later relied upon to dismiss a case brought by a gay Church of England priest who had his permissions and licenses to officiate and provide ministry revoked by the Bishop of Lincoln after he married his same-sex partner.<sup>634</sup> In other contexts, occupational requirement exceptions apply but each includes a proportionality test.<sup>635</sup>

### Commercial service delivery

Until the United States Supreme Court decision in *303 Creative*,<sup>636</sup> businesses (even closely-held small businesses such as ‘bed-and-breakfasts’) have generally not been allowed to discriminate on the basis of religious views when providing non-religious services.<sup>637</sup> The approach in the United States since *303 Creative* may well now be different, particularly in the area of ‘expressive’ services; although some decisions in the United States have followed the general trend.<sup>638</sup>

Even in a case involving services provided in a quasi-religious setting, the British Columbian Human Rights Tribunal in *Knights of Columbus* found that a lesbian couple had been discriminated against when their wedding reception booking was cancelled at a hall owned by the Catholic church. While the Tribunal accepted that the hall managers were entitled to reject bookings that conflicted with their religious views, they were not entitled to do so in the way they had, including by not assisting the couple with reimbursements for other expenses.<sup>639</sup>

While the United States tends to prefer religiously-based claims overall, the few cases which have preferred religiously-based claims in the United Kingdom and Canada have concerned services involving the personal expression of messages. A printer in Canada and a baker in Northern Ireland were each permitted to refrain from providing services that conveyed messages which directly conflicted with their personal religious views. In Canada, the Court required the printing services to be provided subject to the proviso that the printer was not required to

<sup>628</sup> *Vriend* at [193] per L’Heureux-Dubé J.

<sup>629</sup> *Christian Horizons*.

<sup>630</sup> *Christian Horizons* at [97].

<sup>631</sup> For a discussion in the context of religious educational institutions, see Australian Law Reform Commission (2023) [Background Paper: Religious Educational Institutions and Anti-Discrimination Laws – International Comparisons](#) at [119]–[153].

<sup>632</sup> *EU Directive Case* at [105].

<sup>633</sup> *EU Directive Case* at [117].

<sup>634</sup> *Pemberton* at [62]–[63], [110]–[115].

<sup>635</sup> *Equality Act 2010* (UK) sch 9, items 1 and 3.

<sup>636</sup> *303 Creative*.

<sup>637</sup> See e.g. *Arlene’s Flowers*; *Brillinger*; *Bull v Hall*; *Cervelli*; *Elane Photography*; *Klein dba Sweetcakes*; *Riverbend Bed and Breakfast*; *Robertson v Goertzen*.

<sup>638</sup> See *Arlene’s Flowers*; *Cervelli*; *Elane Photography*; *Klein dba Sweetcakes*; *North Coast Women’s Care*. But see contrary: *Bear Creek Bible Church*; *Hands On Originals*.

<sup>639</sup> *Knights of Columbus* at [122]–[128].

print material of a nature which could reasonably be considered to be in direct conflict with core elements of his religious beliefs or creed.<sup>640</sup> In the United Kingdom, the Court indicated that it had reached its view because there had been no discrimination based on sexual orientation or political opinion, given the baker would not have baked a cake with a message to which he objected to anyone regardless of their sexual orientation or political opinion.<sup>641</sup>

## LGBTQ+ PEOPLE AND THE FREEDOM OF RELIGION

While many cases are argued on behalf of LGBTQ+ people based on the right to equality, very few cases contend with the argument that LGBTQ+ people are also entitled to enjoy the freedom of thought, conscience and religion equally with others. Three cases stand out in this regard.

In *Cornerstone*, an Evangelical Christian foster care agency contended that gay men and lesbians could not be considered Evangelical Christians.<sup>642</sup> The English and Welsh Court of Appeal disagreed and said that, to deny the existence of gay Evangelical Christians would be *‘to substitute the precepts of the faith for the reality’*.<sup>643</sup> Rather, gay Evangelical Christians wishing to foster were themselves the victims of the agency’s discriminatory policy, and that *‘it must be recognised that religious doctrine does not stand still’* and the *‘law is entitled to have regard to the rights of those who might wish to be free of a discriminatory practice currently endorsed by their faith’*.<sup>644</sup>

In *Hammons*, the freedom of religion in the First Amendment to the United States Constitution was invoked to protect LGBTQ+ people from discrimination. That case involved a transgender man whose gender affirming hysterectomy was cancelled by a Catholic hospital. In *Hammons* the Court considered that the US State of Maryland’s *‘entanglement’* with the Catholic hospital meant that the actions of the hospital could be treated as acts of the State government. However, having found that the hospital was acting as an arm of the State of Maryland, the Court then dismissed this aspect of the case because US States have *‘sovereign immunity’* from actions brought in Federal courts.<sup>645</sup>

Finally, the Canadian case of *Chamberlain* decided that it was unreasonable for a school board to render LGBTQ+ people invisible in supplementary educational resources in order to appease the religious beliefs of one group.<sup>646</sup> In so doing, the Canadian Supreme Court found the school board impermissibly preferred the religious views of some parents over the views and interests of others, including the children of same-sex parents.

### 9.4 Factors taken into account to assess proportionality

When considering whether LGBTQ+ discrimination may be justified based on countervailing religious beliefs or interests, overseas courts and tribunals have considered a range of factors when applying local laws.

The following list sets out a number of factors which have been considered by overseas courts and tribunals when adjudicating the interaction between the rights of LGBTQ+ people to equality and non-discrimination and the freedom of thought, conscience and religion according to local laws. As discussed below, some factors have emerged as particularly persuasive while others have had less bearing on the assessment. The weight given to each factor greatly depends on the particular circumstances of the case.

- **Core religious activities.** The more directly connected conduct is to religious worship, observance, practice and teaching, the more likely a court will be to preference a claim based on religious beliefs.<sup>647</sup> Conversely, courts are more likely to prioritise non-discrimination where religious

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<sup>640</sup> *Brillinger* at [56].

<sup>641</sup> *Lee v Ashers Baking* at [31]-[35], [62]

<sup>642</sup> *Cornerstone* at [96], [136]-[137] per Jackson LJ (Asplin and Davies LJ agreeing).

<sup>643</sup> *Cornerstone* at [136] per Jackson LJ (Asplin and Davies LJ agreeing).

<sup>644</sup> *Cornerstone* at [136]-[137] per Jackson LJ (Asplin and Davies LJ agreeing).

<sup>645</sup> *Hammons* at 19-41.

<sup>646</sup> *Chamberlain* (7:2, with Gonthier and Bastarache JJ dissenting).

<sup>647</sup> See e.g. *Eweida v UK* at [81]-[82]; *Demkovich*; *Hosanna-Tabor*; *Our Lady of Guadalupe*; *Pemberton*; *Knights of Columbus*; See also HRC General Comment No 22 at [4].

activities or beliefs do not form part of the core elements of a religion<sup>648</sup> or where compliance with anti-discrimination laws ‘poses an incidental conflict with ... religious beliefs’.<sup>649</sup> For example, Canadian courts have limited the rights of schools to discriminate against LGBTQ+ students where the activity in question does not form part of the school’s religious education.<sup>650</sup> However, different considerations may be involved where the activity forms part of a school’s religious service or religious education, is held on school property or is educational in nature.<sup>651</sup>

- **Goods and services offered to the public.** Courts generally preference a person’s right to obtain commercial services free from discrimination.<sup>652</sup> Commercial services offered to the public have been considered at the ‘periphery’ of activities protected by freedom of religion.<sup>653</sup> For example, rights claims based on the freedom of religion have been limited where hotel keepers refuse LGBTQ+ guests,<sup>654</sup> photographers refuse to photograph LGBTQ+ weddings<sup>655</sup> and florists refuse to provide flowers for rainbow events.<sup>656</sup> Even where services may be of an artistic and creative nature, courts have considered these services to be offered in the ordinary course of business.<sup>657</sup> However, as discussed above, that approach may be changing in the United States following *303 Creative*.
- **Promoting messages.** There are examples of courts giving more weight to rights claims based on the freedom of religion where there is an objection to promoting a particular message as opposed to objecting to a particular person or people. In *Lee v Ashers Baking*, a bakery refused to supply a cake iced with the message ‘support gay marriage’ because of the belief of its owners that gay marriage is inconsistent with Biblical teaching and therefore unacceptable to God. The United Kingdom Supreme Court found that there had been no discrimination on the basis of sexual orientation. The bakery had not refused to provide a cake to Mr Lee because he was a gay man or because he supported gay marriage; rather, the bakery was being asked to supply a cake iced with a message with which they ‘profoundly disagreed’.<sup>658</sup>
- **Relevance of religion to employment.** Courts are less likely to endorse discrimination against an LGBTQ+ employee on religious grounds where religion is not overly relevant to that person’s employment.<sup>659</sup> However, discrimination may be considered more justifiable where the employee can be considered in a ‘position of spiritual leadership’.<sup>660</sup>
- **Prior awareness of employer requirements.** Courts will weigh up a person’s decision to enter employment in circumstances where they know there will be a potential impact on their rights to

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<sup>648</sup> See e.g. *Brillinger* at [56]; *Knights of Columbus* at [106]; also see *R (on the application of Amicus) v Secretary of State for Trade and Industry* [2004] EWHC 860 at [44]: ‘At the same time it should be noted that the weight to be given to religious rights may depend upon how close the subject-matter is to the core of the religion’s values or organisation’.

<sup>649</sup> See *North Coast Women’s Care* at III(3).

<sup>650</sup> See *Hall v Powers* at [50].

<sup>651</sup> See *Hall v Powers* at [26]. See also *Demkovich*; *Knights of Columbus*.

<sup>652</sup> See e.g. *Arlene’s Flowers* at [28]; *Brillinger* at [55]; *Bull v Hall*, at [53]; *Cervelli* at [25]; *Elane Photography* at [47]; *Klein dba Sweetcakes* at [542]. See also *Riverbend Bed and Breakfast* at [169]. But see to the contrary e.g. *Bear Creek Bible Church* at [47], [50]–[51]; *Hands On Originals* at 16–18; *Knights of Columbus* at [106]; *Telescope Media* at 4, 6, 14–15 and 56.

<sup>653</sup> See *Brillinger* at [51].

<sup>654</sup> See *Bull v Hall* at [53].

<sup>655</sup> See *Elane Photography* at [47].

<sup>656</sup> See *Arlene’s Flowers*.

<sup>657</sup> See e.g. *Elane Photography* at [29].

<sup>658</sup> *Lee v Ashers Baking* at [55].

<sup>659</sup> See e.g. *Christian Horizons* at [106] (‘Christian Horizons has not discharged its burden of showing that the qualification that its support workers adhere to the L & M Statement by not participating in same sex relationships is reasonable and bona fide because of the nature of that employment’); *EU Directive Case*; *Strydom* at [22].

<sup>660</sup> See e.g. *Strydom* at [17]; *Pemberton*.

freedom of religion.<sup>661</sup> However, employee circumstances change, and an unreasonable workplace requirement may not survive a challenge even if the employee was previously aware of the requirement.<sup>662</sup>

- **Impact on LGBTQ+ people.** The greater the impact on the rights, freedom and dignity of LGBTQ+ people, the less likely that courts will favour rights claims based on religious beliefs. Courts have limited the right to freedom of religion where LGBTQ+ people are forced to deny a crucial component of their identity, including where they required to behave contrary to their sexual orientation.<sup>663</sup> Courts take into account harms to dignity and self-worth, confidence and self-esteem, stigmatisation and isolation.<sup>664</sup> The impact on LGBTQ+ people should not extend to their private and personal lives,<sup>665</sup> and students should not be excluded from significant occasions of school life.<sup>666</sup> The harsh manner in which the refusal is communicated can also favour a finding of discrimination, even if the service could have been legitimately refused.<sup>667</sup>
- **Availability of alternatives.** Courts have generally not been persuaded by the availability of ‘alternative’ services which could possibly alleviate some of the effects of discrimination.<sup>668</sup> In part, this is because LGBTQ+ people are still left with fewer opportunities relative to others which undermines substantive equality.<sup>669</sup> Cases involving healthcare are scrutinised closely, with less leeway for the refusal of care unless patients are able to receive ‘full and equal’ access to the same procedure through another physician who does not have the same religious objections.<sup>670</sup>
- **Impact on religious beliefs.** Courts will generally weigh up the impact of an interference with a person’s right to freedom of thought, conscience or religion (e.g. where a person loses their job),<sup>671</sup> as well as recognising where the impact on a person’s religious practice is limited.<sup>672</sup> However, even where a person may lose their job because of discriminatory conduct based on religious grounds, there are examples of courts that have still preferred rights to non-discrimination.<sup>673</sup>
- **Distinguishing conduct from identity.** Courts have generally not been persuaded by attempts to distinguish discrimination on the basis of sexual orientation and ‘conduct that is inextricably tied to sexual orientation’.<sup>674</sup> For example, a photography company which refused to photograph a same-

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<sup>661</sup> See e.g. *Christian Horizons; Dichmont* at [73]-[77]; *Eweida v UK* at [109].

<sup>662</sup> *Christian Horizons* at [107].

<sup>663</sup> See e.g. *Trinity Western University SCC* (2018) at [96] and [101].

<sup>664</sup> See e.g. *Bull v Hall* at [53]; *Cervelli* at [25]; *Hall v Powers* at [53]; *Robertson v Goertzen* at 8-9; *Trinity Western University SCC* (2018) at [98]. See also *Kluge* (but note that this decision was vacated following the US Supreme Court’s clarification in *Groff*).

<sup>665</sup> See e.g. *Christian Horizons; Hall v Powers* at [49]; *Trinity Western University SCC* (2018) at [96].

<sup>666</sup> See e.g. *Hall v Powers* at [15].

<sup>667</sup> *Knights of Columbus* at [37], [126], [127].

<sup>668</sup> See e.g. *Bull v Hall* at [50]; *Trinity Western University SCC* (2018) at [95]. However, the approach taken in the United States has differed somewhat: see *Fulton* at 1881; *M.J. v Nichols* at [88]; *North Coast Women’s Care* at 968-9.

<sup>669</sup> See e.g. *Trinity Western University SCC* (2018) at [95].

<sup>670</sup> See e.g. *North Coast Women’s Care* at [719]; however, see *Minton*, in that case, the defendant physician was not granted the same relief from anti-discrimination protections where there was a delay before attempting to reschedule the procedure (gender affirming care) at a different hospital. See also *Hammons; Mackereth*.

<sup>671</sup> See e.g. *Black v Wilkinson* at [55], referring to *Eweida v UK* at [106] and [109]; see also *Bear Creek Bible Church* at 616-7; *Birmingham City Council v Afsar & Ors* (Rev 2) [2019] EWHC 3217 (*Afsar*) at [21]; *Dichmont* at [42]-[44]; *Fulton* at 1887; *Kisilowsky* at [24], [28]; *Kluge* at 25-31; *Mackereth* at 39 - 41; *M.J. v Nichols* at [89]-[105]; *Ngole EWCA* at [44], [66]-[67], [163]-[181]; *Trayhorn* at [90]-[93]; *L, R (On the Application of) v Hampshire County Council* [2022] EWHC 49 (*L v Hampshire*) at [36]-[39]; *Page* at [83]-[87].

<sup>672</sup> See e.g. *Brillinger* at [54]; *Cornerstone* at [143]; *Kisilowsky* at [28]; *Knights of Columbus* at [113] and [127]; *Oger v Whatcott* (No 7) 2019 BCHRT 58 at [132] (*Oger*); *Riverbend Bed and Breakfast* at [165]; *Robertson v Goertzen* at 8; *Trinity Western University SCC* (2018) at [102].

<sup>673</sup> See e.g. *Eweida v UK* at [106] and [109]; *Kisilowsky; Mackereth; Dichmont; M.J. v Nichols*.

<sup>674</sup> See e.g. *Arlene’s Flowers* at [54]; *Christian Legal Society Chapter of the University of California, Hastings College of the Law v Martinez* 561 US 661 (2010) at 2990 (*Christian Legal Society*); *Eadie and Thomas* at [109]; *Egan v Canada* [1995] 2 SCR 513, 601-2 [175] (*Egan*); *Elane Photography* at [9]; *Trinity Western University SCC* (2001) at [69].

sex marriage attempted to distinguish between the individual's sexuality and their '*conduct in openly committing to a person of the same sex*'.<sup>675</sup> The Supreme Court of New Mexico considered that to allow discrimination based on conduct so closely correlated with sexual orientation would severely undermine the purpose of the New Mexico Human Rights Act.<sup>676</sup>

- **Pursuing legitimate goals.** Policies which aim to promote equal opportunities and avoid differential treatment on the basis of sexual orientation are a legitimate goal and will be taken into account when considering whether discrimination may be justified.<sup>677</sup> For example, courts may look favourably upon employers who seek to implement and enforce their policy of providing services without discrimination, even in circumstances where an employee loses their job as a result of that policy.<sup>678</sup> However, some courts in the United States have held that broad interests in '*preventing all forms of discrimination*' must be pursued via the least restrictive means in terms of the impact on claims based on religious beliefs.<sup>679</sup>
- **Public roles and funding.** Courts are more likely to favour the rights of an individual LGBTQ+ person where the organisation or institution seeking to rely on the freedom of religion receives public funding;<sup>680</sup> likewise, where a person is employed in a public role and/or working for a public authority.<sup>681</sup>
- **Public confidence.** Where a religious practice or belief undermines public confidence in a profession, it is more likely that courts will favour the rights of LGBTQ+ people to non-discrimination.<sup>682</sup> Courts have recognised, however, that the maintenance of confidence will carry different requirements for different professions, and in different contexts.<sup>683</sup>
- **Consideration by law-makers.** Courts may also give weight to the fact that the legislature has considered a particular issue or has indicated that discrimination is impermissible.<sup>684</sup>

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<sup>675</sup> See *Elane Photography* at [16].

<sup>676</sup> See *Elane Photography* at [16].

<sup>677</sup> See e.g. *Cornerstone* at [123]; *EU Directive Case* at [115], [124], [169]; *Eweida v UK* at [105]; *L v Hampshire* at [24]–[30]; *Mackereth* at [238]–[240]; *Ngole EWCA* at [97], [111]; *Trayhorn* at [93].

<sup>678</sup> See e.g. *Eweida v UK* at [105]–[106] and [109]; *Mackereth*.

<sup>679</sup> See e.g. *Bear Creek Bible Church* at 611.

<sup>680</sup> See e.g. *Afsar* at [53]; *Chamberlain* at 714, 716, 729, 720, 734, 752; *Christian Horizons* at 19; *Cornerstone* at [144]; *Eweida v UK* at [29], [42], [52], [105]; *Hammons* at 29; *L v Hampshire* at [34]; cf *Boy Scouts of America*. See also *Marouf* (noting the Court did not substantively engage with the interaction between rights claims in this case). But see also *Fulton*; *New Hope Family Services*.

<sup>681</sup> See e.g. *Dichmont* at [67]; *Eweida v UK* at [29], [42], [52], [105]; *Kisilowsky* at [11], [28]; *Mackereth* at [193], [240]; *M.J. v Nichols* at [94]; *Page* at [10] [23], [27], [83]; *Trayhorn* at [62]–[64], [92]–[94].

<sup>682</sup> See e.g. *Trinity Western University SCC* (2018) at [103].

<sup>683</sup> See e.g. *Ngole EWCA*.

<sup>684</sup> See e.g. *Black v Wilkinson* at [49]; *Robertson v Goertzen* at 9; *Cornerstone* at [127]; *EU Directive Case* at [64] and [108].

# PART IV: THE WAY FORWARD

## WHAT THIS PART COVERS:

- I. Summary of key findings
- II. A legal framework for approaching reform
- III. Calls to action

**To end LGBTQ+ discrimination in religious educational institutions and faith-based service providers in Australia, a clear set of recommendations and calls to action emerge from the findings of this report. This Part summarises our key findings and sets out a pathway forward.**

Our recommendations and calls to action are relevant to everyone one of us, including legislators and policy-makers, religious schools and organisations, lawyers and advocates, and the media.

Everyone deserves to live, study and work with dignity and respect, and our laws should protect all of us, equally. Here is how it can be done.

## 10. SUMMARY OF KEY FINDINGS

Before going to our calls to action, this section crystalises the key findings emerging from this report. These findings are arranged thematically and summarise supporting evidence discussed throughout the report.

### 10.1 Finding 1: LGBTQ+ discrimination is endemic across religious schools and organisations in Australia

Through 26 personal stories and an extensive investigation of publicly available records and financial information, we have uncovered extensive evidence of the devastating personal impact and systemic extent of LGBTQ+ discrimination in many religious educational institutions and faith-based service providers in Australia.

There are also many religious educational institutions and faith-based service providers that do not discriminate. However, the reputations and contributions to Australian society of these inclusive organisations are being tarnished by too many that still do.

In contrast with the approximately 1 in 10 independent schools and the approximately 1 in 5 of Australia's largest faith-based service providers that are leaders on LGBTQ+ inclusion, there is a large cohort of organisations that are ambiguous in their positions on LGBTQ+ inclusion at best and blatantly discriminatory at worst.<sup>685</sup>

Among our findings are:

- **Catholic system schools are overwhelmingly silent on LGBTQ+ inclusion, leaving staff and students afraid to be who they are.** 9 in 10 of the Catholic educational authorities we reviewed, educating some 70% of all students in Australian Catholic schools, publish so little information on their position on LGBTQ+ inclusion that prospective parents, students and employees do not know whether they will be welcomed or included as LGBTQ+ people.<sup>686</sup> In practice, a requirement to hide your sexuality was either imposed upon or assumed by many Catholic school students and

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<sup>685</sup> See Part I, Figure 3, Figure 4 and Figure 7 at 27, 31 and 50.

<sup>686</sup> See Part I, Figure 3 at 27.



teachers who spoke with us.<sup>687</sup> Transgender students are not always supported to be who they are, if they are allowed to enrol at all.<sup>688</sup>

- **LGBTQ+ students are more likely to attend an independent school that discriminates against them than supports them to be their best.** Nearly 4 in 10 independent schools show evidence of LGBTQ+ discriminatory practices, compared with 3 in 10 that do not.<sup>689</sup> Non-denominational Christian schools are the most discriminatory places for LGBTQ+ people, with a wide range of practices among schools from other Christian denominations.<sup>690</sup>
- **Almost 1 in 10 of Australia's largest faith-based service providers publicly discriminate against LGBTQ+ people and a further nearly 4 in 10 are unclear in their positions on LGBTQ+ inclusion.**<sup>691</sup> In 2020, over \$5 billion in government funding was invested into this cohort which also employed over 69,500 people.<sup>692</sup> Overall, in 2020, Australian taxpayers contributed at least 54 cents in every \$1 dollar earned by faith-based charities in Australia, who also employed 370,944 workers.<sup>693</sup> Such significant public investment into the sector warrants protections against discrimination that cover the employment of staff and delivery of services and support to the general public.

## 10.2 Finding 2: LGBTQ+ discrimination affects LGBTQ+ people and the people who love, support and affirm us

There are three classes of people experiencing LGBTQ+ discrimination in religious educational institutions and faith-based service providers in Australia: LGBTQ+ people, our personal associates and our allies.

### LGBTQ+ people as victims of LGBTQ+ discrimination

In respect of LGBTQ+ people, there are:

- **LGBTQ+ students** like James, Abbie, Leah, Evie and Olivia who are being denied educational opportunities and a safe and inclusive environment in which to learn. These young people are being denied leadership positions, being robbed of milestones such as attending a school formal with their partner of choice, and having to sit through lessons that tell them they are not entitled to be proud and confident in who they are, if they are being allowed to enrol in schools at all.
- **LGBTQ+ teachers** and staff like Lisa\*, Kimberly\*, Emma, Karen, Daniel, Steph, Nathan, Sam, John, Michael\* and Peter\* whose employers are suppressing their right to work as who they are. These teachers and staff are being held back from promotion, denied workplace entitlements afforded to other workers and told to keep their sexual orientation hidden, all with the very real threat of dismissal hanging over their heads. Some have been fired simply for being who they are.
- **LGBTQ+ people** like Harley and Joanne\* who are discriminated against in their interactions with faith-based service providers when they most need support.

In legal terms, these people are experiencing discrimination based on their sexual orientation or gender identity. Sometimes, they are also experiencing discrimination based on their own religious beliefs which are affirming of LGBTQ+ people. Gaps in anti-discrimination protections in every Australian jurisdiction mean that LGBTQ+ people can be lawfully discriminated against in religious educational institutions and faith-based service providers,

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<sup>687</sup> See Part I, section 1: the personal stories of Lisa\*, Abbie, Kimberly\*, Emma, John and Michael\* at 14-15, 17 and 23.

<sup>688</sup> See Part I, section 1: the personal stories of Mark\* at 17 and 'Discrimination towards LGBTQ+ people' at 29-30.

<sup>689</sup> See Part I, Figure 4 at 6.

<sup>690</sup> See Part I, Figure 5 at 33.

<sup>691</sup> See Part I, Figure 7 at 50.

<sup>692</sup> See Part I, section 3.2, 'Key findings from our review' at 51.

<sup>693</sup> See Part I, section 3.1, 'The number and nature of religious and faith-based organisations' at 47.

depending on how the discrimination is framed and where the person lives.<sup>694</sup> Laws in the Northern Territory, Australian Capital Territory and Tasmania offer the strongest protections, followed by Victoria and Queensland. Commonwealth laws offer the worst protections, with South Australian, Western Australian and New South Wales laws also providing little or no protection.<sup>695</sup>

### **Personal associates as victims of LGBTQ+ discrimination**

The second class of victims of LGBTQ+ discrimination are the people who love us.

They include:

- siblings like Mark\*'s twin child who are denied opportunities to learn in the same school as their transgender siblings;
- parents like Caroline\* and Olivia's parents who have felt forced to move homes or have had to pay for different school uniforms because their trans children are refused enrolment or forced to leave schools when they affirm their gender; and
- the children of LGBTQ+ parents at St Catherines who are told that their school principal must believe that their families are not as worthy of endorsement as heterosexual married ones.

In legal terms, these are the people who are discriminated against based on their personal association with LGBTQ+ people. They are not protected under Commonwealth law at all, and are only partially protected under Western Australian law. In other jurisdictions, their protections are also limited by the same carve-outs applying to LGBTQ+ people in religious educational institutions and faith-based service providers.<sup>696</sup>

### **Allies as victims of LGBTQ+ discrimination**

Finally, the third class of victims of LGBTQ+ discrimination are the allies who support and affirm us, like Elizabeth\*, Elise, Matthew\* and Rachel. These are the people who have been denied employment or forced to leave jobs because they cannot be complicit in LGBTQ+ discrimination based on their own deeply held religious convictions.

In legal terms, these people are discriminated against based on their LGBTQ-affirming religious beliefs, being different to those of their religious educational institution and faith-based service provider employers. The absence of protections against religious discrimination under Commonwealth, South Australian and New South Wales, alongside broad legal carve-outs allowing religious educational institutions and faith-based service providers to discriminate against those with LGBTQ+ affirming beliefs, leave our allies also vulnerable to lawful LGBTQ+ discrimination.<sup>697</sup>

## **10.3 Finding 3: Our laws do not protect all of us, equally**

Our laws should protect all of us, equally – but they do not. To protect all people who experience LGBTQ+ discrimination in religious educational institutions and faith-based service providers, we need laws that protect against discrimination based on sexual orientation, gender identity, religious belief and personal association in every jurisdiction. We also need these laws to remove (or not include) inappropriate carve-outs for religious educational institutions and faith-based service providers, and to ensure that other exemptions do not provide an alternative pathway to allowing LGBTQ+ discrimination.

Overall, our report finds that Commonwealth laws offer LGBTQ+ people and the people who love, support and affirm us with the weakest protections against LGBTQ+ discrimination, followed by New South Wales, South Australia and Western Australia. But every state and territory has work to do to get its house in order.

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<sup>694</sup> See Part II, Figure 12, Figure 13 and Figure 14 at 60, 67 and 80.

<sup>695</sup> See Part II, Figure 11 at 59.

<sup>696</sup> See Part II, section 4.4.

<sup>697</sup> See Part II, Figure 11 at 59 and sections 4.3, 5.1 and 5.2 discussing exemptions based on religious beliefs.

The legal findings in our report include:

- **Multiple anti-discrimination laws** at the Commonwealth, State and Territory level mean that reforms are necessary in every jurisdiction if we are to provide victims of LGBTQ+ discrimination with the same avenues for seeking justice as others who experience discrimination. However, we can urgently provide a nationally consistent standard of protection by amending Commonwealth laws and ensuring they do not operate to override better protections at the state or territory level.<sup>698</sup>
- **Some laws give no protection** against LGBTQ+ discrimination at all because of omissions and deficient definitions. Inadequate definitions of protected attributes, along with limited or no protections for personal associates of LGBTQ+ people and people who hold and do not hold religious beliefs, need to be addressed in Commonwealth, New South Wales, Queensland, South Australian and Western Australian laws.<sup>699</sup>
- **LGBTQ+ students, staff and people accessing services can be lawfully discriminated against** by religious educational institutions and faith-based service providers in several jurisdictions.<sup>700</sup> To protect LGBTQ+ students, exemptions in Commonwealth, New South Wales and Western Australian laws, and unclear provisions in South Australian laws, must be addressed.<sup>701</sup> To protect LGBTQ+ staff, exemptions in these same jurisdictions and Queensland must also be addressed.<sup>702</sup> To protect LGBTQ+ people accessing services from faith-based providers, exemptions in all these same jurisdictions as well as in Victorian laws must be addressed.<sup>703</sup>
- **People who refuse to be complicit in LGBTQ+ discrimination can also be lawfully discriminated against** by religious educational institutions and faith-based service providers in most jurisdictions.<sup>704</sup> Under Commonwealth, New South Wales and South Australian laws, this is because there are limited or no protections against discrimination based on religious belief.<sup>705</sup> In the Australian Capital Territory, Queensland and Tasmania, it is because there are exemptions allowing religious educational institutions and/or faith-based service providers to discriminate against people who hold LGBTQ+ affirming religious beliefs or who refuse to hold anti-LGBTQ religious beliefs.<sup>706</sup>
- **Reforms must review anti-discrimination laws as a whole and address alternative loopholes that allow LGBTQ+ discrimination.** In addition to specific exemptions for religious educational institutions and faith-based service providers, exemptions in other parts of a law may provide an alternative basis for LGBTQ+ discrimination by religious educational institutions and faith-based service providers. These include exemptions on student dress and behaviour in Victoria;<sup>707</sup> unclear exemptions dealing with single-sex education in Commonwealth, Victorian, New South Wales and Northern Territory laws;<sup>708</sup> and inherent requirement / genuine occupational qualification

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<sup>698</sup> See Introduction, 'Understanding anti-discrimination laws in Australia' at 7.

<sup>699</sup> See list of 'Reforms needed' item nos. 1, 2, 7, 8, 9, 12 and 16.

<sup>700</sup> See Part II, Figure 12, Figure 13 and Figure 14 at 60, 67 and 80.

<sup>701</sup> See list of 'Reforms needed' item nos. 3 and 4.

<sup>702</sup> See list of 'Reforms needed' item nos. 9 and 11.

<sup>703</sup> See list of 'Reforms needed' item no. 16(a).

<sup>704</sup> See Part II, Figure 12 and Figure 13 at 60 and 67.

<sup>705</sup> See list of 'Reforms needed' item nos. 7, 10, 12 and 16(b).

<sup>706</sup> See list of 'Reforms needed' item nos. 7, 10, 12 and 16(b).

<sup>707</sup> See list of 'Reforms needed' item no. 5.

<sup>708</sup> See list of 'Reforms needed' item no. 6.

exemptions in Commonwealth, Northern Territory, Queensland, South Australian and Tasmanian law.<sup>709</sup> These exemptions must be reviewed and considered in any reforms.

- **Reforms would still provide space for unimpeded religious observance and practice.** As discussed further below, our reform proposals are faithful to international human rights law dealing with the freedom of thought, conscience and religion and the right to non-discrimination and equality. By amending exemptions as discussed in this report, Australian anti-discrimination laws would preserve for communities of faith the full and unimpeded right to:
  - appoint, select, train and educate their religious leaders and members of their religious orders;
  - participate in religious observance and practice;
  - exercise control over their sites of religious significance, such as places of worship;
  - meet the genuine religious needs of members of their religious communities (including whenever faith-based service providers are providing goods, services, facilities or accommodation).<sup>710</sup>

Religious educational institutions and faith-based service providers would also be able to rely on other exemptions provided under anti-discrimination laws on the same basis as other organisations, such as exemptions for charities and voluntary bodies, exemptions for single-sex spaces, and temporary exemptions.<sup>711</sup>

- **Extending protections against discrimination based on religious beliefs have the potential to both protect and harm LGBTQ+ people from discrimination.**<sup>712</sup> To minimise their potential for harm, these laws must not provide religious educational institutions and faith-based service providers with unlimited rights to discriminate based on the religious beliefs or activities of students, staff and people seeking access to their services and support. They also must place appropriate limits on when one person's right to manifest their religious beliefs may be curtailed to protect the rights of others, including the right not to hold any religious belief or refuse to engage in religious activity. These laws do however need to accommodate genuine religious needs and practice, consistently with our international human rights obligations (which are discussed further below).

## 10.4 Finding 4: Australia is out of step with international law and practice

Australia has a binding international human rights obligation to protect people from discrimination and provide effective remedies where their human rights are infringed. These protections extend to LGBTQ+ people, equally with others. This means that our laws must prohibit any distinction, exclusion, restriction or preference based on sexual orientation or gender identity unless the criteria for the differentiation is reasonable and objective, and the aim is to achieve a legitimate purpose.<sup>713</sup>

The principal human rights basis which has been given for exemptions for religious educational institutions and faith-based service providers are that they further the freedom of thought, conscience and religion, and the liberty of parents to ensure religious and moral education for their children. However, this report highlights how these human rights have been selectively interpreted and implemented in Australia's anti-discrimination laws, particularly when compared with the approach taken in the United Kingdom, Canada and South Africa, and by the European Court of

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<sup>709</sup> See list of 'Reforms needed' item no. 13.

<sup>710</sup> See Part II, sections 4.5, 5.4 and 6.1. See also list of 'Reforms needed' item nos. 7, 10, 12, 14, 15 and 16(b).

<sup>711</sup> See Part II, section 6.1.

<sup>712</sup> See Introduction, 'Understanding anti-discrimination laws in Australia' at 7.

<sup>713</sup> See Part III, section 8.1.

Human Rights.<sup>714</sup> The United States, a jurisdictional outlier, shows what happens when domestic legal frameworks give lopsided recognition to some fundamental rights and freedoms over others.<sup>715</sup>

### **A freedom of thought, conscience and religion for everyone**

In respect of the freedom of thought, conscience and religion, this is an individual freedom with a communal aspect. This means that the closer alleged discriminatory conduct is to religious worship, observance, practice and/or teaching, the more latitude should be given to privileging the interests of a religious collective over the interests of an individual with a different religious conviction.<sup>716</sup> Giving greater autonomy to religious communities to govern their core religious activities also reflects the direction taken in comparable overseas jurisdictions.<sup>717</sup>

However, the right to manifest a religion or belief is not absolute and can be limited, including to protect the fundamental rights and freedoms of others, such as the right to equality and non-discrimination. Moreover, everyone has the right to enjoy the freedom of thought, conscience and religion without discrimination, including people who hold no or different religious beliefs.<sup>718</sup> So when confronted with LGBTQ+ discrimination claims intersecting with religious-based rights claims, decision-makers in Canada, the United Kingdom, South Africa and the European Court of Human Rights have seen fit to ensure that the greater the impact of the discrimination on LGBTQ+ people and the more public, government-funded, commercial or non-religious the role or service in question, the less tolerance for LGBTQ+ discrimination under law.<sup>719</sup>

Yet many religious exemptions in Australian law always prefer an institutional religious view over the rights of individual people, including individual people of faith, to be who they are or to hold LGBTQ+ affirming religious beliefs, and still work, study and live faithfully with those beliefs. The absence of proportionality tests in many of our religious exemptions leaves our laws unable to contend with all the rights and interests at play in the circumstances of a particular case. Arguably, it has also led to inconsistent interpretations of religious exemptions as Australian courts and tribunals attempt to do justice with the laws they have been given.<sup>720</sup>

Except for a few cases internationally, generally too little emphasis is given to the rights of LGBTQ+ people to enjoy their own freedom of thought, conscience and religion, equally with others.<sup>721</sup> Previous research and our 2022-2023 consultation survey with over 4,000 LGBTQ+ people in Australia reveals that around 1 in 4 LGBTQ+ people profess a religion or faith.<sup>722</sup> The freedom of thought, conscience and religion for LGBTQ+ people must be accommodated in our anti-discrimination laws too. Similarly, the significant harm experienced by LGBTQ+ people from demeaning and degrading beliefs about them has not been fully contended with in overseas cases concerning LGBTQ+ discrimination.<sup>723</sup> Future decisions should give greater weight to the long-term impacts and harm of these beliefs in the lives of LGBTQ+ people, particularly LGBTQ+ people of faith.

### **The best interests of the child as paramount considerations**

With regards to students in religious educational institutions specifically, the best interests of each child must remain the paramount consideration in all actions affecting the child. This extends to actions taken by public or private social welfare institutions. So, while parents do have a liberty to ensure the religious and moral education of their children, their basic concern remains the best interests of the child. As a child's capacity evolves so does the recognition of their own freedom of thought, conscience and religion, independently from their parents or guardians. Children also

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<sup>714</sup> See Part III, section 9.

<sup>715</sup> See Part III, section 9.3, '*The United States as a jurisdictional outlier*' at 106.

<sup>716</sup> See Part III, section 8.2.

<sup>717</sup> See Part III, section 9.4.

<sup>718</sup> See Part III, section 8.2.

<sup>719</sup> See Part III, section 9.4.

<sup>720</sup> See Part II, section 7.

<sup>721</sup> See Part III, section 9.3, '*LGBTQ+ people and the freedom of religion*' at 109.

<sup>722</sup> See Introduction, '*LGBTQ+ people and our relationship to religion and faith*' at 4.

<sup>723</sup> See Part III, section 9.2.

enjoy the right to expression and special protections against physical and mental injury and harm.<sup>724</sup> When our laws allow discrimination against children in education, they fail to place the child's best interests at the heart of any action taken affecting the child.

It is no answer to say that parents can choose to send their children to a different school if they wish to have their child educated in a non-discriminatory environment. We have revealed that Catholic and independent schools are not often transparent about their positions on LGBTQ+ inclusion, such that the notion of "parental choice" is not a reality borne out in practice.<sup>725</sup> Comparable overseas jurisdictions have also found arguments about the availability of alternatives less persuasive, as they still leave some people with fewer options than others.<sup>726</sup>

Perhaps more importantly, where these parents are members of a community of faith, they too are entitled to share in that faith with their children. Private schools are significantly publicly funded and educate 1 in 3 students in Australia, further eroding the contention that religious educational institutions should somehow be immune to public regulation, particularly relating to the rights of a child. The reality is students rarely choose the school they are enrolled in and do not opt out of their rights and protections merely because their parents exercised a choice regarding their education at an earlier point when their individual personality and identities had not been fully developed or expressed.

Even one child experiencing discrimination at an educational institution because of their sexual orientation or gender identity is unacceptable. It does real damage that can last a lifetime. Discrimination means that students can miss out on educational opportunities, such as the opportunity to show leadership, to go to a school formal with their partner of choice or to be part of a school environment which affirms and celebrates them to be the best versions of themselves. Once lost, these opportunities do not come again. LGBTQ+ students also deserve to see role models who feel like they do. For a young person coming into themselves and exploring who they are, silences about LGBTQ+ people are deafening. They tell LGBTQ+ young people that they have something to hide or be ashamed of, when in truth they are connected to a transglobal history and culture spanning millions of people who feel just as they do.

## 11. A LEGAL FRAMEWORK FOR APPROACHING REFORM

Throughout this report we have listed the reforms needed in every jurisdiction in Australia. This section sets out a methodology for implementing these recommendations into law. As each law differs, we have set out a series of considerations for legislators and policymakers when drafting anti-discrimination laws to ensure that they are fit for purpose and comply with our intentional human rights obligations.

### 11.1 Step 1: Ensuring basic protections are in place

The first step in addressing gaps in Australia's anti-discrimination laws is to ensure that basic protections are in place and are effective. The matters to consider here include:

- Does the law extend to all the relevant protected attributes, such as sexual orientation, gender identity, sex characteristics, and religious belief and activity?
- Are the protected attributes properly defined to cover everyone intended to be covered by the attribute?
- Are the protected attributes extended to presumed, past or future attributes, and characteristics imputed to or generally pertaining to the protected attributes?
- Do the laws extend their protections to personal associates?
- Is discrimination properly defined, and how will the definition interact with definitions of the protected attributes (particularly if the attribute describes a heterogeneous group, or is capable of being intersectional with other attributes)?

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<sup>724</sup> See Part III, section 8.2.

<sup>725</sup> See Part II, Figure 3 and Figure 4 at 27 and 31.

<sup>726</sup> See Part III, section 9.4.

- Do the laws extend their protections to all areas of public life, such as the administration of government laws and programs?

## 11.2 Step 2: Is there a case for no exemption?

Once basic protections are in place, the next question is whether specific religious exemptions are necessary at all.

The strongest argument against specific religious exemptions may be that the legal test for ‘indirect discrimination’ already includes a ‘reasonableness’ defence, leaving only clear cases of ‘direct discrimination’ strictly prohibited.<sup>727</sup> So, for example, a church hall with a sign saying ‘no same-sex couples may hire this hall’ (i.e. direct discrimination) would be in a different position to a religious organisation with a general policy that prohibited any hirer from using its hall in a manner contrary to its beliefs (i.e. indirect discrimination). Under the test for indirect discrimination, a religious organisation that declined to hire its hall to a same-sex couple for their wedding reception could argue that the policy was ‘reasonable’ to meet its genuine religious convictions and it applies its policy equally to everyone, including people who wish to hire the hall for other activities that contradict its religious beliefs. The reasonableness test could then already allow for a case-by-case assessment of competing interests and objectives consistent with international human rights law.

It is also necessary to consider at this stage any other exemptions which are already in place and whether they could achieve the objective sought. Inserting religious exemptions into law may have the unintended effect of limiting the application of other general exemptions, given courts may construe a specific exemption with particular conditions as having overridden a general provision with inconsistent conditions.

Notwithstanding the above, there may be good legal reasons for including a specific religious exemption in an anti-discrimination law. They include:

- to improve consistency in decision-making across similar cases;
- to signal a parliamentary intention as to how the test of ‘reasonableness’ should be applied. That is, specific religious exemptions can send a signal to courts as to what the parliament considers and does not consider to be ‘reasonable’;<sup>728</sup>
- to exclude from broader general exemptions those circumstances covered by more targeted religious exemptions;
- they may be needed for some attributes (such as religious belief and activity) where the basis of a particular religious requirement cannot be objectively proven. For example, to discriminate between people of different denominations within the same faith.

Notwithstanding these reasons, it is important in considering the need for any exemptions not to lose sight of the reasonableness defence within the definition of indirect discrimination and any other exemptions that may interact with the new exemption.

## 11.3 Step 3: Framing any specific religious exemptions

If laws are to include specific religious exemptions, they need to be carefully crafted to first delineate those cases where it will always be reasonable to preference an institutional religious view over the rights and interests of others, including those within the institution who may have different views. This is necessary to recognise that the freedom of thought, conscience and religion is both an individual freedom and has a communal aspect, and the right to hold a belief (or no belief) is inviolate while the right to manifest a belief can be limited.<sup>729</sup>

International human rights law suggests that the areas where it may be reasonable to preference the interests of a religious collective over its individual members include:

- the appointment and selection of religious leaders and members of a religious order;

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<sup>727</sup> See e.g. SDA s 7B.

<sup>728</sup> See e.g. *Black & Morgan v Wilkinson* at [49].

<sup>729</sup> See Part III, section 8.2.

- the education and training of religious leaders and members of a religious order;
- religious worship, observance and practice (provided that a religious ‘practice’ does not have a meaning which is enlarged to the point that it swallows the protections for others altogether);
- access to and conduct within communal places of worship or sacred sites (which may be characterised as the provision of a service, accommodation or facility under different laws); and
- goods, services or accommodation provided within or attached to a communal place of worship or sacred sites.

In these areas, clear and narrow exemptions would have the benefit of providing certainty over when the interests of a religious institution subjugate those of its individual members and people of a different or no faith. The options here include having a narrow blanket exemption or one which is conditional on a religious conformity and/or religious susceptibilities test.<sup>730</sup> However, we recognise that discrimination against LGBTQ+ people in these spaces is still painful to LGBTQ+ people of faith, even if it may accord with the current approach in international human rights law. The pain that these beliefs cause could be acknowledged and better addressed by and within religious organisations even if it is not addressed by law.

Religious exemptions outside of those areas which are directly connected with religious worship, observance, practice and/or teaching should otherwise require considering the corresponding rights and interests of affected individuals and religious collectives, so that discrimination is only permitted on the basis of religious belief and activity (and not on the grounds of sexual orientation or gender identity) when it would be reasonable and proportionate to discriminate against an individual in order to meet the genuine religious requirements of the collective. The genuine religious requirements of the collective could also be framed by adopting a religious conformity and/or religious susceptibilities test.<sup>731</sup> The reason that sexual orientation, gender identity and other attributes do not need to be included in these exemptions is because, as discussed at Step 2, the in-built limitations in the definitions of discrimination and the availability of other exemptions for these attributes already do the work which is necessary.

The factors that could be considered in ascertaining the reasonableness and proportionality in a particular case of religious discrimination are likely to be similar to those considered by overseas jurisdictions, such as:

- the impact of the conduct or proposed conduct on those affected;
- the relevance of religion to the employment or service;
- the availability of alternatives;
- any legitimate goals sought to be achieved by the requirement;
- whether the employment, education or service is publicly funded or endorsed.

In terms of the legal tests which are adopted, we do not support a written policy requirement (as there is in South Australia and the Australian Capital Territory) as there is no evidence that this works to reduce discrimination.<sup>732</sup> Transparent discrimination is no less harmful to a person’s dignity than discrimination done behind their back.

## 12. CALLS TO ACTION

While laws fail to protect LGBTQ+ people and the people who love, support and affirm us from discrimination, there is a role for all of us in standing up against LGBTQ+ discrimination in religious educational institutions and faith-based service providers. Apart from the calls for reform directed at legislators and policymakers throughout this report, here are the calls to action for the rest of us.

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<sup>730</sup> See Part II, section 7.

<sup>731</sup> See Part II, section 7.

<sup>732</sup> See Part I, section 2.2, ‘Allowing schools with written policies to discriminate does not reduce LGBTQ+ discrimination’ at 34.



## 12.1 The days of ‘God v gays’ must end

This report has identified that around 1 in 4 LGBTQ+ people profess a religion or faith, and most LGBTQ+ people support protections for people of faith equally with others.<sup>733</sup> Further, many people of faith, including teachers, religious leaders, schools and organisations, seek to include and affirm LGBTQ+ people and they themselves can be disadvantaged by laws that do not protect them against discrimination based on their sincerely held religious convictions in support of LGBTQ+ people.<sup>734</sup> Even within the same religious denomination, there are a range of practices.<sup>735</sup>

Accordingly, the debates pitting LGBTQ+ people on one side and people of faith on the other must end. In a call to action for all of us, debates about LGBTQ+ discrimination and religion should not be framed in binary opposition to one another as LGBTQ+ people of faith and our allies are put unfairly in the middle.

## 12.2 For religious schools and organisations – be clear in your inclusion

Religious schools and organisation do not have to wait for the law to change to show they are welcoming and inclusive places for LGBTQ+ people.

Religious schools and organisations can:

- publish clear statements and policies welcoming and affirming LGBTQ+ people, particularly by specifically including LGBTQ+ people in relevant policies on discrimination, harassment and bullying and including visible references to LGBTQ+ people in brochures, websites and in job advertisements;
- review and update enrolment and intake forms to ensure they are inclusive of LGBTQ+ people and their families;
- be particularly upfront in their inclusion of and support for LGBTQ+ people when they use words or symbols that LGBTQ+ people might read as coded language for discrimination;
- in consultation with people affected, consider celebrating LGBTQ+ people and their contributions publicly, without hiding aspects of their identities or lives, in the same way as they would others;
- in consultation with LGBTQ+ people, consider mechanisms for involving LGBTQ+ people in the service design and delivery;
- structure their organisations to insulate themselves against the pressure to discriminate coming from outside the organisation; and
- refuse to remain silent when they see LGBTQ+ discrimination, including by undertaking advocacy and making public comment in support of LGBTQ+ inclusion.

For further ideas on LGBTQ+ inclusive practices found among organisational leaders in the faith-based sector, see ‘*Examples of affirming LGBTQ+ environments*’ in independent schools (at 39-40) and ‘*Examples of LGBTQ+ inclusion*’ among faith-based service providers (at 51-52).

## 12.3 For parents – be advocates for your children

Parents have an important role to play in supporting and standing up for their LGBTQ+ children and favourite LGBTQ+ teachers.

If parents are in doubt about the position a religious school or organisation holds on LGBTQ+ inclusion, they can ask them – preferably before they enrol a child.

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<sup>733</sup> See Introduction, ‘*LGBTQ+ people and our relationship to religion and faith*’ at 4 and Figure 1 and Figure 2 at 6-7.

<sup>734</sup> See Part I, section 1, the stories of Rachel Colvin, Elise Christian and Elizabeth\* at 16 and 22; Part I, Figure 3 and Figure 4 at 27 and 31; Part II, Figure 11 at 59.

<sup>735</sup> See Part II, Figure 5 and Figure 9 at 33 and 55.

## 12.4 For lawyers and advocates – embrace new arguments

Lawyers and advocates have a role in developing law and policy so that it better protects human rights for all.

Lawyers and advocates can:

- raise the freedom of thought, conscience and religion as a basis for *protecting* LGBTQ+ people from discrimination, not just the right to equality and non-discrimination;
- highlight inconsistency in the application of religious requirements towards LGBTQ+ people when compared with other groups;
- invite decision-makers to draw adverse inferences from omissions regarding the inclusion of LGBTQ+ people in policies and material where such references should be expected;
- provide pro bono legal support to victims of LGBTQ+ discrimination;
- invite decision-makers to consider the impact of beliefs that demean and degrade the dignity of LGBTQ+ people.

## 12.5 For media – tell our stories

Finally, stories can change lives and remind others that they are not alone.

The media can tell the stories of LGBTQ+ people of faith and those within faith communities that challenge institutionalised views regarding the place of LGBTQ+ people within their faith.

# SCHEDULE A: RELIGIOUS SCHOOLS REVIEW

## METHODOLOGY

The purpose of our schools review was to identify evidence of inclusive or discriminatory practices towards LGBTQ+ students and staff in both Catholic and independent system schools, particularly in jurisdictions where laws do not adequately protect LGBTQ+ people from discrimination due to exemptions for religious and private schools. The methodology was intended to also identify whether a person, such as a parent or guardian, could discern from publicly available material the position of a school or school authority on LGBTQ+ inclusion.

### 13. REVIEW SAMPLES

#### 13.1 Catholic system schools

The project team undertook a desktop review of 10 Catholic educational authorities located in Victoria, New South Wales, South Australia, Western Australia, and the Australian Capital Territory.

The 10 Catholic educational authorities were selected to ensure a diversity of educational authorities in terms of size and location. Overall, these Catholic educational authorities educate well over half-a-million students in over 1,200 schools, or around 70% of all students enrolled in Catholic system schools in Australia. These schools are in both urban and regional parts of Australia.

Categorised by size, the four larger Catholic educational authorities were each responsible for over 100 schools and the six smaller Catholic educational authorities were each responsible for less than 100 schools. The four larger Catholic educational authorities were together responsible for over 900 schools.

#### 13.2 Independent schools

The project team also undertook a desktop review of a random sample of 98 independent schools based in New South Wales, Victoria, South Australia, Western Australia and the Northern Territory.

The review of independent schools commenced by randomly selecting 115 schools from a publicly available list of primary, secondary and combined independent schools in jurisdictions that do not adequately protect LGBTQ+ students or staff from discrimination.

At the time of review, Victoria and the Northern Territory had not yet reformed their laws to protect LGBTQ+ students and staff from discrimination. Accordingly, schools in these jurisdictions were included in the review. On the other hand, while Queensland allowed discrimination against LGBTQ+ staff (but not students) in religious schools in certain situations,<sup>736</sup> the complexity of these laws made it difficult to assess whether schools were complying with these laws solely through a desktop review of publicly available information. Accordingly, schools in Queensland were omitted from this desktop review, although case studies are included in the personal stories reflected in this report.

Ultimately, 98 schools were considered 'in scope' for the review of independent schools. The sample was determined by:

- Excluding from scope 13 independent schools that could not rely on legal exemptions in their respective jurisdiction. These schools were in jurisdictions other than New South Wales and were not religiously affiliated (e.g. Montessori and Aboriginal cultural schools). Accordingly, they did not have the benefit of legal exemptions available only to religious educational institutions. However, non-religious independent schools in New South Wales remained in scope because New South Wales extends exemptions to all private educational institutions.
- Reviewing as a group three schools that appeared twice on the list. These schools appeared twice because they had multiple campuses or were part of a group of schools administered together.

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<sup>736</sup> See Part II, section 5.1.

- Excluding from scope one school that had closed.

Of the 98 independent schools, 44 were in New South Wales, 16 were in Victoria, 23 were in Western Australia, 14 were in South Australia and one was in the Northern Territory.

## 14. REVIEW METHODOLOGY

The review was conducted in 2022 and 2023 by Equality Australia staff and a team of final year law students who were supervised by the Castan Centre for Human Rights and Equality Australia. The team worked to collect, document, review and analyse evidence drawn from publicly available information on school and educational authority websites, social media platforms and on other websites and news articles identified using Google searches. The team looked for evidence of both discriminatory and affirming practices relating to LGBTQ+ people.

### 14.1 Collection of evidence

Evidence on each school and Catholic educational authority was collected through online searches and manual reviews of the school's or authority's website (including documents hosted on that website), social media platforms and using Google searches to identify other websites and relevant news articles referring to the school or educational authority.

Depending on the technical functionality of each online platform, keyword searches and/or manual reviews of the school or authority's website and social media platforms (such as Facebook pages, Twitter and Instagram) were conducted. The team specifically identified and reviewed any statements of belief/statements of faith, "About Us" pages or anti-bullying / anti-harassment policies on each school's or authority's website. The team also looked at other documents hosted on the school's or authority's websites, including annual reports, principal's statements or newsletters, other policies (such as staff, uniform or discipline policies), position descriptions/position vacancy advertisements, student prospectuses, enrolment forms, and webpages that went to the values, mission or approach of the school or educational authority.

Where keyword searches of a website, social media platform or a document published on the website was possible, the team used keyword searches alongside manual reviews. Depending on the search functionality, many keywords and derivatives of keywords were included that related to sexuality or gender, or were likely to identify affirming or discriminatory practices towards LGBTQ+ people. This included terms such as gay, lesbian, bisexual, trans\*, transgender, gender, sexual\*, homosex\*, marriage, 'Wear it Purple', immoral\*, homophob\* and transphob\*. If Boolean searches were not possible, the team used various derivatives of keywords.

Google searches using the school's name were also conducted to identify any publicly available information that might provide evidence of the school's attitude towards sexuality or gender, or LGBTQ+ people.

Particularly when there was a paucity of information on the school's website or platforms, the team also looked at websites linked to the school or educational authority, such as websites of networks or religious communities to which the school or educational authority was connected. However, this secondary material was given less weight unless there was evidence to infer that it also represented the views or practices of the school or educational authority.

The team applied a general time limit of 2 hours searching per school or educational authority. This time limit was put in place to mirror the experience of a parent or prospective employee who might look for information about a school or educational authority before seeking to enrol their child or applying to work with the school or a school overseen by the educational authority. This time limit was put in place to test the proposition that parents or employees can and do 'choose' a school based on its religious values.<sup>737</sup>

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<sup>737</sup> For example, the director of public policy at Australian Christian Schools was recently quoted saying: 'The overwhelming reason that parents are saying they're coming to our schools is because of the values that we have, the Christian values that they're looking for.' See Chenery and Murray, n52.

## 14.2 Analysis of evidence

After an analysis of the evidence in the manner described below, every school and educational authority was given a rating of 1 to 7 based on the following scale:

1. Strongly affirming
2. Evidence of affirmation
3. Weaker evidence of affirmation
4. Unable to tell / Silent
5. Weaker evidence of discrimination
6. Evidence of discrimination
7. Strongly discriminatory

In rating each school or educational authority, evidence was reviewed and analysed in the manner that a court would when hearing a discrimination case. Evidence was assessed as a whole, and individual pieces of evidence were given appropriate weight.

The considerations taken into account in weighing up evidence included:

- the generality versus the specificity of the evidence, with more specific evidence (such as direct statements relating to sexuality or gender) given more weight;
- the seniority of the person making any statement or their association with the school or educational authority, with more senior or closely associated personnel (e.g. the principal) given more weight;
- whether the school was a primary or secondary school, appreciating that omitting references to sexuality in primary school communications may well be age-appropriate rather than evidence of discrimination;
- the contemporaneousness of the statement, including whether it was made recently on social media or in a recent newsletter;
- the prominence of the evidence, such as whether it was easy to find and/or displayed prominently on social media platforms;
- the nature of the document or statement, such as whether it was a policy, an enrolment form, a job application form or social media content;
- the omission of references to sexual orientation or gender in documents in which they may be reasonably expected, such as in anti-bullying or anti-discrimination policies.

The review team treated the absence of information cautiously. Many schools and educational authorities were not forthcoming about their practices or attitudes towards LGBTQ+ people, and the team had to weigh up sometimes general or unclear statements. In those cases, inferences might be made where the absence of affirming or discriminatory statements were compared with other explicit statements that made the inference compelling. For example, if a secondary school anti-discrimination policy made no reference to sexual orientation but referred to disability, sex or race, this could suggest a school treated discrimination based on sexual orientation less seriously or something that it is not willing to talk about. In all cases, the team reviewed and interrogated the evidence as a whole, considering what the school or authority had said – as well as what they failed to say – to assess whether a parent, student or employee might experience the school as an affirming or discriminatory place for LGBTQ+ people.

A score of '4 – Unable to tell / Silent' indicates that, after the collection and analysis of evidence in the manner described above, we still could not determine the views or practices of the school towards LGBTQ+ people, or matters relating to sexuality and gender. This could mean several things, including that no information was available, that the school in fact had a neutral position, or that discrimination against LGBTQ+ people was hidden. Overall, we treated schools and educational authorities with the benefit of the doubt, treating silences as evidence of neither discriminatory nor affirming practices. In practice, however, silence can reinforce discriminatory environments for LGBTQ+ people.

After collecting and reviewing the evidence, the review team prepared a summary report for each school and educational authority. The reports provided a rating for each school and authority, summarised the evidence collected and the manner in which was collected, and provided reasons for the rating (including the weight attributed to different evidence). Supporting evidence (such as screenshots of online content and documents downloaded from school websites) were saved in a folder for each school and authority.

### 14.3 Second-round review

Using the summary reports and supporting evidence, a second-round review was then conducted by the Legal Director at Equality Australia. On second review:

- 7 out of the 10 Catholic educational authorities received the same rating as they did at the first stage, 2 authorities received a more favourable rating (each 1 band higher) and 1 authority received a less favourable rating (one band lower). Accordingly, 90% of Catholic educational authorities received the same or a more favourable rating after second round review.
- 68 out of the 98 independent schools received the same rating as they did at the first stage, 20 schools received a more favourable rating (18 schools ranked 1 band higher, 2 schools ranked 2 bands higher) and 10 schools received a less favourable rating (9 schools ranked 1 band lower, 1 school ranked 2 bands lower). Accordingly, 89.8% of independent schools received the same or a more favourable rating after second round review.

There was no significant difference of opinion between the first round and second round review. However, on second round review, slightly different weight was given to certain pieces of evidence, particularly where there was an overall absence of information. For example, less weight was given on second round review to discriminatory statements made by governing religious leaders unless it was clear that the religious leaders had directly imposed those views on the school or educational authority. Less weight was also given to more opaque statements of religious values (such as statements suggesting a more conservative interpretation of religious texts e.g. 'Biblical truth', 'Christian worldview') in the absence of any directly discriminatory statements.

## 15. TABLE OF RESULTS

### 15.1 Catholic educational authorities

| RATING                               | EDUCATIONAL AUTHORITY NO. | SIZE – LARGER OR SMALLER THAN 100 SCHOOLS? | STUDENT POPULATION – 50,000 STUDENTS OR GREATER? |
|--------------------------------------|---------------------------|--|--|
| 2. Evidence of affirmation           | 6                         | Smaller                                    | Smaller  |
| 3. Weaker evidence of affirmation    | 1                         | Larger                                     | Greater  |
|                                      | 3                         | Smaller                                    | Smaller  |
|                                      | 7                         | Smaller                                    | Smaller  |
| 4. Unable to tell / Silent           | 2                         | Smaller                                    | Smaller  |
|                                      | 4                         | Larger                                     | Greater  |
|                                      | 9                         | Smaller                                    | Smaller  |
| 5. Weaker evidence of discrimination | 5                         | Larger                                     | Greater  |
|                                      | 8                         | Larger                                     | Greater  |
|                                      | 10                        | Smaller                                    | Smaller  |

No Catholic educational authorities received a rating of '1. Strongly affirming', '6. Evidence of discrimination', or '7. Strongly discriminatory'.

## 15.2 Independent schools

| RATING                               | TOTAL NO. OF SCHOOLS | BY STATE                                     | BY TYPE   | BY DENOMINATION  |
|--------------------------------------|----------------------|--|---|--|
| 1. Strongly affirming                | 10                   | NSW: 7<br>Vic: 2<br>WA: 1                    | Combined: 7<br>Secondary: 2<br>Special: 1         | Anglican: 2<br>Catholic: 2<br>Independent: 1<br>Jewish: 1<br>Presbyterian: 1<br>Uniting Church: 2<br>Other: 1  |
| 2. Evidence of affirmation           | 7                    | NSW: 2<br>Vic: 2<br>WA: 3                    | Combined: 5<br>Primary: 1<br>Secondary: 1         | Anglican: 3<br>Baptist: 1<br>Independent: 2<br>Lutheran: 1   |
| 3. Weaker evidence of affirmation    | 11                   | NSW: 3<br>SA: 1<br>Vic: 4<br>WA: 3           | Combined: 8<br>Primary: 2<br>Secondary: 1         | Anglican: 4<br>Baptist: 1<br>Catholic: 1<br>Christian: 2<br>Orthodox: 1<br>Jesuit: 1<br>Montessori: 1  |
| 4. Unable to tell / Silent           | 31                   | NSW: 19<br>SA: 6<br>Vic: 4<br>WA: 2          | Combined: 22<br>Primary: 4<br>Secondary/senior: 5 | Anglican: 5<br>Baptist: 2<br>Catholic: 1<br>Christian: 6<br>Independent: 4<br>Islamic: 3<br>Lutheran: 3<br>Orthodox: 1<br>Seventh Day Adventist: 2<br>Uniting: 1<br>Other: 3 |
| 5. Weaker evidence of discrimination | 25                   | NSW: 6<br>NT: 1<br>SA: 5<br>Vic: 2<br>WA: 11 | Combined: 15<br>Primary: 5<br>Secondary: 5        | Anglican: 1<br>Baptist: 2<br>Catholic: 2<br>Christian: 15<br>Islamic: 3<br>Lutheran: 1<br>Presbyterian: 1  |

| RATING                        | TOTAL NO. OF SCHOOLS | BY STATE                           | BY TYPE                     | BY DENOMINATION                                |
|-------------------------------|----------------------|------------------------------------|-----------------------------|--|
| 6. Evidence of discrimination | 9                    | NSW: 3<br>SA: 2<br>Vic: 2<br>WA: 2 | Combined: 8<br>Secondary: 1 | Christian: 7<br>Lutheran: 1<br>Presbyterian: 1 |
| 7. Strongly discriminatory    | 5                    | NSW: 4<br>WA: 1                    | Combined: 4<br>Secondary: 1 | Christian: 5                                   |



## SCHEDULE B: FAITH-BASED SERVICE PROVIDERS REVIEW METHODOLOGY

The purpose of our faith-based service providers review was to identify evidence of inclusive or discriminatory practices towards LGBTQ+ service users and employees in Australia's largest faith-based organisations which provide social services to the general community. The methodology was intended to also identify whether a person, such as a prospective service user or employee, could discern from publicly available material the position of the faith-based service provider on LGBTQ+ inclusion.

### 16. REVIEW SAMPLE

#### 16.1 Identifying Australia's largest faith-based service providers

Based on total annual revenue reported to the ACNC in the 2020 reporting year, the project team undertook a desktop review of the largest 100 religious or faith-based charities or charitable groups registered and operating in Australia. From the 100 largest religious or faith-based charities or charitable groups in Australia, we identified 70 faith-based organisations that provided social services to the general community, as follows.

Using the 2020 ACNC Annual Information Statement dataset, we identified as religious or faith-based charities or charitable groups those organisations operating and registered in Australia with the 100 largest reported total annual revenues which:

- identified 'advancing religion' among their charitable purposes;
- identified themselves as a 'basic religious charity' (there were none), or
- after a review of publicly available material (such as material published on their website or in ACNC filings), indicated they had a current religious affiliation.

A couple of large charitable organisations were not included in this sample because their religious affiliation appeared to be historical, and therefore the religious bodies exemptions was unlikely to apply to them.

From the top 100, we excluded from the scope of this review:

- 28 charities and charitable groups that were schools or educational authorities providing only primary or secondary education. These were excluded to avoid duplication with the schools' review described in Schedule A. However, 2 faith-based tertiary educational institutions remained in the sample.
- 2 charities that were closely associated with religious institutions, which were established to distribute funds and which did not have a public facing material that we could review.

Some charities report to the ACNC individually, while others report to the ACNC as part of a group. Among the 70 faith-based service providers in the sample:

- 19 were a charitable group, reporting for a number of charities;
- 10 organisations reported individually but were part of 3 broader charitable groups.

### 17. REVIEW METHODOLOGY

The review was conducted in 2022 and 2023 by Equality Australia staff and a team of final year law students who were supervised by the Castan Centre for Human Rights and Equality Australia. The team worked to collect, document, review and analyse evidence drawn from publicly available information in ACNC filings and on service

provider websites, social media platforms and on other websites and news articles identified using Google searches. The team looked for evidence of both discriminatory and affirming practices relating to LGBTQ+ people.

## 17.1 Collection of evidence

In the same way as with the schools' review,<sup>738</sup> evidence on each service provider was collected through online searches and manual reviews of the organisation's website (including documents hosted on that website), social media platforms and using Google searches to identify other websites and relevant news articles referring to the organisation. We also used information filed with the ACNC to collect information on the organisations.

Like with the school's review, the team also applied a general time limit of 2 hours searching per organisation or charitable group. This time limit was put in place to mirror the experience of a prospective service user or employee who might look for information about an organisation before seeking its services or employment with the organisation.

## 17.2 Analysis of evidence

After an analysis of the evidence using a similar methodology to our schools' review, every service provider was given a rating using a traffic light system:

- **Green** indicated evidence of LGBTQ+ affirming practices, with a 'plus' indicating particularly strong examples of affirmation;
- **Red** indicated evidence of LGBTQ+ discriminatory practices, with a 'plus' indicating particularly strong examples of discrimination; and
- **Orange** was used where, after the collection and analysis of evidence, we could not determine the views or practices of the organisation towards LGBTQ+ people, or matters relating to sexuality and gender, or the evidence was mixed.

Like in the schools' review, evidence was reviewed and analysed in the manner that a court would when hearing a discrimination case. Evidence was assessed as a whole, and individual pieces of evidence were given appropriate weight based on similar considerations as set out in the schools' review methodology. Evidence was recorded and documented in summary reports or screenshots for each organisation.

## 17.3 Second-round review

Using the summary reports and supporting evidence, a second-round review was then conducted by the Legal Director and Legal Policy Advisor at Equality Australia. There was no significant difference of opinion between the first round and second round review, mostly because the rating system was simpler to apply than in the schools' review.

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<sup>738</sup> See Schedule A: Schools review methodology.

## 18. TABLE OF RESULTS

| RATING   | TOTAL NO. OF ORGS. | TOTAL ANNUAL REVENUE | ANNUAL REVENUE DERIVED FROM GOV (% OF TOTAL ANNUAL REVENUE) | TOTAL NO. OF PAID EMPLOYEES | MAIN SERVICES PROVIDED <sup>739</sup>   | RELIGIOUS AFFILIATION   |
|--|--------------------|----------------------|---|-----------------------------|---|---|
| Green plus   | 13                 | \$5.95b              | \$3.76b (63.1%)   | 55,225                      | Aged care: 7<br>Health: 2<br>Other social services: 8                               | Anglican: 2<br>Baptist: 1<br>Catholic: 4<br>Uniting Church: 6                           |
| Green  | 25                 | \$8.61b              | \$3.70b (42.5%)   | 72,713                      | Aged care: 16<br>Education: 1<br>Health: 6<br>Other social services: 15<br>Other: 1 | Anglican: 5<br>Baptist: 2<br>Catholic: 13<br>Other Christian: 3<br>Uniting Church: 2    |
| Orange   | 26                 | \$9.44b              | \$4.74b (50.2%)   | 60,413                      | Aged care: 16<br>Education: 1<br>Health: 6<br>Other social services: 8<br>Other: 2  | Anglican: 1<br>Catholic: 16<br>Other Christian: 5<br>Protestant: 2<br>Uniting Church: 2 |
| Red  | 4                  | \$1.45b              | \$419m (28.8%)  | 10,508                      | Health: 1<br>Aged care: 3<br>Education: 2<br>Other social services: 3               | Anglican: 1<br>Baptist: 1<br>Catholic: 1<br>Other Christian: 1                          |
| Red plus   | 2                  | \$390m               | \$183m (46.8%)  | 4,004                       | Aged care: 1<br>Other social services: 1  | Baptist: 1<br>Uniting Church: 1   |
| Not rated – no material available / not a public facing organisation                       | 2                  | \$185m               | \$7.69m (4.1%)  | 347                         | Other: 2  | Catholic: 1<br>Latter Day Saints: 1   |
| Not rated as part of this review – primary or secondary schools or educational authorities | 28                 | \$11.12b             | \$8.30b (76.7%)   | 62,223                      | Education: 28   | Anglican: 6<br>Catholic: 12<br>Other Christian: 8<br>Uniting Church: 2                  |

<sup>739</sup> Note: a service provider may provide more than one type of service.