

Report

June 2016



South Australian Law Reform Institute

‘Lawful Discrimination’: Exceptions under the *Equal Opportunity Act 1984 (SA)* to unlawful discrimination on the grounds of gender identity, sexual orientation and intersex status

The **South Australian Law Reform Institute** was established in December 2010 by agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia. It is based at the University of Adelaide Law School.

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This Report was written by Sarah Moulds, drawing upon the Issues Paper prepared on the same topic by Holly Ritson. Louise Scarman, Dr David Plater and Professor Williams provided proofreading and editorial assistance.

This Report draws upon the significant work and consultation undertaken by the Institute for its Audit Paper on the topic, published in September 2015.

The Institute acknowledges and relies upon previous research on this topic, and in particular upon the work of the Australian Human Rights Commission, the Human Rights Law Centre, the South Australian Equal Opportunity Commission and the South Australian Department for Communities and Social Inclusion.

The Institute is further grateful for the many insightful submissions in relation to this reference.

Abbreviations

ART	Assisted Reproductive Treatment
Audit Paper	SALRI Audit Paper (September 2015)
EOC	Equal Opportunity Commission South Australia
<i>EO Act 1984</i>	<i>Equal Opportunity Act 1984 (SA)</i>
LGBTIQ	Lesbian, Gay, Bisexual, Trans, Intersex and Queer
SALRI	South Australian Law Reform Institute

Executive Summary

South Australia has historically been at the forefront of developing and implementing laws designed to prohibit unlawful discrimination and to promote equality. South Australia was the first Australian jurisdiction to introduce sex discrimination legislation and the South Australian *Sex Discrimination Act* of 1975 took full effect from August 1976. These laws, now expressed in the comprehensive *Equal Opportunity Act 1984* (SA) (the ‘*EO Act 1984*’) provide a normative statement about the attributes the community considers should be protected from differential and detrimental treatment. The *EO Act 1984* also sets the boundaries around what is and is not unlawful discrimination, exempting a range of bodies from its application. The *EO Act 1984* also provides a mechanism for resolving complaints, and establishes the South Australian Equal Opportunity Commission (the EOC) to provide guidance and education for individuals, organisations, businesses and employers.

These laws — that currently protect against discrimination on a range of grounds including sexuality and chosen gender — have featured in the South Australian Law Reform Institute’s (SALRI’s) reference to review legislative and regulatory discrimination against lesbian, gay, bisexual, trans and intersex South Australians.¹

In the first stage of this work, which culminated in the Audit Report, *Discrimination on the Grounds of Sexual Orientation, Gender, Gender Identity and Intersex Status in South Australian Legislation* (Audit Report), published in September 2015,² SALRI received many submissions that identified the *EO Act 1984* as containing features in potential need of reform. These features include the terminology used to describe the certain protected attributes and the scope and operation of the exceptions and exemptions that make certain discrimination on these grounds lawful.

SALRI also indicated in the Audit Report its intention to conduct further research on a number of complex areas, including the existing exemptions to unlawful discrimination on the grounds of sexuality and chosen gender under the *EO Act 1984* with a view to determining whether the scope of each exemption remains necessary and appropriate having regard to its normative and practical impact on the promotion of equality.³

¹ For the full text of the Reference see His Excellency the Honourable Hieu Van Le AO, ‘Speech to the Fifty-Third Parliament of South Australia’ (Speech delivered at the Opening of the Second Session of the Fifty-Third Parliament of South Australia, 10 February 2015) 20-21
<<http://www.premier.sa.gov.au/images/govern/GovernorSpeech100215.pdf>>.

² South Australian Law Reform Institute, *Discrimination on the Grounds of Sexual Orientation, Gender, Gender Identity and Intersex Status in South Australian Legislation*, Audit Paper (2015) (‘Audit Report’). A copy of the Audit Report is available at <https://law.adelaide.edu.au/research/law-reform-institute/documents/audit_report_lgbtiq_sept_2015.pdf>.

³ Ibid 13 [2.7].

This Report contains the findings of SALRI's further consideration of the exceptions and exemptions to the protections against unlawful discrimination on the grounds of sexuality and chosen gender in the *EO Act 1984*.

It has been prepared following an extensive community consultation process, beginning with the online and in person consultation engaged in with respect to the Audit Report, and culminating in the receipt of over 350 written submissions, electronic comments and emails provided through the use of the South Australian Government's *YourSAy* website and social media platform. An Issues Paper presenting four reform Options was produced to guide the consultation process. SALRI also conducted a number of media interviews with local and national radio stations about its work. SALRI is grateful for the thoughtful community participation in the consultation process.

As this consultation process suggests, any change to the exceptions to the *EO Act 1984* is contentious and attracts strong views from many in the community. This is particularly with respect to the exceptions in the *EO Act 1984* relating to religious bodies and to religious educational authorities, including religious schools. Indeed, the vast majority of electronic submissions received by SALRI relate to the exceptions applying to religious schools and clearly support the continuation (or strengthening) of these exceptions to unlawful discrimination on the grounds of sexuality and chosen gender. SALRI also heard from a smaller group of South Australians with exposure to discrimination on the grounds of sexuality or chosen gender, including experiences arising from the current exceptions. Other submissions outlined the reasons why changes should be made, some quoting statistical evidence and research pointing to the prevalence of harm caused to LGBTIQ people as a result of discrimination, including discrimination in the area of education.

These views have been carefully considered by SALRI in formulating this Report, as has comparative research undertaken to determine how other Australian jurisdictions currently tackle these complex issues under their anti-discrimination laws. Also pertinent is South Australia's current, but soon to expire exemption, from the relevant provisions of the Commonwealth anti-discrimination regime, and the need to ensure that any reforms recommended remove or at least limit the risk of South Australia's inconsistency with the Commonwealth laws.

As a result of the consultation process, it became clear to SALRI that some of the reform options presented in the Issues Paper would be considered by many South Australians as a disproportionate response to the findings in SALRI's Audit Report. In particular, it became clear that the complete removal of the current exceptions available to religious bodies would be perceived to undermine the right to freedom of religious belief by the majority of community members who participated in the second round of the *YourSAy* consultation process. Partly for this reason, SALRI is not inclined to recommend reform Options C and D in its Issues Paper that would replace the current exceptions with a general limitation clause or make exemptions subject to an application process.

The consultation process also revealed the real and deleterious impact that discrimination on the grounds of sexual orientation, gender identity and intersex status can have on the lives and wellbeing

of LGBQIT South Australians and their families — including discrimination arising from one of the existing exemptions to the *EO Act 1984*. For some, the very existence of exemptions making discrimination lawful in certain circumstances undermines the concept of equality before the law and hinders progress towards substantive equality and acceptance of difference in South Australia. It also emerged that some existing exceptions in the *EO Act 1984* are too wide and cannot be objectively justified and require refinement. For these reasons, reform Option A in the Issues Paper — recommending no changes to exceptions to discrimination against LGBTIQ people — is not pursued in this Report.

Instead, the Report focuses on reform Option B in the Issues Paper and proposes recommendations that will clarify, adjust and in some cases narrow the scope of the existing exceptions to discrimination on the grounds of sexuality and chosen gender.

In formulating its findings and recommendations, SALRI has adopted a framework that recognises both the fundamental right to religious belief and the right to freedom from discrimination, as well as other related human rights protected under international law such as the rights of the child and the right to education. Any law in this area must balance these two potentially competing considerations.

SALRI has arrived at recommendations that will help ensure that the current exceptions in the *EO Act 1984* remain necessary and proportionate, having regard to the impact they have on the range of human rights they seek to invoke. It has also recommended changes that would help ensure that the South Australia regime aligns with the relevant protections at the Commonwealth level. This requires replacing the protected attributes of ‘sexuality’ and ‘chosen gender’ with ‘sexual orientation’, ‘gender identity’ and ‘intersex status’, as recommended in the Audit Report and partially implemented by the Statutes Amendment (Gender Identity and Equity) Bill (SA). It also requires making some further structural changes to the *EO Act 1984*, such as those relating to the tests for discrimination.

This Report also contains some specific recommendations about the current exceptions held by religious bodies.

It recommends that the general exemption available to religious bodies in s 50 of the *EO Act 1984* — which permits discrimination with respect to the ordainment of priests for example — remain in place, but that s 50(1)(c) be removed to make it clear that it does not apply to exempt discrimination with respect to the provision of key public services such as education or health services. This would make it clear that the exemption does not permit discrimination with respect to current or potential students or patients.

This Report also recommends that the existing exemption available to religious educational authorities with respect to employment in s 34(3) of the *EO Act 1984* be replaced with an exemption based on religious belief, rather than sexual orientation or gender identity. This would make it clear that religious educational authorities could not refuse to employ a person, or dismiss them, on the basis of their sexual orientation or gender identity, but could require the person to share the school’s religious

beliefs. This reform should be combined with preservation of the requirement for the religious educational authority to have a publically available written policy statement and that it be required to show that the discrimination was not unreasonable in the circumstances.

The Report further recommends that s 48 of the *EO Act 1984* should be amended to clarify that ‘sporting activity’ *does not* include coaching, umpiring or administering any sporting activity and does not apply to sporting activities by children who have not yet attained the age of 12 years.

It further recommends that the EOC should be empowered to issue Practice Guidelines with respect to the matters in the *EO Act 1984*, as is the case in Victoria. Such a power would ensure that the EOC can perform its important educative and preventative role, by disseminating clear practical advice for individuals, sports clubs, schools, religious bodies and employers about how to comply with their legal obligations and how to exercise their legal rights. Such a reform would enable the EOC to issue Practice Guidelines with respect to Gender Identity and Sport, having regard to the *Play by the rules* initiative and other relevant sources. It also enables the EOC to issue Practice Guidelines with respect to the health care related exception in s 79A, that should include reference to current, reliable statistical data relating to the prevalence of infectious diseases including HIV and address any myths and stereotypes giving rise to discrimination against LGBTIQ people.

Finally, this Report recommends that the *EO Act 1984* be subject to a more comprehensive, independent review that looks beyond just the exceptions to unlawful discrimination to the broader machinery of the Act, and considers whether it remains a fair, appropriate and effective framework for anti-discrimination law in South Australia.

Such a review is supported by the EOC and the Law Society of South Australia, among others, on the grounds that it would provide an important opportunity to examine how the Act works in practice, and whether changes should be made to ensure that businesses and employers are better able to comply with their legal obligations. Such a review could also consider whether there is a need to broaden the range of attributes protected under the current Act — for example to include religious belief, domestic violence or irrelevant criminal record — and whether protection from vilification should apply to all or some protected attributes.

SALRI wishes to thank the South Australian community for engaging so thoughtfully and generously with this reference, and for sharing personal stories of how these laws impact their lives, families and important personal values. Consideration of the scope of anti-discrimination regimes is a contentious area that inevitably evokes strong and sincerely held views. SALRI has been privileged to be able to distil some of those views in this Report.

Summary of Recommendations

Recommendation 1: Ensure South Australian protections are consistent with Commonwealth regime

SALRI recommends that Part 3 of the South Australian *EO Act 1984* should be amended to ensure that it includes protections against discrimination on the grounds of sexual orientation, gender identity and intersex status that are consistent with the protections provided with respect to those attributes under the Commonwealth *Sex Discrimination Act 1984* (Cth). These amendments are necessary to ensure that the relevant features of the *EO Act 1984* are consistent with the relevant provisions of the *Sex Discrimination Act 1984* (Cth) when South Australia's current temporary exemption from these Commonwealth provisions ceases in June 2016.

The specific amendments required include:

- Replacing the current attributes of 'sexuality' and 'chosen gender' in Part 3 of the *EO Act 1984* with the attributes of 'sexual orientation', 'gender identity' and 'intersex status', as SALRI previously recommended in the Audit Report.
- Amending the test for direct and indirect discrimination in Part 3 of the *EO Act 1984* to align with the tests applied in s 5A-5C and s 7B-7C of the *Sex Discrimination Act 1984* (Cth).
- Ensuring the time periods applied for lodging complaints and the powers of the Commission in relation to inquiring into and resolving complaints under the South Australian regime are consistent with those applying at the Commonwealth level.

SALRI notes that such structural reforms may have implications for attributes beyond sexual orientation, gender identity and intersex status and should be considered further in light of the potential impact on those other attributes.

Recommendation 2: Clarify that exceptions relating to religious bodies do not extend to provision of public services including health and education

SALRI recommends that paragraph (c) be removed from the existing religious bodies exemption in s 50(1) of the *EO Act 1984* to clarify that it does not apply to discrimination undertaken by religious bodies with respect to the provision of public services, such as health and education.

This would ensure that this general exception could not be relied upon to exempt discrimination on the grounds of sexual orientation or gender identity undertaken with respect to current or potential students or patients.

In making this recommendation, SALRI emphasises that the existing exemption available to religious bodies in ss 50(1)(a)-(ba) of the *EO Act 1984* should remain in place, insofar as it relates to the ordination or appointment of priests, ministers of religion or members of a religious order; the training

or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order; or the administration of a body established for religious purposes in accordance with the precepts of that religion.

In the event that the above recommendation is not adopted, an alternative option would be to list the specific services that should be removed from the potential scope of the exception in s 50(1)(c), following the approach adopted in s 37 of the *Sex Discrimination Act 1984 (Cth)*, which excludes aged care services from the scope of the general religious bodies exception. Specific services that should be excluded include (at a minimum) education, health, housing and adoption services.

Recommendation 3: Replace religious educational authorities exception with one based on religious belief

SALRI recommends that the existing exemption available to religious educational authorities with respect to employment in s 34 (3) of the *EO Act 1984* — which permits discrimination on the grounds of sex, sexuality and chosen gender — be replaced with an exemption that permits discrimination by religious educational authorities in the area of employment on the basis of religious belief.

This replacement exemption should be based on s 51 of the *Anti-Discrimination Act 1998 (Tas)* but should preserve the requirement in the current South Australian provision for the religious educational authority to have a written policy outlining the basis on which it seeks to rely upon the exemption, and that this policy be made publicly available.

The replacement exemption should also include a requirement that the discrimination on the grounds of religious belief be not unreasonable in the circumstances. Guidance should be provided as to what is reasonable in the circumstances, as in s 25(5) of the *Anti-Discrimination Act 1991 (Qld)* which requires consideration of: (a) whether the action taken or proposed to be taken by the employer is harsh or unjust or disproportionate to the person’s actions; and (b) the consequences for both the person and the employer should the discrimination happen or not happen.

Recommendation 4: Practice guidelines for sport

In line with Recommendation 9 (below), SALRI recommends that the Equal Opportunity Commission issue practice guidelines with respect to gender identity and sport, having regard to the *Play by the rules* initiative and other relevant sources.

Recommendation 5: Clarifying the scope of sporting activity

SALRI recommends that s 48 of the *EO Act 1984* be amended to clarify that ‘sporting activity’ *does not* include:

- (a) the coaching of persons engaged in any sporting activity;
- (b) the umpiring or refereeing of any sporting activity;
- (c) the administration of any sporting activity;

- (d) any prescribed sporting activity; or
- (e) sporting activities by children who have not yet attained the age of 12 years.

Recommendation 6: Practice guidelines for health

Having regard to Recommendation 9, SALRI recommends that the Equal Opportunity Commission issue practice guidelines with respect to the health care related exception in s 79A, that should include reference to current, reliable statistical data relating to the prevalence of infectious diseases including HIV and address any myths and stereotypes giving rise to discrimination against LGBTIQ people.

Recommendation 7: Limitation on exception for religious bodies

Having regard to Recommendation 2, SALRI recommends that s 50(1)(c) of the *EO Act 1984* should be amended or removed to make it clear that the exception for religious bodies does not extend to the provision of health services.

Recommendation 8: Remove exception for Assisted Reproductive Treatment

SALRI recommends the repeal of s 5(2) of the *EO Act 1984* that currently excludes assisted reproductive treatment from the definition of ‘services’ in the Act.

Recommendation 9: Power to issue practice guidelines

SALRI recommends that the *EO Act 1984* should be amended to enable the Equal Opportunity Commission to issue Practice Guidelines with respect to the protection and exception provisions of the *EO Act 1984*, based on Part 10 of the *Equal Opportunity Act 2010* (Vic).

Recommendation 10: Broader review of *EO Act 1984*

That the Government undertake an independent, comprehensive review of the *EO Act 1984* to determine whether it continues to meet its equality objectives and remains accessible, fair, and effective. The review’s terms of reference should include, at a minimum, consideration of whether the *EO Act 1984* should include protections against harassment and vilification with respect to all protected attributes; whether the test for discrimination and the burden of proof associated with this test is fair for all users; and whether additional attributes, such as religious belief, domestic violence and irrelevant criminal record, should be included in the *EO Act 1984*.

Such a review should commence following the implementation of the specific recommendations made in this Report.

Recommendation 11: No retrospective application

SALRI recommends that the above changes to the *EO Act 1984* do not apply retrospectively, so that cases of discrimination can only be raised from the commencement of any amended *EO Act 1984*. SALRI further recommends that information and guidance materials relating to each of the proposed

changes be provided in writing to all sports clubs, schools, religious bodies and others who may be affected by the changes, along with a broader public awareness campaign.

Part 1: Introduction

1.1 Background

1.1.1 The South Australian Law Reform Institute (SALRI) was established in December 2010. Based at the Adelaide University Law School, SALRI was formed by an agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia.

1.1.2 When conducting reviews and research on proposals from the Attorney General, SALRI focuses on the modernisation of the law; the elimination of defects in the law; the consolidation of any laws; the repeal of laws that are obsolete or unnecessary; and uniformity between laws of other States and the Commonwealth.

1.1.3 SALRI then provides reports to the Attorney-General or other authorities on the outcomes of reviews and/or research and makes recommendations based on those outcomes. It is ultimately up to the State Government and the Parliament to implement any recommended changes to South Australian law.

1.1.4 The reference is about identifying the laws and regulations in South Australia that discriminate against individuals and families on the basis of their sexual orientation, gender, gender identity or intersex status.⁴ This includes laws that discriminate against lesbians, gays, bisexuals, trans, intersex and queer (LGBTIQ) people.

1.1.5 The wider context for these recommendations is the South Australian Government's stated aims for a South Australia where the presence and contributions LGBTIQ people are welcomed and celebrated and where their ability to participate fully in all aspects of social and economic life, free from discrimination and prejudice, is maximised.⁵

1.1.6 On 7 September 2015, SALRI completed the first part of its work with respect to this Reference by publishing an Audit Report entitled *Discrimination on the Grounds of Sexual Orientation, Gender, Gender Identity and Intersex Status in South Australian Legislation* (the 'Audit Report').⁶ The Audit Report outlines in some detail the current legislative regime in South Australia, as well as the discriminatory impact this regime is having on the lives of LGBTIQ people in South Australia, and argued a strong case for reform.

⁴ For the full text of the Reference see His Excellency the Honourable Hieu Van Le AO, above n 1.

⁵ Government of South Australia, *LGBTIQ State of Play: Equality for Lesbian, Gay, Transgender, Intersex and Queer (LGBTIQ) People* (2015) <<http://yoursay.sa.gov.au/documents/lgbtiq-state-of-play.pdf>> (hereafter referred to as 'LGBTIQ State of Play').

⁶ Audit Report, above n 2, 44 [102].

1.2 The Audit Report

1.2.1 The Audit Report was prepared following an extensive desktop review of all South Australian laws, followed by extensive consultation by SALRI with LGBTIQ individuals and community organisations and included a public submission process facilitated by the Government’s *YourSAy* website.⁷

1.2.2 The individuals and organisations consulted asked pertinent questions about the law and the values it enshrines. These questions serve to highlight the discriminatory barriers that members of the LGBTIQ communities often encounter in their daily lives.

1.2.3 The desktop review identified over 140 Acts and Regulations that, on their face, discriminate against individuals on the basis of sex or gender diversity. The vast majority of the Acts or Regulations in this category discriminate by reinforcing the binary notion of sex (‘male’ and ‘female’) or gender (‘man’ or ‘woman’) or by excluding members of the LGBTIQ communities by a specific or rigid definition of gender.

1.2.4 However, a smaller number of laws had a more acute discriminatory impact on the lives of LGBTIQ South Australians and their families. These included a lack of adequate legal protection against discrimination, particularly on the grounds of gender identity and intersex status; legal barriers to relationship recognition and exclusion through a number of regimes designed to help couples start a family and raise children, such as access to artificial reproductive treatments.

1.2.5 The Audit Report contained a number of recommendations for immediate reform, as well as recommendations relating to five complex areas of law that had been identified as giving rise to discrimination, but that required further review and reporting.⁸

1.2.6 Among its recommendations for immediate reform, the Audit Report recommended that the South Australian Government,

[a]mend ss 5 and 29 and Part 3 of the *Equal Opportunity Act 1984 (SA)* to replace the term ‘sexuality’ with ‘sexual orientation’; replace the term ‘chosen gender’ with ‘gender identity’ and insert a new provision 5(6) ‘intersex status’ with new terms to be defined in accordance with s 4 of the *Sex Discrimination Act 1984 (Cth)*.⁹

1.2.7 SALRI notes that aspects of this recommendation have been incorporated in the Omnibus Bill, the Statutes Amendment (Gender Identity and Equity) Bill 2015, tabled in the House of Assembly by the Premier by way of a Ministerial statement on 1 December 2015 and formally introduced on 10

⁷ Government of South Australia, *YourSAy: LGBTIQ – Removing Discrimination from SA laws* (2015) <<http://yoursay.sa.gov.au/yoursay/lgbtiq-removing-discrimination-from-sa-laws>>.

⁸ Audit Report, above n 2, 9-10.

⁹ Ibid 13 [2.3].

February 2016.¹⁰ This Report proceeds on the likely basis that this Bill (including the recommendation as to amending the *EO Act 1984*) will be shortly accepted by the South Australian Parliament.¹¹

1.2.8 In the Audit Report, SALRI foreshadowed its intention to conduct further research on a number of areas, including:

[t]he scope of the existing exemptions to unlawful discrimination on the grounds of sexual orientation, gender identity and intersex status under the *Equal Opportunity Act 1984* (SA) with a view to determining whether the scope of each exemption remains necessary and appropriate having regard to its normative and practical impact on the promotion of equality.¹²

1.2.9 This Report sets out the further research conducted by SALRI on the topic of exceptions to the *EO Act 1984* and sets out a range of recommendations, having regard to the reform options identified in the Issues Paper, and the public consultation process undertaken (discussed below).

1.3 Consultation Process

1.3.1 While the time frames for completing this Report did not permit SALRI to travel to regional areas or hold numerous community meetings, this Report was developed following extensive community consultation, in person in Adelaide and via a range of online methods. As discussed below, SALRI recommends that consideration be given to a more extensive review of the *EO Act 1984* that could include appropriate time frames for South Australia-wide consultation on key aspects of the Act and its impact.

Consultation prior to the Audit Report

1.3.2 The preparation of this Report has involved several stages. First, following a detailed desktop review of all South Australian laws and regulations, and the provision of plain English ‘Fact Sheets’ on key issues,¹³ SALRI undertook extensive consultation with the South Australian LGBTIQ community to identify those laws that discriminated on the grounds of sexual orientation, gender identity and intersex status. SALRI then utilised the Government’s *YourSAy* website¹⁴ and invited members of the public to provide submissions or request meetings with SALRI to discuss its work. Secondly, SALRI considered submissions made, legislative regimes in other jurisdictions and relevant

¹⁰ South Australia, *Parliamentary Debates*, House of Assembly, 10 February 2016, 4209-4213 (Jay Weatherill, Premier).

¹¹ South Australia, *Parliamentary Debates*, House of Assembly, 1 December 2015, 3805 (Jay Weatherill, Premier). See also South Australia, *Parliamentary Debates*, House of Assembly, 10 September 2015, 2460-2461 (Stephen Marshall, Opposition Leader); South Australia, *Parliamentary Debates*, House of Assembly, 24 February 2016, 4427-4433 (Ms Chapman); South Australia, *Parliamentary Debates*, House of Assembly, 25 February 2016, South Australia, 4505-4513; *Parliamentary Debates*, House of Assembly, 9 March 2016, 4620-4628, 4660-4675.

¹² Audit Report, above n 2, 13 [2.7].

¹³ See, for example, SALRI Fact Sheet 2: Legal Protections Against Discrimination <<https://law.adelaide.edu.au/research/law-reform-institute/documents/factsheet-2-legal-protections-100615.pdf>>.

¹⁴ Government of South Australia, above n 7.

law reform and government reports. This work, reflected in the Audit Report, found that the current exceptions to the *EO Act 1984* in South Australia gave rise to considerable concern with respect to discrimination on the grounds of sexual orientation, gender identity and intersex status.

1.3.3 Following the release of the Audit Report, SALRI developed an Issues Paper specifically focused on exceptions to the *EO Act 1984*.¹⁵ This Issues Paper was then made available on the State Government's *YourSay*¹⁶ platform (described below) and distributed to interested parties who had contributed to the Audit Report consultation process.

1.3.4 SALRI also liaised with the South Australian Equal Opportunity Commission (EOC) and with relevant experts from South Australia and interstate in preparing this Report.

Issues Paper

1.3.5 The Issues Paper prepared by SALRI set out the existing exceptions to the *EO Act 1984* and described the rationale for these exceptions.¹⁷

1.3.6 The Issues Paper then discussed in greater detail the particular exceptions in the *EO Act 1984* that prompted concern in the submissions to SALRI during the consultation process. The exceptions in the *EO Act 1984* that gave rise to the most concern were exceptions for religious organisations, especially in the area of employment; exceptions relating to participation in competitive sports; exceptions in the provision of health care relating to blood donation and assisted reproductive therapy; health care provision by religious institutions; the terminology in the exception for clubs and associations and the measures in the *EO Act 1984* intended to achieve greater equality.

1.3.7 To inform the *potential* reform proposals, the Issues Paper then detailed how each of the other Australian jurisdictions (State, Territory and Commonwealth) provides exceptions in relation to the areas of concern.

1.3.8 The final section of the Issues Paper set out four options for reform. The suggested options were:

Option A: no reform required: No changes to exceptions to discrimination against LGBTIQ and other people necessary.

Option B: reform to certain exceptions only: Amend provisions that permit lawful discrimination

¹⁵ South Australian Law Reform Institute ("SALRI"), *'Lawful Discrimination': The Effect of Exceptions Under the Equal Opportunity Act 1984 (SA) on Lesbian, Gay, Bisexual, Trans, Intersex and Queer (LGBTIQ) South Australians* (December 2015) <https://law.adelaide.edu.au/research/law-reform-institute/documents/eo_act_exceptions_issues_paper_final.pdf>.

¹⁶ Government of South Australia, *YourSay: South Australian Law Reform Institute Review of Exceptions to Equal Opportunity Law* (live from December 2015 until February 2016) at <<http://yoursay.sa.gov.au/decisions/yoursay-engagements-south-australian-law-reform-institute-review-of-exceptions-to-equal-opportunity-law/about>>.

¹⁷ SALRI, above n 15.

against LGBTIQ people individually to address key concerns.

Option C: general limitations clause: Repeal all (or most) lawful discrimination provisions under the *EO Act 1984*. Introduce a general limitations clause, similar to that suggested by the Commonwealth Government in 2012.

Option D: exceptions by application only: Repeal all lawful discrimination provisions under the *EO Act 1984*. Exemptions would be granted by application under s 92 of the *EO Act 1984* only.

1.3.9 Submissions on the issues raised and options suggested by this Issues Paper were invited from all interested members of the public and other groups.

The YourSAy Consultation Process

1.3.10 As noted above, the Issues Paper was made available to the public through the Government's 'YourSAy' platform¹⁸ — a website linked to social media that is frequently used by the Government to facilitate public consultations on issues. The *YourSAy* site included background information about SALRI and its Reference, as well as Fact Sheets about the particular issues concerning the *EO Act 1984* and exceptions to discrimination under that Act.

1.3.11 The *YourSAy* site invited members of the public to participate in the consultations in four separate ways (1) via formal written submission made directly to SALRI, (2) via online feedback form, (3) by requesting a meeting or phone call with SALRI, or (4) by posting on the online discussion forum.

1.3.12 The *YourSAy* site was promoted through direct referral by SALRI to interested parties involved in the Audit Report consultation process, as well as through the existing subscriber list to the *YourSAy* site and conventional media avenues such as radio and print. The Issues Paper was also made available for download on SALRI's website.

1.3.13 SALRI received feedback through each of these avenues. By far the most common was completion of the online feedback form which asked:

Question 1: Does the current South Australian *Equal Opportunity Act 1984* (SA) provide appropriate protection against discrimination for LGBTIQ South Australians?

Question 2: If no, what areas should be priority areas for reform?

Question 3: Do you support any of the models of reform outlined in the Issues Paper?

Question 4: Any other comments on the Issues Paper?

1.3.14 SALRI received 364 responses to the *YourSAy* consultation, the majority of these being in the form of a direct email to SALRI, however SALRI also received a large number of direct responses to the online questionnaire and a small number of longer written submissions. It is important to note

¹⁸ Government of South Australia, above n 16.

that between 80 and 90% of the electronic responses received exclusively or primarily related to the exceptions applying to religious bodies and almost all of these responses opposed any change to the current exceptions. Some of these responses were expressed in similar language. A smaller number of respondents — between 10 and 20% — advocated for reform. Respondents are listed at Appendix 1. The online discussion forum on the *YourSay* was less popular, attracting only four comments.¹⁹

1.3.15 SALRI also met with a number of individuals and groups to discuss their views and concerns. These meetings are also listed at Appendix 1.

1.3.16 The information gained at each of these stages has informed the options evaluated and recommendations contained in this Report.

1.4 Some Notes on Terminology

1.4.1 While the South Australian *EO Act 1984* refers to ‘*exemptions*’, SALRI finds that the provisions in the *EO Act 1984* provide *exceptions* to the usual rules. In some jurisdictions the difference between exemptions, which are applied for, and exceptions, which are standing exclusions for certain acts from the rules, is strict and important.²⁰ In South Australia, the difference is mostly semantic. This paper uses *exception* (and its derivatives) to convey the meaning and effect of the South Australian legislative provisions and only uses *exemption* where clearly referring to statute.

1.4.2 This Report adopts the same approach to terminology as used in the Audit Report and the Issues Paper. Underlying this approach is SALRI’s strong support for the use of inclusive terminology and the right of people to identify their sexual orientation, gender identity or intersex status as they choose, and recognition of the complexity and power of language. SALRI is aware of the important distinction between the terms ‘gender identity’ and ‘intersex status’.

1.4.3 Some of the terminology used in this Issues Paper is set out below. These uses were developed as part of the consultation process undertaken by SALRI earlier in 2015.²¹

Gender: The term ‘gender’ refers to the way in which a person identifies or expresses their masculine or feminine characteristics. A person’s gender identity or gender expression is not always exclusively male or female and may or may not correspond to their sex.

Gender expression: The term ‘gender expression’ refers to the way in which a person externally expresses their gender or how they are perceived by others.

Gender identity: The term ‘gender identity’ refers to a person’s deeply held internal and individual

¹⁹ You can see these comments at <<http://yoursay.sa.gov.au/discussions/south-australian-law-reform-institute-review-of-exceptions-to-equal-opportunity-law-equal-opportunity-law-review>>.

²⁰ *Anti-Discrimination Act 1998* (Tas). See Hobart Community Legal Service, *Exceptions and Exemptions under the Tasmanian Act* (2013) Hobart Community Legal Service <<http://www.hobartlegal.org.au/tasmanian-law-handbook/rights/discrimination/tasmanian-anti-discrimination-framework/exceptions-and>>.

²¹ Audit Report, above n 2, 25-26.

sense of gender.

Intersex: The term ‘intersex’ refers to people who are born with genetic, hormonal or physical sex characteristics that are not typically ‘male’ or ‘female’. Intersex people have a diversity of bodies and identities.

LGBTIQ: An acronym that is used to describe lesbian, gay, bisexual, trans, queer and intersex people collectively. Many sub-groups form part of the broader LGBTIQ movement.

Sex: The term ‘sex’ refers to a person’s biological characteristics. A person’s sex is usually described as being male or female. Some people may not be exclusively male or female (the term ‘intersex’ is explained above). Some people identify as neither male nor female.

Sexual orientation: The term ‘sexual orientation’ refers to a person’s emotional or sexual attraction to another person, including, amongst others, the following identities: heterosexual, gay, lesbian, bisexual, pansexual, asexual or same-sex attracted.

Trans: The term ‘trans’ is a general term for a person whose gender identity is different to their sex at birth. A trans person may take steps to live permanently in their nominated sex with or without medical treatment.

1.5 Ensuring Consistency Between South Australian and Commonwealth Protections Against Discrimination

1.5.1 As noted in the Audit Report, by virtue of reforms enacted in 2013, South Australia is required to update the *EO Act 1984* to conform with the *Sex Discrimination Act 1984* (Cth) by July 2016.²²

1.5.2 The relevant provisions of the South Australian *EO Act 1984* and the Commonwealth *Sex Discrimination Act 1984* (Cth) are discussed in detail below, however it is important to note that the most significant change required to the South Australia regime is to ensure that the attributes of sexual orientation, gender identity and intersex status are fully protected from unlawful discrimination.

1.5.3 This can be achieved by replacing the current attributes of ‘sexuality’ and ‘chosen gender’ in Part 3 of the *EO Act 1984* with the attributes of ‘sexual orientation’, ‘gender identity’ and ‘intersex status’, as SALRI previously recommended in the Audit Report. SALRI notes that the terms ‘sexual orientation’ and ‘gender identity’ feature in the Statutes Amendment (Gender Identity and Equality) Bill 2015, however the additional attribute of ‘intersex status’ is not included.

1.5.4 Further structural changes may also be required to ensure that the South Australia regime offers the same level of protection against unlawful discrimination on these grounds, and to promote consistency between the two regimes. These changes include:

- amending the test for direct and indirect discrimination in Part 3 of the *EO Act 1984* to align with the tests applied in s 5A-5C and s 7B-7C of the *Sex Discrimination Act 1984* (Cth);

²² Ibid 10, 107.

- ensuring the time periods applied for lodging complaints and the powers of the Commission in relation to inquiring into and resolving complaints under the South Australian regime are consistent with those applying at the Commonwealth level.

1.5.5 SALRI notes that such structural reforms may have implications for attributes beyond sexual orientation, gender identity and intersex status and should be considered further in light of the potential impact on those other attributes.

Recommendation 1: Ensure South Australian protections are consistent with Commonwealth regime

SALRI recommends that Part 3 of the South Australian *EO Act 1984* be amended to ensure that it includes protections against discrimination on the grounds of sexual orientation, gender identity and intersex status that are consistent with the protections provided with respect to those attributes under the *Sex Discrimination Act 1984* (Cth). These amendments are necessary to ensure that the relevant features of the *EO Act 1984* are consistent with the relevant provisions of the *Sex Discrimination Act 1984* (Cth) when South Australia's current temporary exemption from these Commonwealth provisions ceases in June 2016.

The specific amendments required include:

- Replacing the current attributes of 'sexuality' and 'chosen gender' in Part 3 of the *EO Act 1984* with the attributes of 'sexual orientation', 'gender identity' and 'intersex status', as SALRI previously recommended in the Audit Report.
- Amending the test for direct and indirect discrimination in Part 3 of the *EO Act 1984* to align with the tests applied in s 5A-5C and s 7B-7C of the *Sex Discrimination Act 1984* (Cth).
- Ensuring the time periods applied for lodging complaints and the powers of the Commission in relation to inquiring into and resolving complaints under the South Australian regime are consistent with those applying at the Commonwealth level.

SALRI notes that such structural reforms may have implications for attributes beyond sexual orientation, gender identity and intersex status and should be considered further in light of the potential impact on those other attributes

Part 2: Balancing Rights and SALRI's Terms of Reference

2.1 Human Rights Considerations

2.1.1 Before considering the recommendations contained in this Report, it is important to keep in mind (a) the nature of SALRI's Reference to which these recommendations relate and (b) the range of individual rights and freedoms necessarily invoked by any discussion of the appropriate scope and content of equal opportunity law.

2.1.2 SALRI's Reference derives from the speech made by the Governor, the Honourable Hieu Van Le AO, at the Opening of the Second Session of the Fifty-Third Parliament of South Australia, 10 February 2015 that included the following:

Some individuals and families are not able to participate fully in our democracy because of who they are, whether it be lesbian, gay, bisexual and transgender.

The strength of our society will be shaped by the extent to which we can guarantee access to these pillars of our democracy, education, health and justice, to all South Australians.

My Government will invite the South Australian Law Reform Institute to review legislative or regulatory discrimination against individuals and families on the grounds of sexual orientation, gender, gender identity, or intersex status

Their recommendations will then be considered in the South Australian Parliament.²³

2.1.3 This Reference necessitates an analytical approach that (a) identifies laws that discriminate on the grounds of sexual orientation, gender, gender identity, or intersex status and (b) identifies and evaluates options for reform of those laws, having regard to SALRI's broader mandate to improve and modernise the law, and to promote consistency where possible. The wider context is significant, namely the South Australian Government's commitment to welcoming, including and celebrating LGBTIQ South Australians and ensuring that LGBTIQ South Australians can fully participate in all aspects of social and economic life, without experiencing prejudice or discrimination.²⁴ This was the approach adopted during the Audit Report, and in subsequent further Reports issued by SALRI.

2.1.4 It also aligns with recent developments around Australia and internationally, where the rights of LGBTIQ people are being reflected in law, and advanced through social and policy change. For example, in 2015 the United Nations Human Rights Commissioner stated in relation to discrimination and violence against individuals based on their sexual orientation and gender identity that:

²³ His Excellency the Honourable Hieu Van Le AO, above n 1, 20-21.

²⁴ LGBTIQ State of Play, above n 5; Government of South Australia, Department for Communities and Social Inclusion, *South Australian Strategy for the Inclusion of Lesbian, Gay, Bisexual, Transgender, Intersex and Queer People 2014-2016* (May 2014) <<http://publicsector.sa.gov.au/wp-content/uploads/20140501-DCSI-LGBTIQ-Strategy.pdf>>.

16. The protection of rights to equality before the law, equal protection of the law and freedom from discrimination is a fundamental obligation of States under international law, and requires States to prohibit and prevent discrimination in private and public spheres, and to diminish conditions and attitudes that cause or perpetuate such discrimination. To this end, States should enact comprehensive anti-discrimination legislation that includes sexual orientation and gender identity among protected grounds. States should review and repeal discriminatory laws and address discrimination against LGBT and intersex persons, including in the enjoyment of the rights to health, education, work, water, adequate housing and social security.

17. States also have obligations to address discrimination against children and young persons who identify or are perceived as LGBT or intersex. This includes harassment, bullying in schools, lack of access to health information and services, and coercive medical treatment.²⁵

2.1.5 This theme and the importance of addressing such discrimination has been repeated in a South Australian context. The South Australian Premier, for example, observed:

Governments should support the greatest possible engagement in society for all members of our community; that is, they should govern for all people. The fact remains that some individuals and families are not able to participate fully in our community because they are who they are, whether that be gay, lesbian, bisexual, transgender, intersex or queer.²⁶

2.1.6 David Pisoni MP, similarly commented:

I would like to reflect on generally what happens in politics. Regardless of what political party you are a member of, whether it comes to education, whether it comes to health, whether it comes to other sectors in the community, I think it is fair to say that people from both sides want the best outcome. The politics is about how you get there, but I think when it comes to the progressive members of the Parliament, and their view of, and support for equality, there is no politics about how to get there it is, 'Let's just do it. Let's do it. Let's make sure we support equality.'²⁷

2.1.7 These are critical considerations in considering the current exception in the *EO Act 1984*.

2.1.8 Of course, when undertaking this approach, SALRI is also aware of the need to ensure that any reform options it recommends do not (a) unduly or unjustifiably infringe or limit the rights and freedoms of any South Australians or (b) have unintended detrimental consequences for the rights and freedoms of the broader South Australian community. For this reason, SALRI has widely consulted in the preparation of this Report, actively seeking input from both those with experience of discrimination on the grounds of sexual orientation, gender, gender identity, or intersex status, as

²⁵ United Nations High Commissioner on Human Rights, *Report to the Human Rights Council on discrimination and violence against individuals based on their sexual orientation and gender identity*, UN Human Rights Council, 29th sess, Agenda items 2 and 8, UN Doc A/HRC/29/23 (May 2015) [16]-[17] [footnotes omitted]
<http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Documents/A_HRC_29_23_en.doc>.

²⁶ South Australia, *Parliamentary Debates*, House of Assembly, 10 September 2015, 2503 (Jay Weatherill, Premier).

²⁷ South Australia, *Parliamentary Debates*, House of Assembly, 10 September 2015, 2462 (David Pisoni). See further South Australia, *Parliamentary Debates*, House of Assembly, 10 September 2015, 2460-2461 (Stephen Marshall, Opposition Leader); South Australia, *Parliamentary Debates*, House of Assembly, 10 September 2015, 2461-2462 (Katherine Hildyard).

well as those individuals, organisations and communities who may be affected by any changes to the current law.

2.1.9 SALRI has received many submissions from individuals and organisations emphasising the fundamental nature of freedom of religion or freedom of religious belief and its protection under international human rights conventions to which Australia is a party. For example, over 200 electronic responses to SALRI's *YourSay* consultation noted or referred to freedom of religious belief, which is protected under art 18 of the *International Covenant on Civil and Political Rights (ICCPR)*²⁸ and provides:

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

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

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

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

2.1.10 As noted in a number of submissions,²⁹ the UN Human Rights Committee has made extensive comments in its *General Comment No 22: The right to freedom of thought, conscience and religion*, including that:

The right to freedom of thought, conscience and religion (which includes the freedom to hold beliefs) in article 18.1 is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others.³⁰

2.1.11 The UN Human Rights Committee has also made it clear that this a freedom that cannot be subject to limitation unless certain strict criteria are satisfied:

Article 18.3 permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others. The freedom from coercion to have or to adopt a religion or belief and the liberty of parents and guardians to ensure religious and moral education cannot be restricted. In interpreting the scope of permissible limitation clauses, States parties should

²⁸ *International Covenant on Civil and Political Rights (ICCPR)*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

²⁹ See, for example, Issue Paper Submissions Nos 356 (Association of Australian Christian Schools) and 363 (Archbishop of Adelaide).

³⁰ United Nations Human Rights Committee, *General Comment No 22: The right to freedom of thought, conscience and religion*, 48th sess, 1993, UN Doc HRI/GEN/1/Rev.1 (29 July 1994) 35, [8].

proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26. Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18. The Committee observes that paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated.³¹

2.1.12 The right to freedom of religion and belief is also recognised in a limited form under s 116 of the *Australian Constitution*. As Evans explains:

Section 116 prohibits the Commonwealth Parliament from enacting legislation that would prohibit the free exercise of religion or establish a religion. This constitutional protection is, however, limited in many ways. It applies only to the Commonwealth and not to the States. It does not apply to all government action but only to legislation or actions taken under legislation.³²

2.1.13 Family Voice Australia describes the protection in s 116 of the *Constitution* as preventing the Commonwealth Parliament from establishing a State church; enforcing religious observance; prohibiting religious observance or imposing a religious test for public office. It further notes:

The High Court of Australia has confirmed, in its judgment on the “Scientology case”, that the legal definition of religion involves both belief and conduct. Justices Mason and Brennan held that “for the purposes of the law, the criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief...” Consequently, freedom of religion in Australia involves both freedom of belief and freedom of conduct giving effect to that belief.

The justices also highlighted the importance of freedom of religion to democracy: Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society. The chief function in the law of a definition of religion is to mark out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint.³³

2.1.14 These and other relevant international human rights principles guide SALRI’s work in this area. For example, the right to equality and non-discrimination is also protected under international human rights conventions to which Australia is a party.³⁴

³¹ Ibid.

³² Carolyn Evans, *Legal Aspects of the Protection of Religious Freedom in Australia* (Centre for Comparative Constitutional Studies, Melbourne Law School, June 2009)
<https://www.humanrights.gov.au/sites/default/files/content/frb/papers/Legal_%20Aspects.doc>.

³³ Issues Paper Submission No 358 (Family Voice Australia) references omitted but relate to *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120.

³⁴ These include the *ICCPR*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 2.1, 14, 24, 25 and 26; the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 2.2; the *Convention on the Elimination of All Forms*

2.1.15 Article 26 of the *ICCPR* provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2.1.16 As the Australian Human Rights Commission has explained:

[i]n addition to the grounds expressly listed, discrimination on a number of other grounds should also be regarded as covered, due to the reference to 'discrimination of any kind' and the reference to 'other status'.

Some of these grounds have subsequently been expressly included in Australia's obligations through other human rights treaties.³⁵

2.1.17 These grounds include: age;³⁶ disability;³⁷ gender identity; nationality;³⁸ marital status³⁹ and sexual orientation.⁴⁰

2.1.18 Protection of discrimination on the grounds of sexual orientation and gender identity is now well recognised at the international level, through a range of United Nations Committees and in

of Racial Discrimination, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) arts 1, 2, 4 and 5; the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1477 UNTS 3 (entered into force 2 September 1990) art 2; the *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) arts 2, 3, 4 and 15; the *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, UN Doc.A/61/611, (entered into force 3 May 2008) arts 3, 4, 5 and 12; implicitly in the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature on 10 December 1984, 1465 UNTS 85, (entered into force 26 June 1987) (since treatment being discriminatory can also contribute to it being found to be 'degrading'). See also Australian Human Rights Commission, *Rights to equality and non discrimination* <<https://www.humanrights.gov.au/rights-equality-and-non-discrimination>>.

³⁵ Australian Human Rights Commission, above n 34. See also *Toonen v Australia*, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994).

³⁶ See for example Committee on Economic, Social and Cultural Rights, *General comment No. 6, The economic, social and cultural rights of older persons*, 13th sess, 1995, UN Doc E/1996/22 (1996) 20, reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.6 (2003) 34.

³⁷ See for example Committee on Economic Social and Cultural Rights, *General Comment No. 5, Persons with disabilities*, 11th sess, 1994, UN Doc E/1995/22 (1995) 19, reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.6 (2003) 24; and note that disability is now expressly covered by the *Convention on the Rights of Persons with Disabilities*.

³⁸ Note that while *Convention on the Elimination of All Forms of Racial Discrimination* excludes distinctions made by parties themselves on grounds of citizenship, but does not exclude discrimination by other organisations or individuals.

³⁹ Note that marital status is now expressly covered by the *Convention on the Elimination of All Forms of Discrimination Against Women*.

⁴⁰ See *Toonen v Australia*, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994).

declarations and statements, including United Nations Human Rights Commissioner's 2015 statement on discrimination and violence against individuals based on their sexual orientation and gender identity (quoted above) and the principles on the *Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (also known as the Yogyakarta Principles)⁴¹ which provide non-legally binding but persuasive guidance as to how human rights obligations apply regarding sexually diverse and gender diverse people. The principles outline the right to recognition of people before the law regardless of gender identity, state that laws should uphold the principles of equality and non-discrimination, and state that legislative steps should be taken to prohibit and eliminate discrimination on the basis of sexual orientation and gender identity.

2.1.19 Also relevant to this Report, and, in particular, the exceptions in the *EO Act 1984* for religious schools, are the international human rights principles as to the rights of the child (which include broad rights to equality and non-discrimination on the grounds of the child's sexual orientation or gender identity, and that of their family⁴²) and the general right to education under art 13 of the *International Convention on Economic, Social and Cultural Rights (ICESCR)*. This Article provides that everyone has the right to education and that in pursuit of this right:

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

2.1.20 Article 13 also provides that:

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

2.1.21 Similarly, art 29 of the *Convention on the Rights of the Child* provides:

1. States Parties agree that the education of the child shall be directed to:

- (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
- (b) The development of respect for human rights and fundamental freedoms, and for the

⁴¹ In 2006, in response to well-documented patterns of abuse, a distinguished group of international human rights experts met in Yogyakarta, Indonesia to outline a set of international principles relating to sexual orientation and gender identity. The result was the *Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity* (the 'Yogyakarta Principles'), a universal guide to human rights which affirm binding international legal standards with which all States must comply. A copy of these principles is available at <<http://www.yogyakartaprinciples.org/>>.

⁴² *Convention on the Rights of the Child*, art 2.

principles enshrined in the Charter of the United Nations;

(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

(e) The development of respect for the natural environment.

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

2.1.22 Other important human rights are also invoked by the issues raised in this report, including: freedom of association;⁴³ right to respect for the family⁴⁴ and the right to marry and found a family.⁴⁵

2.1.23 These human rights principles have influenced SALRI's thinking in this Report, and form the basis of extensive academic and community debate and discussion about the appropriate scope of equal opportunity and anti-discrimination laws in Australia.⁴⁶

2.1.24 In particular, these principles must be borne in mind when considering the application of equal opportunity laws to religious institutions (especially schools run by religious institutions). In this area, considerations as to whether and how *both* rights to equality and rights to religious belief should be limited to accommodate each other is contentious.⁴⁷

⁴³ ICCPR art 22; ICESCR art 8.

⁴⁴ ICCPR art 23.1

⁴⁵ Ibid art 23.2

⁴⁶ See, Audit Report, above n 2. See also, for example, Reid Mortensen, 'A Reconstruction of Religious Freedom and Equality: Gay, Lesbian and De Facto Rights and the Religious School in Queensland' (2003) 3 *Queensland University of Technology Law & Justice Journal* 320; Carolyn Evans and Beth Gaze, 'Religious Freedom and Non-discrimination Laws' (2007) 16 *Human Rights Defender* 5; Carolyn Evans and Leilani Ujvari, 'Non-Discrimination Laws and Religious Schools in Australia' (2009) 30(1) *Adelaide Law Review* 31; Greg Walsh, 'The Right to Equality and the Employment Decisions of Religious Schools' (2014) 16 *University of Notre Dame Australia Law Review* 107.

⁴⁷ The website for the Victorian Scrutiny of Acts and Regulations Committee (see Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Exceptions and Exemptions to the Equal Opportunity Act 1995: Final Report* (2009)) indicates that a total of 1252 submissions were received by the Committee. Of these, 418 were pro forma or letter submissions and a further 60 submissions were forwarded from the Department of Justice which had commenced an earlier review of the exceptions under the *Equal Opportunity Act 1995* (Vic) in February 2008. Of these submissions, 450 brief submissions on the religious exceptions under the *Equal Opportunity Act 1995* (Vic) were received from individuals, ministers and church officials and some congregations, in addition to 20 submissions from religious organisations including substantial submissions from the Catholic Church, the Anglican Church, the Uniting Church,

2.1.25 As outlined in the Issues Paper, this question has generated extensive academic⁴⁸ and media⁴⁹ debate. As one study concluded:

The question of the extent to which religious schools should be permitted exceptions from the general anti-discrimination law is a complex one. It requires consideration of whether, and for what reasons, religious schools are valuable in Australia and the extent to which the principle of non-discrimination should be valued.⁵⁰

2.1.26 SALRI's recent consultation confirms that this issue attracts a strong response from the community. For example, one submission noted that:

Members of the LGBTIQ community should have access to all the same rights, resources, services, organisations as everyone else. They should be able to participate and play the same sports, attend church if they wish too, work as a teacher and donate blood provided it is safe to do so (have them checked prior to donating), which should be common practice for everyone. Gay couples or single people should have the same access and rights to either artificial insemination or to adopting a child as every other male and female in Australia has, as once again their sexual orientation has no bearing

and the Presbyterian Church as well as Australian Christian Lobby, Australian Evangelical Alliance, Christian Parent Controlled Schools Ltd, Salt Shakers and Christian Schools Australia as well as submissions from Festival of Light and Family Voice Australia. An analysis of these submissions indicates that the greatest cause for concern was in the context of discrimination in religious schools. See John Tobin, 'Should Discrimination in Victoria's Religious Schools Be Protected? Using the Victorian Charter of Human Rights and Responsibilities Act to Achieve the Right Balance' (2010) 36(2) *Monash University Law Review* 16, n 7.

⁴⁸ See, for example, Mortensen, above n 46, 320; Evans and Gaze, above n 45; Evans and Ujvari, above n 46; Tobin, above n 47; Walsh, above n 46.

⁴⁹ See, for example, Melissa Fyfe, 'Church and state clash over equality laws', *Sydney Morning Herald* (online), 19 July 2009, <<http://www.smh.com.au/national/church-and-state-clash-over-equality-laws-20090718-dozx.html>>; Jonathan Swan, 'Anti-Gay rights to stay', *Sydney Morning Herald* (online), 16 January 2013, <<http://www.smh.com.au/federal-politics/political-news/antigay-rights-to-stay-20130115-2crma.html>>; 'Brian Greig, 'Exemptions for religious groups keep fears alive', *Sydney Morning Herald* (online), 22 January 2013, <<http://www.smh.com.au/federal-politics/exemptions-for-religious-groups-keep-fears-alive-20130121-2d2f8.html>>; Josephine Tovey, 'Schools defend right to expel gays', *Sydney Morning Herald* (online), 7 July 2013, <<http://www.smh.com.au/nsw/schools-defend-right-to-expel-gays-20130706-2pirh.html>>; Katherine Towers, 'New anti-discrimination laws "erode religious freedom"', *The Australian* (online), 9 May 2014, <<http://www.theaustralian.com.au/business/legal-affairs/new-antidiscrimination-laws-erode-religious-freedom/story-e6frg97x-1226910856242>>; John Ferguson, 'Labor vows to get tough on religious discrimination at school', *The Australian* (online), 21 October 2014, <<http://www.theaustralian.com.au/national-affairs/labor-vows-to-get-tough-on-religious-discrimination-at-school/news-story/25744041b73b3cd2d4bf493afe07980c>>; Henrietta Cooke, 'Religious groups hit out at Labor's move to rewrite state's equal opportunity laws', *The Age* (online), 8 December 2014, <<http://www.theage.com.au/victoria/victoria-state-election-2014/religious-groups-hit-out-at-labor-s-move-to-rewrite-states-equal-opportunity-laws-20141208-122rz6.html#ixzz3tjSbuqH1>>; Rosemary Bolger, 'Tasmania's religious schools to be given right to reject students who don't share faith', *ABC News* (online), 19 March 2015, <<http://www.abc.net.au/news/2015-03-19/religious-schools-to-be-given-the-right-to-reject-non-religious/6333256>>; Bianca Hall, 'Government urged to remove LGBTI discrimination in schools', *The Age* (online), 2 September 2015, <<http://www.theage.com.au/victoria/government-urged-to-remove-lgbti-discrimination-in-schools-20150902-gjd5c0.html>>.

⁵⁰ Carolyn Evans and Beth Gaze, 'Discrimination by Religious Schools: Views from the Coal Face' (2010) 34 *Melbourne University Law Review* 392, 424.

on whether the lesbian mum or homosexual couple will make 'bad or good parents'. I think that members of the LGBTIQ community are just people like everyone else and they deserve the same respect and rights as all other Australians. The only harm that is being caused by excluding members of the LGBTIQ community is increasing homophobic attitudes and discrimination as well as hate crimes and further segregation.⁵¹

2.1.27 Another observed:

We wish to object to any moves to remove exemptions presently held by religious based schools & churches to existing anti-discrimination legislation. Proposed changes reflect the 'thin edge of the wedge' to remove the Judao-Christian basis of our legislation. Schools & religious bodies should be free to employ only people who support their values & ethos: specifically they should not be forced to employ people who are opposed to their values. Red Cross should not be required to take blood from practicing homosexual men, in order to protect the rest of the population. Religious based schools should not be required to employ atheists. Bishops should be free to distribute to their members documents reflecting their beliefs eg Don't Mess with Marriage. Removing these exemptions would undermine the basis of our tolerant Australian society as we know it, it could lead to considerable unrest if the silent majority finally says 'enough is enough'.⁵²

2.1.28 Balancing, if possible, these competing outlooks is the challenge when framing any legal regime.

2.1.29 While South Australia does not have a legal framework for balancing human rights, the following principles derived from international human rights and reflected in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) provides a useful tool when evaluating reform options in these contentious areas.⁵³

2.1.30 Under the Victorian Charter, all human rights remain subject to potential limitation provided the limitation in question can be shown to be reasonably and demonstrably justified in a free and democratic society. In assessing whether a limitation satisfies this test, s 7(2) of the Charter lists five factors which must be considered:

- (a) the nature of the right;
- (b) the importance and purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relationship between the limitation its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to

⁵¹ Issues Paper Submission No 27 (Danielle).

⁵² Issues Paper Submission No 316 (Ron & Helen Tyson).

⁵³ For an example of a legal analysis using this approach in the context of exceptions to anti-discrimination law for religious organisation, see Tobin, above n 47.

achieve.

2.1.31 This approach is consistent with that adopted under international human rights law with respect to non-derogable rights and helps to ensure that no hierarchy of rights emerges when considering whether and how certain rights or freedoms should be limited to ensure the realisation of other rights and freedoms.⁵⁴

2.1.32 As will be discussed further in this Report, different Australian jurisdictions (as well as comparable overseas jurisdictions) have reached different conclusions as to how to best balance these rights and freedoms, following extensive consultation and debate. These different models provide important reform options for South Australia to consider in light of this current Reference to review legislative or regulatory discrimination against individuals and families on the grounds of sexual orientation, gender, gender identity, or intersex status.

⁵⁴ This approach is also evident in considering the application of the *European Convention of Human Rights*.

Part 3: Existing South Australian Equal Opportunity Laws

3.1 Legal Framework in South Australia

3.1.1 The South Australian *EO Act 1984* provides both a practically accessible complaints resolution framework, as well as a normative statement on the protection and promotion of equality in this State. As was declared in 2009 when the *EO Act 1984* was last subject to significant amendment:

Equal opportunity law exists to allow all South Australians to take part equally in public life. Everyone should have equal opportunity in the fields of work, education, qualifications, access to goods and services, lodging, landholding, and membership of associations. No-one should be excluded from taking part in society because of the prejudices of others. No-one should be harassed or victimised in the exercise of these rights.⁵⁵

3.1.2 In South Australia, the *EO Act 1984* provides protection from discrimination on various grounds. These include a person's sex, breastfeeding status, chosen gender, sexuality, marital or domestic partnership status, pregnancy, race, age, disability, association with a child, caring responsibilities, religious appearance or dress and spouse or partner's identity. Such discrimination is prohibited in a variety of areas including employment, membership of clubs, education, accommodation, competitive sports and access to services. Of particular relevance to this Report is the protection from discrimination on the grounds of *sex, chosen gender and sexuality* (noting SALRI's early recommendation to change these attributes to '*sexual orientation, gender identity and intersex status*').

3.1.3 Part 3 of the *EO Act 1984* prohibits discrimination on the ground of sex, chosen gender, or sexuality. Under Part 3 of the *EO Act 1984*, there are a number of exceptions to the application of these anti-discrimination laws, that is, the *EO Act 1984* provides that certain discrimination on the grounds of a person's sex, chosen gender or sexuality is 'lawful'.⁵⁶ The *EO Act 1984* provides that discrimination on the grounds of a person's sex, chosen gender or sexuality is 'lawful':

- In employment, where
 - a person is employed or contracted by an employer or principal for purposes not connected with the business carried on by the employer or principal;⁵⁷
 - there is a genuine occupational requirement that a person be of a particular sex, chosen gender or sexuality;⁵⁸

⁵⁵ South Australia, *Parliamentary Debates*, House of Assembly, 30 April 2009, 2563 (Michael Atkinson, Attorney-General).

⁵⁶ The exception provisions of the *EO Act 1984* are set out in full at Appendix 2.

⁵⁷ *EO Act 1984* s 34(1).

⁵⁸ *Ibid* s 34(2).

- employment or engagement for the purposes of that religious education institution, provided certain criteria are met.⁵⁹
- By associations, where
 - in relation to the use or enjoyment of a service or benefit provided by an association, men and women cannot use the service or benefit in the same way or at the same time, if reasonable measures are taken;⁶⁰
 - an association is established for persons of a particular sex, chosen gender or sexuality (other than heterosexuality);⁶¹
 - the association is administered in accordance with the precepts of a religion and the discrimination is founded on those precepts.⁶²
- In education, single-sex education institutions are permitted to discriminate on the ground of sex in relation to admission and provision of boarding facilities.⁶³
- In dealing with land, persons may discriminate in disposing of interests in land by way of testamentary disposition or gift.⁶⁴
- In providing a service, if the nature of a service varies according to whether it is exercised to men or to women, there is no contravention of anti-discrimination law where the service is given in accordance with normal practice.⁶⁵
- In accommodation, where
 - the person (or their near relative) who provides the accommodation resides in the accommodation;⁶⁶ or
 - the provider is a not for profit organisation.⁶⁷

3.1.4 There are also a number of general exceptions provided by Part 3, set out in Division 7 of that Part. Discrimination on the grounds of a person's sex, chosen gender or sexuality is also 'lawful':

⁵⁹ Ibid s 34(3).

⁶⁰ Ibid s 35(2).

⁶¹ Ibid s 35(2a).

⁶² Ibid s 35(2b).

⁶³ Ibid s 37(3).

⁶⁴ Ibid s 38(2).

⁶⁵ Ibid s 39(2).

⁶⁶ Ibid s 40(3).

⁶⁷ Ibid s 40(4).

- By charities in relation to conferring charitable benefits on persons of one sex, chosen gender or a particular sexuality.⁶⁸
- If it is a measure intended to achieve equality.⁶⁹
- In relation to participation in a competitive sporting activity if
 - the strength, stamina or physique of the competitor is relevant;
 - the exclusion is genuinely intended to facilitate or increase the participation of people who are otherwise unlikely to participate and there are alternative opportunities to participate for those excluded; or
 - the exclusion is necessary to permit the participants to advance to higher level competitions and there are alternative opportunities to participate for those excluded.⁷⁰
- In issuing insurance, if it is reasonable having regard to data from a source on which it is reasonable to rely.⁷¹
- By ‘religious bodies’
 - in relation to the ordination or appointment and related training of members of a religious order;⁷² or
 - if it is a practice of a religious body that conforms with the precepts of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion,⁷³ including in the administration of the religious body.⁷⁴

3.1.5 Under s 92 of the *EO Act 1984*, the Equal Opportunity Tribunal may also ‘grant exemptions from a provision of this Act in relation to (a) a person, or class of persons; or (b) an activity, or class of activity; or (c) circumstances of a specified nature.’ In granting exemptions, the Tribunal is to have regard to ‘the desirability of certain discriminatory actions being permitted for the purpose of redressing the effect of past discrimination’ and any other relevant considerations.

⁶⁸ Ibid s 45.

⁶⁹ Ibid s 47.

⁷⁰ Ibid s 48.

⁷¹ Ibid s 49.

⁷² Ibid s 50(1)(a)-(b).

⁷³ Ibid s 50(1)(c).

⁷⁴ Ibid s 50(1)(ba).

3.1.6 As will be discussed in further detail below, some of these exceptions were included in the 1994 review of the *EO Act 1984* conducted by Brian Martin QC and featured in the subsequent *Equal Opportunity (Miscellaneous) Amendment Act 2009 (SA)*.

3.1.7 This Report considers the main exceptions identified as raising concerns during the Audit Report process, and evaluates the four reform options set out in the Issues Paper, designed to limit or remove their discriminatory impact on LGBTIQ South Australians, in accordance with SALRI’s Reference.

Part 4: Australian Anti-Discrimination Frameworks

4.1 Overview of Australian Anti-Discrimination Frameworks

4.1.1 Before evaluating the reform options set out in the Issues Paper, it is helpful to consider how that regime fits within the broader Australian anti-discrimination framework. This is particularly important given (a) SALRI's general mandate to modernise the relevant law and, where appropriate, to increase consistency and best practice with other States and the Commonwealth and (b) the requirement that South Australia update the *EO Act 1984* to conform with the Commonwealth law by July 2016.⁷⁵

4.1.2 As a starting point, all Australian equal opportunity legislative frameworks protect LGBTIQ people from discrimination⁷⁶ although there are differences in the way protected attributes such as sexual orientation, gender identity and intersex status are described.⁷⁷

4.1.3 Each Act also provides for lawful discrimination against LGBTIQ people, in similar circumstances to those provided for in the South Australian *EO Act 1984* exempting otherwise discriminatory acts by religious bodies, sporting competitions, health care, and clubs and associations. Each Act also contains measures designed to achieve equality.

4.1.4 Like the South Australian Act, each Act has been subject to extensive reform over time, and robust community debate as to the fairness and appropriateness of its scope and operation.⁷⁸

4.2 Religious Bodies

4.2.1 All Australian jurisdictions acknowledge that equal opportunity laws — designed to promote and protect the right to equality — must also coexist with other equally important rights and freedoms, including freedom of religious belief. As a result, no Australian equal opportunity law insists on absolute equality of treatment in all circumstances.⁷⁹ All jurisdictions provide at least some exceptions

⁷⁵ Audit Report, above n 2, 10, 107.

⁷⁶ *Sex Discrimination Act 1984* (Cth); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1996* (NT); *Anti-Discrimination Act 1991* (Qld); *Anti-Discrimination Act 1998* (Tas); *Equal Opportunity Act 2010* (Vic); *Equal Opportunity Act 1994* (WA).

⁷⁷ Differences in the scope of the categories covered by the various Acts are not considered in this section, as it is assumed that any future change to the South Australian *EO Act 1984* will conform with the Commonwealth provisions in relation to discrimination on the grounds of sexual orientation, gender identity and intersex status by mid-2016, as previously recommended by SALRI. See Audit Report, above n 2, 13 [2.3].

⁷⁸ See, for example, ABC News, 'Fury as Baillieu rams through pro-discrimination law', ABC News (online), 3 June 2011 <<http://www.abc.net.au/news/2011-06-02/fury-as-baillieu-rams-through-pro-discrimination/2741824>>.

⁷⁹ Evans and Gaze, above n 50, 395.

for religious institutions from the operation of anti-discrimination laws.⁸⁰ These exception provisions can be divided into three main categories: exceptions for employment in religious schools, general exceptions for religious institutions and exceptions for acts relating to the ordaining of religious leaders. Each of these types of exceptions are also found in s 50 of the South Australian *EO Act 1984*.

Employment in Religious Schools

4.2.2 All Australian jurisdictions appear to acknowledge the arguments made by the Association of Independent Schools of South Australia (AISSA) in their submission to SALRI — that education is a crucial part of religious life and that religious schools should reserve the right to employ staff in accordance with a school’s religious teachings and status.⁸¹

4.2.3 In many jurisdictions, it is lawful for education institutions that are conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion (religious schools) to discriminate in the area of employment if the discrimination is in ‘good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.’⁸²

4.2.4 For example, s 38 of the *Sex Discrimination Act 1984 (Cth)* provides that the unlawful discrimination provisions relating to sexual orientation and gender identity do not apply:

in connection with employment as a member of the staff of an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

4.2.5 This is broadly similar to the South Australia provision which is outlined in detail below.

4.2.6 The NSW legislation creates separate exceptions to discrimination by religious bodies in employment on the grounds of sex,⁸³ being transgender,⁸⁴ and homosexuality.⁸⁵ Each of these

⁸⁰ *Sex Discrimination Act 1984 (Cth)* s 42; *Equal Opportunity Act 2010 (Vic)* s 72 (on the basis of sex or gender identity); *Anti-Discrimination Act 1977 (NSW)* s 38; *Anti-Discrimination Act 1998 (Tas)* s 29 (on the basis of gender); *Anti-Discrimination Act 1991 (Qld)* s 111; *Equal Opportunity Act 1984 (WA)* s 35; *Discrimination Act 1991 (ACT)* s 41; *Anti-Discrimination Act 1996 (NT)* s 56.

⁸¹ *Sex Discrimination Act 1984 (Cth)* s 38; *Equal Opportunity Act 2010 (Vic)* s 83; *Anti-Discrimination Act 1977 (NSW)* ss 25(3)(c), 38C(3), 49ZH(3); *Anti-Discrimination Act 1998 (Tas)* ss 27(1)(a), 51; *Anti-Discrimination Act 1991 (Qld)* s 25(3); *Equal Opportunity Act 1984 (WA)* s 73; *Discrimination Act 1991 (ACT)* s 33(1); *Anti-Discrimination Act 1996 (NT)* s 37A.

⁸² *Sex Discrimination Act 1984 (Cth)* s 38; *Equal Opportunity Act 1984 (WA)* s 73; *Discrimination Act 1991 (ACT)* s 33(1); *Anti-Discrimination Act 1996 (NT)* s 37A.

⁸³ *Anti-Discrimination Act 1977 (NSW)* s 25(3)(c).

⁸⁴ *Ibid* s 38C(3).

⁸⁵ *Ibid* s 49ZH(3).

exceptions states that it is not unlawful for a private educational authority to discriminate in employment. A private educational authority is defined by the Act and includes religious schools.⁸⁶

4.2.7 In Victoria, a religious school may discriminate ‘in the course of establishing, directing, controlling or administering the educational institution’ on grounds including religious belief or activity, sex, sexual orientation, lawful sexual activity or gender identity if the act ‘(a) conforms with the doctrines, beliefs or principles of the religion; or (b) is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.’⁸⁷

4.2.8 The Queensland approach is based on the concept of ‘a genuine occupational qualification or requirement’ of the job. Section 25 of the *Anti-Discrimination Act 1991* (Qld) states:

(1) A person may impose genuine occupational requirements for a position.

...

(2) Subsection (3) applies in relation to—

(a) work for an educational institution (an employer) under the direction or control of a body established for religious purposes; or

(b) any other work for a body established for religious purposes (also an employer) if the work genuinely and necessarily involves adhering to and communicating the body’s religious beliefs.

(3) It is not unlawful for an employer to discriminate with respect to a matter that is otherwise prohibited under section 14 or 15, in a way that is not unreasonable, against a person if—

(a) the person openly acts in a way that the person knows or ought reasonably to know is contrary to the employer’s religious beliefs—

during a selection process; or

in the course of the person’s work; or

in doing something connected with the person’s work; and

(b) it is a genuine occupational requirement of the employer that the person, in the course of, or in connection with, the person’s work, act in a way consistent with the employer’s religious beliefs.

...

(5) For subsection (3), whether the discrimination is not unreasonable depends on all the

⁸⁶ Ibid s 4: ‘private educational authority’ means a person or body administering a school, college, university or other institution at which education or training is provided, not being: (a) a school, college, university or other institution established under the *Education Reform Act 1990* (by the Minister administering that Act), the *Technical and Further Education Commission Act 1990* or an Act of incorporation of a university, or (b) an agricultural college administered by the Minister for Agriculture.

⁸⁷ *Equal Opportunity Act 2010* (Vic) s 83(2).

circumstances of the case, including, for example, the following —

(a) whether the action taken or proposed to be taken by the employer is harsh or unjust or disproportionate to the person’s actions;

(b) the consequences for both the person and the employer should the discrimination happen or not happen.

(6) Subsection (3) does not apply to discrimination on the basis of age, race or impairment.

(7) To remove any doubt, it is declared that subsection (3) does not affect a provision of an agreement with respect to work to which subsection (3) applies, under which the employer agrees not to discriminate in a particular way.⁸⁸

4.2.9 In Tasmania, the exception applies only to discrimination on the grounds of religious belief or affiliation (rather than to discrimination on the grounds of sexual orientation or gender identity). Section 51 of the *Anti-Discrimination Act 1998 (Tas)* provides:

(1) A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to employment if the participation of the person in the observance or practice of a particular religion is a genuine occupational qualification or requirement in relation to the employment.

(2) A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to employment in an educational institution that is or is to be conducted in accordance with the tenets, beliefs, teachings, principles or practices of a particular religion if the discrimination is in order to enable, or better enable, the educational institution to be conducted in accordance with those tenets, beliefs, teachings, principles or practices. (Emphasis added).

4.2.10 It is noted that under the Tasmanian Act, as in a number of other Australian jurisdictions, ‘religious belief or affiliation or religious activity’ is listed as a specific protected attribute. By contrast, the South Australian *EO Act 1984* does not include ‘religious belief’ as one of the protected attributes in its unlawful discrimination regime.

4.2.11 The South Australian provisions exempting religious bodies from discrimination in employment are broadly similar to those in Victoria, but are unique in requiring the religious education institution to prepare a written policy stating its position in relation to the matter; and make a copy of the policy available on request, free of charge to employees and contractors and prospective employees and contractors of the authority to whom it relates or may relate; and to students, prospective students and parents and guardians of students and prospective students of the institution; and to other members of the public.⁸⁹ These provisions will be outlined in detail below.

⁸⁸ *Anti-Discrimination Act 1991 (Qld)*.

⁸⁹ *EO Act 1984* s 34(3).

Students at Religious Schools

4.2.12 Discrimination by educational authorities on the grounds of sex, sexual orientation and gender identity, is generally prohibited under all Australian anti-discrimination regimes, and broadly takes the form of s 21 of the *Sex Discrimination Act 1984* (Cth) which provides that it is unlawful for an educational authority to discriminate against a person on those (and other) grounds by refusing or failing to accept the person's application for admission as a student; or in the terms or conditions on which it is prepared to admit the person as a student.

4.2.13 It is also unlawful for an educational authority to discriminate against a student: by denying the student access, or limiting the student's access, to any benefit provided by the educational authority; by expelling the student; or by subjecting the student to any other detriment.

4.2.14 Broad exceptions apply with respect to educational institutions established for one sex, and Australian equal opportunity frameworks also contain exceptions for unlawful discrimination on LGBTIQ related grounds for religious schools in the area of education, such as admission of students.⁹⁰ Whilst the *EO Act 1984* does not provide a specific exception for discrimination by religious schools (South Australian schools rely on the general exception contained in s 50 of the *EO Act 1984*), some other Australian jurisdictions specifically permit discrimination by religious schools in admitting students.⁹¹

4.2.15 Generally, this discrimination is only permitted in accordance with the religious principles of the school. In Queensland, Tasmania and the Northern Territory, this discrimination is only permitted on the grounds of religious belief.

General Exceptions

4.2.16 As with South Australia, most other jurisdictions make general exceptions for acts or practices by religious bodies that either conform to the doctrines, tenets or beliefs of the religion or are necessary to avoid injury to the religious susceptibilities of adherents of that religion.⁹²

4.2.17 The *Sex Discrimination Act 1984* (Cth) also includes a general exception, albeit with a special 'carve out' for the provision of aged care services introduced as part of the reports to this Act in 2013. Section 37 provides:

⁹⁰ Audit Report Submission No 40.

⁹¹ *Sex Discrimination Act 1984* (Cth) s 38(c); *Equal Opportunity Act 2010* (Vic) s 83; *Anti-Discrimination Act 1977* (NSW) s 31A(3) (on the ground of sex), s 38K (on transgender grounds), s 49ZO (on the ground of homosexuality); *Anti-Discrimination Act 1998* (Tas) s 51A; *Anti-Discrimination Act 1991* (Qld) s 41(a); *Equal Opportunity Act 1984* (WA) s 73(3); *Discrimination Act 1991* (ACT) s 33(2); *Anti-Discrimination Act 1996* (NT) s 30(2).

⁹² *Sex Discrimination Act 1984* (Cth) s 37(1)(d); *Equal Opportunity Act 2010* (Vic) s 82(2); *Anti-Discrimination Act 1977* (NSW) s 56(d); *Anti-Discrimination Act 1998* (Tas) s 52(d); *Anti-Discrimination Act 1991* (Qld) s 109(1)(d); *Equal Opportunity Act 1984* (WA) s 72(d); *Discrimination Act 1991* (ACT) s 32(d). The Northern Territory Act does not include a general exception of this type.

(1) Nothing in Division 1 or 2 affects:

- (a) the ordination or appointment of priests, ministers of religion or members of any religious order;
- (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order;
- (c) the selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice; or
- (d) any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

(2) Paragraph (1)(d) does not apply to an act or practice of a body established for religious purposes if:

- (a) the act or practice is connected with the provision, by the body, of Commonwealth-funded aged care; and
- (b) the act or practice is not connected with the employment of persons to provide that aged care.

4.2.18 There are, however, some variations in the extent of the exception between the different jurisdictions.

4.2.19 The Victorian exception goes further than other jurisdictions in that it also provides an exception for discrimination by religious individuals, that is,

discrimination by a person against another person on the basis of that person’s religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity if the discrimination is reasonably necessary for the first person to comply with the doctrines, beliefs or principles of their religion.⁹³

4.2.20 As noted above, the Commonwealth exception does not permit discrimination in the provision of aged care services by religious bodies that receive Commonwealth funding.⁹⁴ The exception still, however, applies in relation to employment by Commonwealth funded religious aged care facilities.

4.2.21 The ACT, Queensland and Tasmanian exceptions only apply where the discriminatory act both conforms to the doctrines, tenets or beliefs of the religion *and* is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

⁹³ *Equal Opportunity Act 2010* (Vic) s 84.

⁹⁴ *Sex Discrimination Act 1984* (Cth) s 37(2).

4.2.22 The Tasmanian exception is further limited in its application in that it only permits discrimination on the grounds of religious belief or affiliation or religious activity.⁹⁵ The *Anti-Discrimination Act 1998* (Tas) only permits general discrimination by religious bodies on the basis of gender ‘if it is required by the doctrines of the religion of the institution.’⁹⁶

4.2.23 Under the *Anti-Discrimination Act 1996* (NT), the only general exception for religious bodies is for ‘an act by a body established for religious purposes if the act is done as part of any religious observance or practice.’⁹⁷

Ordaining and Membership

4.2.24 All Australian equal opportunity laws contain exceptions for unlawful discrimination on LGBTIQ grounds for religious bodies in relation to the selection, ordaining, appointment, training or education of priests, ministers of religion or other members of a religious order. These exceptions are found without significant variation in all jurisdictions.⁹⁸ In most Acts, this exception is a general exception to all or part of the Act.

4.2.25 The Tasmanian exception is again unique, in that it only permits discrimination in this area on the grounds of religious belief or affiliation or religious activity, rather than sex, sexuality or gender identity.⁹⁹

4.3 Sport

4.3.1 In each Australian jurisdiction it is lawful to discriminate on the basis of a person’s sex in relation to participation in competitive sports.¹⁰⁰ Similarly to South Australia, all jurisdictions except NSW and Tasmania restrict this exception to where the ‘strength, stamina or physique’ of the competitor is relevant. Like the *EO Act 1984*, the *Equal Opportunity Act 2010* (Vic) also provides

⁹⁵ *Anti-Discrimination Act 1998* (Tas) s 52.

⁹⁶ *Ibid* s 27(1)(a).

⁹⁷ *Anti-Discrimination Act 1996* (NT) s 51(d).

⁹⁸ *Sex Discrimination Act 1984* (Cth) ss 37(1)(a)-(c); *Equal Opportunity Act 2010* (Vic) s 82(1); *Anti-Discrimination Act 1977* (NSW) s 56(d); *Anti-Discrimination Act 1998* (Tas) ss 52(a)-(c); *Anti-Discrimination Act 1991* (Qld) ss 109(1)(a)-(c); *Equal Opportunity Act 1984* (WA) s 72(a)-(c); *Discrimination Act 1991* (ACT) ss 32(a)-(c); *Anti-Discrimination Act 1996* (NT) ss 51(a)-(c).

⁹⁹ *Anti-Discrimination Act 1998* (Tas) s 52.

¹⁰⁰ *Sex Discrimination Act 1984* (Cth) s 42; *Equal Opportunity Act 2010* (Vic) s 72 (on the basis of sex or gender identity); *Anti-Discrimination Act 1977* (NSW) s 38; *Anti-Discrimination Act 1998* (Tas) s 29 (on the basis of gender); *Anti-Discrimination Act 1991* (Qld) s 111; *Equal Opportunity Act 1984* (WA) s 35; *Discrimination Act 1991* (ACT) s 41; *Anti-Discrimination Act 1996* (NT) s 56.

exceptions where the discrimination is to permit progression to elite levels of the competition or to encourage participation.¹⁰¹

4.3.2 In a number of jurisdictions, this exception is limited to sporting competitions where the players are over 12 years of age.¹⁰² Many jurisdictions further limit the application of the exception by excluding coaching, administration, umpiring or refereeing and other prescribed activities from the exception.¹⁰³

4.3.3 In NSW and Western Australia, additional provisions provide specific exceptions for discrimination on the basis of specific traits included in the legislation in these jurisdictions. Section 38P of the *Anti-Discrimination Act 1977 (NSW)* exempts ‘the exclusion of a transgender person from participation in any sporting activity for members of the sex with which the transgender person identifies’ from anti-discrimination provisions. It is lawful in NSW to prevent a trans person from playing a single sex sport of their identified sex. This exception does not apply to coaching, administration or other prescribed activities.

4.3.4 Section 35AP(2) of the *Equal Opportunity Act 1984 (WA)* makes discrimination against a gender reassigned person lawful where:

- (a) the relevant sporting activity is a competitive sporting activity for members of the sex with which the person identifies; and
- (b) the person would have a significant performance advantage as a result of his or her medical history.

4.4 Health Care

4.4.1 Australian equal opportunity laws also contain general exceptions in the interests of public health and safety in some jurisdictions.¹⁰⁴ In a number of jurisdictions, the exception operates similarly to that found in the *EO Act 1984*, that is, it is an exception on the ground of disability, which is defined as including a disease or illness and includes a future or ‘presumed’¹⁰⁵ disability.¹⁰⁶ These provisions all include the condition that the discrimination must be ‘reasonably necessary’ or words

¹⁰¹ *Equal Opportunity Act 2010 (Vic)* ss 72(1A), (1B).

¹⁰² *Sex Discrimination Act 1984 (Cth)* s 42(2)(e); *Equal Opportunity Act 2010 (Vic)* s 72(3); *Anti-Discrimination Act 1998 (Tas)* s 29; *Anti-Discrimination Act 1991 (Qld)* s 111(2); *Equal Opportunity Act 1984 (WA)* s 35(2)(e); *Anti-Discrimination Act 1996 (NT)* s 56(2).

¹⁰³ *Sex Discrimination Act 1984 (Cth)* s 42; *Anti-Discrimination Act 1977 (NSW)* s 38; *Anti-Discrimination Act 1991 (Qld)* s 111; *Equal Opportunity Act 1984 (WA)* s 35; *Discrimination Act 1991 (ACT)* s 41; *Anti-Discrimination Act 1996 (NT)* s 56.

¹⁰⁴ *Anti-Discrimination Act 1991 (Qld)* ss 107-108; *Anti-Discrimination Act 1996 (NT)* s 55.

¹⁰⁵ *Anti-Discrimination Act 1977 (NSW)* s 49A.

¹⁰⁶ *Disability Discrimination Act 1992 (Cth)* s 48; *Equal Opportunity Act 2010 (Vic)* s 86; *Anti-Discrimination Act 1977 (NSW)* s 49P; *Anti-Discrimination Act 1998 (Tas)* s 47; *Discrimination Act 1991 (ACT)* s 56.

to that effect. These provisions have been relied upon to permit discrimination against men who have sexual contact with men when applying to donate blood.

4.5 Clubs and Associations

4.5.1 Other Australian jurisdictions, except the Commonwealth, also contain exceptions in relation to the membership of and provision of services by clubs and associations.¹⁰⁷ All the provisions regarding the provision of services to men and women separately use the term ‘men and women’ or ‘males and females’.

4.6 Measures Intended to Achieve Equality

4.6.1 Each jurisdiction excludes measures intended to achieve equality from anti-discrimination provisions.¹⁰⁸ Generally, these measures are similar to the *EO Act 1984* exception.

4.6.2 In NSW, certification of the responsible Minister is required for any schemes purporting to exist under s 126D of the *Anti-Discrimination Act 1977* (NSW).

4.6.3 In Queensland, s 105(1) of the *Anti-Discrimination Act 1991* (Qld) provides that ‘a person may do an act to promote equal opportunity for a group of people with an attribute if the purpose of the act is not inconsistent with this Act’. The purposes of the *Anti-Discrimination Act 1991* (Qld) are defined as anti-discrimination and the promotion of equal opportunity.¹⁰⁹

The Victorian Equal Opportunity Tribunal may also grant exemptions from anti-discrimination provisions upon application where such an exemption is necessary and reasonable given consideration to the human rights principles set out in the *Charter of Human Rights and Responsibilities 2006* (Vic).¹¹⁰

¹⁰⁷ *Equal Opportunity Act 2010* (Vic) ss 66, 68-69; *Anti-Discrimination Act 1977* (NSW) s 34A; *Anti-Discrimination Act 1998* (Tas) s 27; *Anti-Discrimination Act 1991* (Qld) ss 97-98; *Equal Opportunity Act 1984* (WA) s 22; *Discrimination Act 1991* (ACT) s 40; *Anti-Discrimination Act 1996* (NT) s 47.

¹⁰⁸ *Sex Discrimination Act 1984* (Cth) s 7D; *Equal Opportunity Act 2010* (Vic) s 88; *Anti-Discrimination Act 1977* (NSW) s 126A; *Anti-Discrimination Act 1998* (Tas) s 26; *Anti-Discrimination Act 1991* (Qld) s 105; *Equal Opportunity Act 1984* (WA) ss 31, 35ZD; *Discrimination Act 1991* (ACT) s 27; *Anti-Discrimination Act 1996* (NT) s 57.

¹⁰⁹ *Anti-Discrimination Act 1991* (Qld) s 6.

¹¹⁰ *Equal Opportunity Act 2010* (Vic) ss 89-90.

Part 5: Evaluation of Reform Options

5.1 Overview of Feedback Received

5.1.1 During the Audit Report consultation process, SALRI received a number of submissions that expressed concerns that the exceptions to discrimination in Part 3 of the *EO Act 1984* operate to entrench unfair discrimination against LGBTIQ South Australians.¹¹¹ For these participants the current exceptions to unlawful discrimination do not constitute a nuanced balancing of rights. Rather, these participants consider the permanent exceptions in the *EO Act* to be arbitrary, inflexible, broad, and unreasonable. As one submission noted:

[S]ome of my friends employed at religious schools have lived with a constant fear of their sexuality being discovered. They have had to avoid public events held within the gay and lesbian community for fear of being seen there. They have had to restrict their social options and live a life of secrecy. This has not been good for them or their friends. And it cannot be good for the community to have people living double lives like this. Additionally, it must have an appalling impact on LGBTI students at these schools. And it will enforce homophobic values in other students at these schools. [Submission 32].

5.1.2 The EOC also informed SALRI that it receives enquiries and complaints where organisations rely upon the exemptions to discriminate in ways that could be considered to be in conflict with societal expectations.¹¹² Examples of this include when students and employees in non-religious roles such as administration or maintenance are discriminated against at religious schools. Notes from the Commission shared with SALRI provide:

Equal Opportunity Commission Case study

A legal service called for advice. They are working with a family whose 14 year old daughter was boarding at a religious school on a scholarship. She and another girl recently told their supervisor that they are gay. Both girls were then expelled and lost their scholarships. There was no consultation with the parents, no warnings etc. and she has been flown home. Discussed complaint process but advised that the school may argue that they are covered under exemption (50(c)).

5.1.3 SALRI has also heard from a number of submission makers about the normative impact of the exceptions to discrimination on the grounds of LGBTIQ South Australians and the barriers this can create to their full participation in the South Australian community. For example, one submission maker told SALRI that:

Heterosexual people are not superior to GLBT people in any way and most often can learn a lot from them in terms of treating each other with respect and humanity. Some heterosexual people do not realise how their treating of gay people causes lots of issues with self-worth and makes them feel

¹¹¹ See, for example, Audit Report Submissions Nos 27 and 38.

¹¹² Audit Report Submission No 40, 5.

like second hand citizens. Personally I think it would be better to invest time and money in addressing homophobia rather than focus on justifying reasons for excluding gay people.¹¹³

5.1.4 In light of the complexity of the issues arising from exemptions to unlawful discrimination under the *EO Act 1984*, SALRI undertook to look further at the continued necessity and appropriateness of the exceptions in Part 3 of the *EO Act 1984* relating to discrimination on the grounds of sex, sexuality and chosen gender. It introduced an Issues Paper that invited feedback from members of the public in relation to the following reform options:

Option A: no reform required: No changes to exceptions to discrimination against LGBTIQ and other people necessary.

Option B: reform to certain exceptions only: Amend provisions that permit lawful discrimination against LGBTIQ people individually to address key concerns.

Option C: general limitations clause: Repeal all (or most) lawful discrimination provisions under the *EO Act 1984*. Introduce a general limitations clause, similar to that suggested by the Commonwealth Government in 2012.

Option D: exceptions by application only: Repeal all lawful discrimination provisions under the *EO Act 1984*. Exemptions would be granted by application under s 92 of the *EO Act 1984* only.

5.1.5 This section of the Report considers each of these reform options in light of the feedback received in response to the Issues Paper, and having regard to SALRI's broader mandate to modernise the relevant law and, where appropriate, to increase consistency and best practice with other States and the Commonwealth.

5.1.6 The analytical framework described above with respect to balancing human rights is employed in this section of the Report.

5.1.7 It is followed by a more detailed evaluation of reform Option B, and set of recommendations for legislative reform.

5.2 Overview of Reform Options

Option A: No Reform

5.2.1 As explained in the Issues Paper, South Australia has well established anti-discrimination laws that provide protection against unlawful discrimination including on the grounds of sex, sexuality and chosen gender. In its Audit Report, SALRI recommended that these protections be modernised to refer to gender identity, intersex status and sexual orientation. These laws also contain specific and general exceptions to the provisions that make discrimination unlawful. SALRI's research and consultation to date suggest that the relevant exception provisions also require review and reform to ensure that they align with best practice. However, not all interested parties share this view.

¹¹³ Issues Paper Submission No 261 (Jess S).

Submissions in support of this option

5.2.2 SALRI heard from a range of religious organisations, representatives of religious schools and parents and families of students attending religious schools who strongly advocate for no change to the existing exceptions. These responses made up between 80 and 90% of the electronic responses received by SALRI in response to the *YourSAy* site, although as discussed below, only a small number of these submissions commented in detail on the reform options set out in the Issues Paper or made reference to any specific provisions of the *EO Act 1984*.

5.2.3 For many of these submission makers, the current exceptions in s 34(3) and s 50 of the *EO Act 1984* strike the right balance between respect for freedom of religious belief and the rights of others to non-discrimination and equality. For example, Robyn LaBroot said:

I support Option A: No reform required. I cannot accept as reasonable that a religious organisation should be forced to employ people in any capacity where such people do not live a lifestyle which is exemplary by the standards of that religion. The concept of ‘general occupational requirement’ conflicts with the need for religions to demonstrate the standards to which they adhere for all roles. As a practical matter, this would not result in opening those positions more broadly; it would merely result in a less transparent process for rejecting candidates who did not meet the standard.¹¹⁴

5.2.4 Kate Bishop told SALRI that:

As a parent I have the right to determine my children’s moral education — according to the *International Covenant on Civil and Political Rights* [Article 18(4)]. If I choose a Christian school, then I would expect that staff employed there would share the same moral convictions & values as me and teach my children accordingly. The State should not deny me the right to choose. I support stronger exemptions for religious organisations in the EOA — or at the very least, no change to the law (Option A).¹¹⁵

5.2.5 For some of these submission makers, the current laws do not go far enough in terms of exemption religious bodies from the prohibitions in Part 3. For example, Carol Sullivan told SALRI:

I actually support **stronger** exemptions for religious organisations in the Equal Opportunity Act, or at the very least **no change** to the law (Option A). Removing religious exemptions undermines the fundamental human freedoms of religion and association. Exemptions in the Equal Opportunity Act (such as sections 34, 50 and 85ZM) rightly recognise freedom of religion. As Islam tries to increase its influence, and perceived rights, Christian values are constantly being challenged and eroded by our Government. The *International Covenant on Civil and Political Rights* [Article 18(4)] gives parents the right to determine their children’s moral education. The state should not deny the right of parents to choose a particular religious school to teach their children their own moral convictions via staff (both teaching and administrative) who model their values.¹¹⁶

¹¹⁴ Issues Paper Submission No 283.

¹¹⁵ Issues Paper Submission No 202.

¹¹⁶ Issues Paper Submission No 93 [emphasis in original].

5.2.6 The Mount Barker Council for Mt Barker Baptist Church said they:

support stronger exemptions for religious organisations in the *Equal Opportunity Act*, or at least no change to the law. We believe that removing religious exemptions undermines the fundamental freedoms of religion and association. The existing exemptions rightly recognise freedom of religion. All parents have the right to determine the values that are inherent in the education given to their children. The state should not deny this right to choose a school which has moral convictions which align with their own, where staff model these values to their students.¹¹⁷

5.2.7 SALRI notes that the vast majority of these submissions exclusively focused on the exceptions relating to religious bodies and religious educational institutions and did not comment on the other exceptions outlined in the Issues Paper. For this reason, these submissions will be considered in further detail below under the sub-heading ‘religious bodies’.

Submissions opposing this option

5.2.8 During the Audit Report process and the specific Issues Paper consultation, SALRI heard from a number of members of the LGBTIQ communities and their families about the impact of the existing exception provisions and the need for reform. Some of these reasons are summarised in the submission received from SHine SA:

Australians who identify as LGBTIQ continue to experience high levels of homophobic/transphobic verbal and physical abuse in the community and in institutions such as schools. This discrimination is linked to concurrently high levels of self-harm, suicidality and other negative health outcomes among LGBTIQ Australians. Legislative and institutional discrimination serve to affirm and sustain negative attitudes towards LGBTIQ people, which is why we believe that legislative reform around “lawful discrimination”, is imperative.

...

SHine SA believes reform of current exemptions is imperative to advancing the rights of LGBTIQ South Australians and will bring legislation more in line with the values of the community. It will support LGBTIQ South Australians to feel respected, safe and included in the areas of employment, education, health care and participation in community activities. This reform is critical in the South Australian Government’s Inclusion strategy and in creating a community that is more inclusive and respectful.¹¹⁸

5.2.9 Judith Wright also told SALRI that:

Religious organisations being given the right to legal discrimination means there are not equal opportunities. What religious organisations do within their places of worship should remain free from outside intervention, when involved in business, education, or services they should adhere to the same standards as secular organisations. Allowing government supported discrimination of GLBT people by these organisations substantiates the claim some make that being GLBT is unacceptable and they deserve fewer rights. In effect, it is sanctioned that the right to discriminate

¹¹⁷ Issues Paper Submission No 296.

¹¹⁸ Issues Paper Submission No 352 (SHine SA) [footnotes omitted].

based on religious grounds is more important than an individual's right not to be discriminated against. The equal rights of the individual should hold more weight.¹¹⁹

5.2.10 The specific reform options supported by SHine SA and others are discussed in further detail below.

5.2.11 SALRI further notes that a number of other Australian jurisdictions, including Victoria, Tasmania, ACT and the Commonwealth have recently reviewed and amended the exception and exemption provisions in their anti-discrimination law, including those relating to religious bodies and religious educational authorities.

Option B: Modify Certain Exceptions

5.2.12 The Issues Paper asked whether the existing laws have struck the correct balance between the need to protect people against discrimination and other important rights or interests, such as the need to respect religious practices and freedom of religious belief.

Submissions in support of this option

5.2.13 SALRI's research and consultation in the Audit Report process (described above) suggest that there a number of specific exceptions to the *EO Act 1984* that require review and amendment to ensure that they align with best practice. These were outlined in detail in the Issues Paper.

5.2.14 This conclusion has been supported by the submissions received in response to the Issues Paper, with a number of submission makers, and individuals and organisations consulted by SALRI strongly urging reform of individual exceptions (as opposed to one of the other options outlined below).

5.2.15 For example, the Law Society of South Australia submitted that the Society prefers Option B, as it appears to be both fair and reasonable.¹²⁰ This approach was also supported by the South Australian Equal Opportunity Commission. The South Australian Office for Recreation and Sport also welcomed the opportunity to look specifically at the exceptions relating to sport.¹²¹

5.2.16 SALRI's comparative research also suggests the need to amend certain exception provisions relating to Part 3 of the *EO Act 1984* to ensure that South Australian law accords with current best practice and promotes uniformity and consistency with other Australian regimes where appropriate.

Submissions opposing this option

¹¹⁹ Issues Paper Submission No 299.

¹²⁰ Issues Paper Submission No 364 (Law Society of South Australia).

¹²¹ Issues Paper Submission No 361 (Office for Recreation and Sport).

5.2.17 SALRI received a large number of submissions from religious bodies or parents and families connected with religious schools opposing reform to the exceptions held by religious bodies in the *EO Act 1984*.

5.2.18 SALRI also heard from some members of the LGBTIQ communities that favoured complete removal of the standing exceptions to Part 3 of the *EO Act 1984* over reform of the specific exceptions listed in the Issues Paper. For these submission makers, reform of individual exception provisions did not go far enough to promote equality. For example, Helen Povall told SALRI that:

I live for the day everyone is treated equally in the eyes of our laws. There should be no exceptions, exemption. If good old aged care can move forward with no exemptions for the first time in Australian history, then surely the rest of Australia can move forward to begin to ensure that the barriers of yesterday are removed once and for all.¹²²

Option C: General Limitations Clause

5.2.19 As outlined in the Issues Paper, an alternative option to reforming specific exceptions in the *EO Act 1984* would be to remove all or some of the specific exceptions to unlawful discrimination on the grounds of sexuality or chosen gender in the *EO Act 1984* and replace these with a general limitation clause. Such a clause would operate to exempt a particular individual or organisation from the operation of the Act, but only when certain criteria are satisfied.

5.2.20 This option was mooted by the Commonwealth Government in 2011,¹²³ based on the *Canadian Human Rights Act*.¹²⁴ In the Canadian Act, otherwise discriminatory acts are not unlawful if there is some *bona fide* requirement or justification. Rather than having multiple exception provisions dealing with particular areas, the *EO Act 1984* could have a single provision that provides exceptions to certain parts or sections of the *EO Act 1984* where the conduct is justifiable.

Submissions in support of this option

5.2.21 Option C received support from a number of submission makers, including the Association for Australian Christian Schools, in so far as it encompassed an alternative approach to the existing religious bodies exceptions and provides for what some have argued is a more positive reflection of the importance of freedom of religious belief.

5.2.22 SALRI notes that in its recent report, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, the Australian Law Reform Commission (ALRC) considers freedom of religion

¹²² Issues Paper Submission No 258.

¹²³ Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws* (Discussion Paper, Attorney-General's Department, September 2011) 37. In 2011, the Commonwealth Government conducted significant consultation regarding the consolidation of Commonwealth anti-discrimination laws, resulting in an exposure draft *Human Rights and Anti-Discrimination Bill 2012* (Cth). This Bill was never passed into law.

¹²⁴ *Canadian Human Rights Act*, RSC 1985, c H-6, s 15 ('the Canadian Act').

and the justifiable legal limits on this freedom under Australian and international law.¹²⁵ The ALRC Report provides the follow example of a general limitations clause, as proposed by Professors Patrick Parkinson and Nicholas Aroney.¹²⁶ The ALRC observed:

Parkinson and Aroney have proposed a general limitations clause that redefines discrimination to include limitations on freedom of religion where ‘necessary’. The proposed definition is comprehensive and combines direct and indirect discrimination. The definition includes a proportionality test and what is *not* discrimination—due to religious beliefs—within the definitional section itself, rather than expressing it as a limitation, exception or exemption:

1. A distinction, exclusion, restriction or condition does not constitute discrimination if:
 - a. it is reasonably capable of being considered appropriate and adapted to achieve a legitimate objective; or
 - b. it is made because of the inherent requirements of the particular position concerned; or
 - c. it is not unlawful under any anti-discrimination law of any state or territory in the place where it occurs; or
 - d. it is a special measure that is reasonably intended to help achieve substantive equality between a person with a protected attribute and other persons.
2. The protection, advancement or exercise of another human right protected by the *International Covenant on Civil and Political Rights* is a legitimate objective within the meaning of subsection 2(a).¹²⁷

5.2.23 The ALRC report also notes that in 2008, the Legal and Constitutional Affairs Committee recommended that the exemptions in ss 30 and 34–43 of the *Sex Discrimination Act 1984 (Cth)* — including those for religious organisations — be replaced by a general limitations clause.¹²⁸ In making this recommendation, the Committee observed that such a clause would permit discriminatory conduct within reasonable limits and allow a case-by-case consideration of discriminatory conduct. It said that this would allow for a more ‘flexible’ and ‘nuanced’ approach to the balancing of the competing rights.¹²⁹

5.2.24 SALRI notes that other submission makers supported this option as part of a hybrid model. For example, Matt Loader told SALRI that:

¹²⁵ Australian Law Reform Commission (‘ALRC’), *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, ALRC Final Report No 129 (March 2016) Chapter 5, <<https://www.alrc.gov.au/publications/freedoms-alrc129>>.

¹²⁶ Patrick Parkinson and Nicholas Aroney, Submission to Attorney-General’s Department, *Consolidation of Commonwealth Anti-Discrimination Laws*, 2011.

¹²⁷ ALRC, above n 125, [5.111]-[5.112].

¹²⁸ Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (2008) rec 36.

¹²⁹ *Ibid.*

I like the idea of the tighter exemption for religious schools and also for associations suggested, but I also quite like the general exemption approach. Perhaps, to combine the two, the way to approach this is: — have a general exemption at a statutory level — allow the tribunal to recommend to the AG a ‘standing exemption’ underneath it to be set out in a code of practice (which expires, say every 5-10 years) — also permit exemptions by application as required. The standing exemption could be like a code of practice under OHS law, compliance with which is deemed to satisfy the general requirements at the statutory level. This would have the merit of allowing for adaptability to community standards, while also minimising the need to consider multiple applications.¹³⁰

5.2.25 The Law Society of South Australia also submitted:

Option C might be more workable if it were undertaken together with wider change to the *Equal Opportunity Act 1984* (SA) (*EO Act 1984*), enabling individual exemptions and cases to be taken to an internal review by the Commissioner for Equal Opportunity, rather than the expense and lengthy time it takes to take a case to the Equal Opportunity Tribunal (EOT).¹³¹

5.2.26 However, the Law Society also noted that:

if the EOT moves into the South Australian Civil and Administrative Appeals Tribunal (SACAT), the time and cost of these types of applications would likely reduce.

This option also places the burden wholly on the person facing alleged discrimination.

The Society considers that the time and expense of asserting rights under this process, without wider change to the *EO Act 1984*, would unfairly burden those the subject of discrimination and not afford protection to those most in need.

Option D might similarly be burdensome.¹³²

5.2.27 While SALRI does not support this option in this Report, it notes that the review that it recommends in Recommendation 10 could examine in more detail whether a general limitations clause such as that outlined in Option C of the Issues Paper and discussed by the Australian Law Reform Commission should be incorporated in the *EO Act 1984*.

Submissions opposing this option

5.2.28 As noted above, SALRI received a large number of submissions from religious bodies or parents and families connected with religious schools opposing reform to the exceptions held by religious bodies under the *EO Act 1984*.

5.2.29 This option was also opposed by other submission makers on the grounds that it would fail to provide appropriate protection against unlawful discrimination on the grounds of sexual orientation, gender identity and intersex status.

¹³⁰ Issues Paper Submission No 247 (Matt Loader).

¹³¹ Issues Paper Submission No 364 (Law Society of South Australia).

¹³² Ibid.

5.2.30 The Issues Paper also notes that this option also has the potential disadvantage of leading to complexity and uncertainty in the equal opportunity system, as groups would be unsure as to whether their actions would be the subject of a Tribunal determination. As noted by the Law Society of South Australia (above), this model would also involve significant resource implications for the Equal Opportunity Tribunal and financial implications for the State.

Option D: Exceptions by Application Only

5.2.31 The final option would be to repeal all lawful discrimination provisions that affect LGBTIQ people under the *EO Act 1984*, leaving the option for exemptions to be granted by application under s 92 of the *EO Act 1984* only.

5.2.32 All jurisdictions currently provide for the granting of exemptions to anti-discrimination provisions by application. The ability to have a case-by-case approach leads to a flexible system, whereby the rights of those who are discriminated against are only encroached upon where it is determined, by an appropriately equipped body, that there is a need for the discriminatory action.

5.2.33 One option for implementing this reform would be to repeal all the existing statutory exceptions and move to an ‘exception by application’ system. This would involve relying upon the existing s 92 powers of the Equal Opportunity Tribunal to grant exemptions.

Submissions in support of this option

5.2.34 A number of submissions received by SALRI during the Audit Report process advocated for the removal of the present discriminatory exceptions in the *EO Act 1984* in the interests of equality and advancing the rights of LGBTIQ people.¹³³ For example, Dean Gloede noted:

Option D is first preferred followed by option C as second preferred. The onus to prove that a discriminatory action is justifiable needs to be upon the discriminator not on the person being discriminated against. LGBTIQI people have endured centuries of discrimination and fought for recognition in many areas of their lives — they should not have to continue to fight on a case by case basis each time they come up against a potentially unjustifiable case of discrimination.¹³⁴

5.2.35 Another submission maker told SALRI that

there is no need for exemptions, all of the current exemptions are based on out dated stereo types, and all of them would have individuals hiding their orientation. It is quite ignorant of the system to think individuals do not have the capability to change from the stupid ‘labels’ we give them to help their comprehension. Today I am ‘straight’, Tomorrow I am ‘gay’ — the next generation coming through have no need of our out dated identity labeling system for sexual preferences, for them it is fluid. Why do they (any of us) need to type cast as anything? Anyone can change from one week to

¹³³ See, for example, Audit Report Submission No 13; Audit Report Submission No 32; Audit Report Submission No 38, 1.

¹³⁴ Issues Paper Submission No 2.

the next, and it is no one else's business when between to consenting individuals.¹³⁵

5.2.36 Marcus Patterson supported Option D for the following reasons:

Any organisation seeking to exclude or discriminate should be required to apply and articulate the factual basis for their need to exclude or discriminate. All successful applications for an exemption should be required to be published on the organisations website and a searchable register on the EO Commission Website.¹³⁶

5.2.37 SHine SA also supported this model:

An 'exception by application' system will more fairly balance the need for protection of LGBTIQ South Australians with the rights of religious organisations and other community groups. It will reduce instances of unnecessary discrimination that unfairly impact LGBTIQ South Australians and contribute to a culture of homophobia and transphobia.¹³⁷

5.2.38 The Australian Coalition for Equality provided SALRI with a Model Bill it developed in 2009 and a Discussion Paper specifically directed at exceptions to discrimination on the grounds of gender identity, intersex status and sexual orientation. This Discussion Paper concluded that the preferred option for the Coalition was that exemptions should be granted on an application basis only.¹³⁸ The Australian Coalition for Equality argued that this model would ensure that anti-discrimination law should provide, to the greatest extent possible, for the effective and fair participation of LGBTIQ people in public life, including sport,¹³⁹ religious life, and community clubs and associations.

Submissions opposing this option

5.2.39 SALRI received a large number of submissions from religious bodies or parents and families connected with religious schools opposing reform to the exceptions held by religious bodies under the *EO Act 1984*, some of which specifically opposed this particular option for reform. For example, James Giesbrecht told SALRI:

Option D should not be adopted. It can lead to the unfair treatment of groups based on the views of the authorities enforcing the act. Further, it could lead to the situation where the authorities reject all claims for exceptions through overt or covert (for example through imposition of hefty fees) means. ... If the *Equal Opportunity Act 1984* (SA) is reformed in such a way as to weaken or remove the existing exceptions, and depending on how the reformed act is enforced then the following may happen: 1) religious and charitable institutions and schools may no longer provide the services that are acknowledged by the SA government as being important; 2) parents may take their children out of religious and charitable institutions; 3) families may leave the state seeking a more "moral" place

¹³⁵ Issues Paper Submission No 8 (Sam).

¹³⁶ Issues Paper Submission No 306.

¹³⁷ Issues Paper Submission No 352 (SHine SA)

¹³⁸ Australian Coalition for Equality Discussion Paper, 2.

¹³⁹ Ibid 7.

to live; 4) court action may be taken against the government by organisations who believe the reformed laws are unjust.¹⁴⁰

5.2.40 This view was repeated in other submissions to SALRI.

5.2.41 The Issues Paper also noted that, while it would be possible to have a period of transition, this system would have significant resource costs for South Australia. Currently, the Equal Opportunity Tribunal grants relatively few exemptions. If all exemptions to anti-discrimination provisions needed to be determined by application, the Tribunal would be likely to require an increase in resources to manage the increased workload efficiently.

5.3 SALRI’s Preferred Reform Option

5.3.1 Having regard to the above considerations, and in light of the more detailed analysis below, SALRI supports Option B as the preferred model for reform of the current exceptions to the *EO Act 1984* relating to discrimination on the grounds of sexual orientation, gender identity and intersex status.

5.3.2 In the next section of this Report, SALRI identifies and evaluates specific reform options for each of the exceptions outlined in the Issues Paper.

5.3.3 SALRI notes that the recommendations made in the next section of the Report should be considered in light of Recommendation 10 (below) that a comprehensive and independent review of the *EO Act 1984* be undertaken.

¹⁴⁰ Issues Paper Submission No 229.

Part 6: Evaluation of Reform Options for Particular Exceptions

6.1 Religious Organisations

6.1.1 This section of the Report evaluates the reform options relevant to the existing exceptions for religious organisations as set out in the Issues Paper. It has regard to the submissions received from consultation which, as noted above, were considerable with respect to these particular exceptions. This section of the Report also has regard to the rationale underpinning these exceptions, and the strong support these exceptions received during the consultation process undertaken by SALRI.

Nature of the Existing Exceptions

6.1.2 The *EO Act 1984* contains a general prohibition on discrimination with respect to sex, sexuality, and chosen gender by educational authorities in s 37 by refusing an application for admission as a student; or in the terms or conditions on which it offers to admit the person as a student. It is also unlawful for an educational authority to discriminate against a student on the ground of sex, chosen gender or sexuality in the terms or conditions on which it provides the student with training or education; by denying or limiting access to a benefit provided by the authority; or by expelling the student; or subjecting them to other detriment. This section does not apply to discrimination on the ground of sex in respect of a school, college, university or institution wholly or largely established for students of the one sex.

6.1.3 The *EO Act 1984* also prohibits discrimination on these grounds in area of employment in s 30, which includes discrimination in the course of determining, who should be offered employment; or by denying or limiting access to opportunities for promotion, transfer or training, or by dismissing the employee; or subjecting them to other detriment.

6.1.4 However, s 34(c) of the *EO Act 1984* states that discrimination on the ‘ground of chosen gender or sexuality’ in relation to employment or engagement for the purposes of an educational institution will not be unlawful where:

- (a) the educational institution is administered in accordance with the precepts of a particular religion and the discrimination is founded on the precepts of that religion; and
- (b) the educational authority administering the institution has a written policy stating its position in relation to the matter; and
- (c) a copy of the policy is given to a person who is to be interviewed for or offered employment with the authority or a teacher who is to be offered engagement as a contractor by the authority; and
- (d) a copy of the policy is provided on request, free of charge—
 - (i) to employees and contractors and prospective employees and contractors of the authority to whom it relates or may relate; and

(ii) to students, prospective students and parents and guardians of students and prospective students of the institution; and

(iii) to other members of the public.

6.1.5 A general exemption for religious bodies is also contained in s 50 as follows:

50—Religious bodies

(1) This Part does not render unlawful discrimination in relation to—

(a) the ordination or appointment of priests, ministers of religion or members of a religious order; or

(b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order; or

(ba) the administration of a body established for religious purposes in accordance with the precepts of that religion; or

(c) any other practice of a body established for religious purposes that conforms with the precepts of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

6.1.6 As discussed below, a number of submissions raised concerns that s 50, and in particular subparagraph 50(1)(c), can be potentially relied upon to exempt discrimination by religious schools against students attending or applying to attend those schools.

Rationale Behind the Religious Organisations Exceptions

6.1.7 The rationale behind these exceptions for religious bodies is based on respect for the fundamental freedom of religious belief.

6.1.8 Family Voice Australia described freedom of religion as including three distinct elements:

- the freedom to form, hold and change opinions and beliefs without government interference;
- the freedom to manifest those beliefs and opinions in public or private through speech and actions;
- the freedom of parents to raise their children in accordance with their opinions, beliefs and practices.¹⁴¹

6.1.9 SALRI also heard from the Most Rev Philip Wilson DD JCL, The Roman Catholic Archbishop of Adelaide, who succinctly summarised the rationale behind the exceptions as follows:

Ultimately a person’s right to choose whether or not to participate in a religious institution, and the

¹⁴¹ Issues Paper Submission No 358.

freedom not to do so, is a sufficient mechanism to avoid the suggestion that there is unreasonable or excessive discrimination in such institutions. However, where a choice is made to participate in a religious institution, it must be understood that the rules and principles applicable in that institution will apply.¹⁴²

6.1.10 This freedom is protected under a number of international human rights conventions to which Australia is a party, and interacts with a range of other protected rights, including the right to education. This is reflected in art 13 of the *ICESCR*, which provides:

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

6.1.11 The Archbishop of Adelaide also emphasised the importance of recognising the distinction between positive and negative freedom, when considering the rationale behind the current religious bodies exceptions.¹⁴³ The Archbishop explained that this distinction ‘is one which recognises, in short, that freedom can only properly be understood when looked at in its negative and positive forms; “freedom to” do something as opposed to “freedom from” restriction’.¹⁴⁴ The Archbishop further explained that this concept was recognised by the High Court in *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* where it was observed that ““religion” is no mere idle concept to be divorced from reality, but in fact is one which has a real and practical impact on people’s lives.”¹⁴⁵ For the Archbishop, this case also confirms that:

religious belief cannot be restricted to privately held convictions — incapable of being lived out and acted upon. As one academic observer has similarly pointed out: “...*religion is not an isolated component of life, because religion has broad, holistic implications for the lives of its adherents as a worldview that shapes the way individuals think and act.*”¹⁴⁶

6.1.12 The Archbishop submitted that:

if any suggestions about legislative change are to have a real and balanced impact in society, they must also recognise and account for the observations made by Mason and Brennan JJ (as their Honours then were) in the *Church of New Faith* case:

¹⁴² Issues Paper Submission No 363 (Archbishop of Adelaide).

¹⁴³ Ibid. See also Isaiah Berlin, *Four Essays on Liberty*, (Oxford University Press, 1969) 118 (Two Concepts of Liberty).

¹⁴⁴ Issues Paper Submission No 363 (Archbishop of Adelaide). See also Berlin, above n 143.

¹⁴⁵ Issues Paper Submission No 363 (Archbishop of Adelaide). See also *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120.

¹⁴⁶ Issues Paper Submission No 363 (Archbishop of Adelaide), quoting Dr A Zimmerman, LL.M (cum laude), PhD (Mon), Senior Lecturer, Monash University.

“Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society. The chief function in the law of a definition of religion is to mark out an area within which a person subject to the law is free to believe and act in accordance with his belief without legal restraint.”

Any discussion of equal opportunity and anti-discrimination law must therefore account for these important considerations if there is to be a balanced approach taken in this complex area.¹⁴⁷

6.1.13 The acceptance that that education is a vital part of religious life and that religious schools should reserve the right to employ staff in accordance with a school’s religious teachings and status, has formed the basis of the various exceptions to unlawful discrimination with respect to religious bodies in all Australian jurisdictions¹⁴⁸ As Evans and Ujvari explain:

Religious schools play a complex role in religiously pluralistic societies. The existence of a range of religious schools with some degree of autonomy from state control can be an important aspect of diversity and pluralism. Religious schools maintain a space for parents to choose the values and religious understandings to which their children will be exposed.¹⁴⁹

6.1.14 Evans also notes:

Most religious groups believe that it is essential that they maintain autonomy when it comes to issues such as selection of clergy or other key religious appointments. This autonomy is an important element of religious freedom, impacts on a relatively small number of people and would be hard to justify removing. However, religious groups may wish to be permitted to discriminate in other areas in which they are active, for example in relation to admissions to religious schools, employment in religious organisations or the types of groups to whom they rent property. In such cases, the religious freedom of individuals or groups can come into conflict with the right of other individuals not to be discriminated against. In most Australian jurisdictions this tension is dealt with by a partial exemption to some discrimination laws for religious bodies. The precise nature and scope of these exemptions differs between different jurisdictions.¹⁵⁰

Support for Continued Unchanged Religious Organisation Exceptions

6.1.15 SALRI received a large number of submissions from religious bodies or parents and families connected with religious schools opposing reform to the religious bodies’ exceptions in the *EO Act 1984*. These submissions — which totalled over 300 in number and included dozens of emails expressed in very similar language — reflect views of those expressed during past reviews of the *EO*

¹⁴⁷ Issues Paper Submission No 363 (Archbishop of Adelaide).

¹⁴⁸ *Sex Discrimination Act 1984* (Cth) s 38; *Equal Opportunity Act 2010* (Vic) s 83; *Anti-Discrimination Act 1977* (NSW) ss 25(3)(c), 38C(3), 49ZH(3); *Anti-Discrimination Act 1998* (Tas) ss 27(1)(a), 51; *Anti-Discrimination Act 1991* (Qld) s 25(3); *Equal Opportunity Act 1984* (WA) s 73; *Discrimination Act 1991* (ACT) s 33(1); *Anti-Discrimination Act 1996* (NT) s 37A.

¹⁴⁹ Evans and Ujvari, above n 46, 31.

¹⁵⁰ Evans, above n 32, 30 [4.1]. Though it is important to note that the religious non-government education sector is diverse and different values and employment practices exist within that sector, even within schools affiliated to the same religious denomination.

Act 1984, including the reviews that culminated in the *Equal Opportunity (Miscellaneous) Amendment Act 2009* (SA).

6.1.16 In relation to the exceptions for religious institutions, the South Australian Government explained why it had decided to leave these exceptions unchanged when it last made significant changes in this area of the law in 2009:

The Government accepts that some South Australians are taught by their religion, and sincerely believe, that homosexuals should not teach in schools. In general, the State ought not to interfere in the practice of religion and ought not to compel any person to act against his or her conscience. Consequently, the Bill proposes to limit this exception to the only thing for which it is known to be used. It would not be available to all institutions run on religious principles, but would be limited to schools. It would not apply to the treatment of students but only the hiring of staff. Further, the Bill proposes that these schools should publicly disclose this policy. That way, both parents and prospective staff will know where the school stands. The Bill would require the school make the policy available on request and to publish the policy on the school's website if it has one.¹⁵¹

6.1.17 This passage highlights the need to respect the legitimate rights of religious bodies to administer their schools in accordance with their beliefs and practices.

6.1.18 In response to SALRI's Issues Paper, the Hon Dennis Hood MLC set out the Family First Party's objection to any change to the existing religious organisations exceptions as follows:

When individuals choose to exercise their religion collectively, the State must respect the autonomy of the group which extends to aspects such as, but not limited to, freedom to choose religious leaders, priests, teachers and staff: to distribute religious texts and to determine appropriate enrolment guidelines for students.

...

It is entirely appropriate therefore, that religious organisations and schools are able to practice their convictions taking into account the tenets of their faith, ethos and idiosyncrasies within their chosen

¹⁵¹ South Australia, *Parliamentary Debates*, Legislative Council, 26 November 2008, 865 (Gail Gago). See also South Australia, *Parliamentary Debates*, House of Assembly, 30 April 2009, 2565-2566 (Michael Atkinson, Attorney-General): 'The Government gave much thought to whether such an exemption should be allowed to continue. Our law says that discrimination on the ground of sexuality is wrong. Moreover, religious schools receive public funding. An argument can be made that those who accept public funding should comply with the standards set by the public through legislation. At the same time, the Government acknowledges that independent schools make a great contribution to the education and pastoral care of South Australia's children. This contribution is possible, in part, because of the commitment of the school community to its faith. The Government accepts that some South Australians are taught by their religion, and sincerely believe, that homosexuals should not teach in schools. In general, the State ought not to interfere in the practice of religion and ought not to compel any person to act against his or her conscience. Consequently, the government proposes to limit this exception to the case for which it is primarily used. It should not be available to all institutions run on religious principles, but should be limited to schools. It should not apply to the treatment of students but only the hiring of staff. Further, it is proposed that these schools should publicly disclose this policy on request and also give it to persons who are being offered work. That way, both parents and prospective staff will know where the school stands. We are doing this out of respect for religious freedom. I wish to emphasise that the Government does not believe that homosexual people pose any greater threat to children than do heterosexual people. The threat to children comes from pederasts.'

denomination and religion, without limitation. Changes to the exemptions found in sections 35(3) and 50 of the *EO Act 1984* have the potential to effect limitation.¹⁵²

6.1.19 The Australian Association of Christian Schools, that represents four South Australian schools and 130 schools Australian wide, told SALRI:

Christian schools have enjoyed the general right to act as religious organisations and its associated religious freedom. This right of religious freedom has been well established within Australian democracy, supported in common and statute law and affirmed in multiple international covenants to which Australia is a signatory. Within this context, Christian schools have enjoyed the freedom to operate holistic educational communities where staff teach and affirm the community’s teachings and beliefs and where the educational practice of the school is shaped by the school’s core beliefs.¹⁵³

6.1.20 Similar views were expressed in many of the submissions received by SALRI. For example, Joseph Stephen said:

I feel very strongly that any faith-based organisation should remain exempt from any Equal Opportunity legislation which would undermine that organizations statement of faith. A faith-based organisation operates for the very purpose of upholding the faith to which they adhere and removing such exemptions would force many in that organization to act against their own conscience. This in itself is a very dangerous position to force anyone into. This also goes against the very equal opportunity and antidiscrimination you are seeking to eliminate. You are thus not eliminating discrimination by removing exemptions, but merely changing the one to whom discrimination is in favour of. I understand that antidiscrimination legislation may be a good thing for society when people are discriminated against for merely racial colour or physical handicap, but where conscience, ethics and morality are involved, discrimination will always be present since as mentioned, to legislate otherwise would merely switch the discrimination.¹⁵⁴

6.1.21 David McCall similarly observes:

I express my concern at any proposal to remove any exemptions to the churches and educational institutions to the employment of persons who are not willing to accept the values and teachings of the church or institution concerned. Generally speaking, the churches seek to be inclusive and compassionate; however there may be occasions when the values and teaching of a church or school would mean that they would not be willing to employ persons who oppose their values or teaching. Such exemptions an important aspect of a society that claims to allow freedom of religion. To discriminate against churches or schools on such grounds is a form of persecution and could limit the choice of parents concerning their choice of educational institutions as regards the teaching and values they believe important. The reality is that people and institutions have different understanding about what is right and wrong. Any institution that seeks the harm or hurt of any members of society who differ in their views would be rightly condemned; however, to penalise an institution that was simply being true to its faith and beliefs would constitute a denial of freedom of religion. I trust the review will recommend that the present exemptions be retained.¹⁵⁵

¹⁵² Issues Paper Submission No 360 (Hon Dennis Hood MLC) 2.

¹⁵³ Issues Paper Submission No 365 (Australian Association of Christian Schools) 1.

¹⁵⁴ Issues Paper Submission No 31.

¹⁵⁵ Issues Paper Submission No 33.

Particular support for the continuation of exceptions available to religious schools

6.1.22 SALRI received a large number of submissions from individuals and organisations concerned to preserve the existing scope of the exceptions available to religious schools. Indeed, many argued for a strengthening of the current exceptions to provide more latitude for religious schools to lawfully discriminate in their operations.

6.1.23 A number of submission makers referred to some of the human rights instruments described above when expressing support for the continuation of the current exceptions for religious bodies. For example, Paul and Gina Voskulen observed:

The *International Covenant on Civil and Political Rights* gives parents the right to determine their children's education, including their moral education. While the state has the right (the duty even) to oversee education, it should not deny parents the right to pass on their own moral convictions by choosing a school that upholds their values and employs staff (both teaching and administrative) who model those values. We support option A in the review of the *Equal Opportunities Act* or, if there is to be any change, a strengthening of exceptions for religious organisations.¹⁵⁶

6.1.24 Linda Knock said that:

I believe that stronger exemptions for religious organisations in the *Equal Opportunity Act*, should be adopted at this time. All human freedoms of religion and association, which I consider as fundamental, will be undermined should religious exemptions be removed. Sections 34, 50 and 85ZM in the *Equal Opportunity Act* rightly recognise freedom of religion and these exemptions need to remain unchanged within the Act. Parents must always maintain the right to determine their children's moral education which is currently afforded to them by Article 18.4 of the *International Covenant on Civil and Political Rights*. Parents should not be denied the right to choose a particular religious school to teach their children their own moral convictions by staff (both teaching and administrative) who model their values. The State should determine this decision.¹⁵⁷

6.1.25 The vast majority of these submissions were made by parents or grandparents of children attending religious schools, and the organisations representing religious schools in South Australia. From these submissions, it appears that religious school communities, and in particular Christian school communities, are most concerned about two critical matters:

- The right of religious schools to operate in accordance with their beliefs and therefore able to employ staff in line with the school's religious beliefs.
- The value of diversity of choice and the long established freedom parents have to choose schools that are in harmony with their own religious, cultural and social convictions.¹⁵⁸

¹⁵⁶ Issues Paper Submission No 101.

¹⁵⁷ Issues Paper Submission No 45.

¹⁵⁸ Issues Paper Submission No 365 (Australian Association of Christian Schools) 1.

6.1.26 These issues are examined below.

Employing staff in line with the school’s beliefs

6.1.27 The vast majority of submissions received by SALRI opposing change to the religious bodies exceptions referred to the need for religious schools to retain control over the selection of staff in their school.

6.1.28 The Hon Dennis Hood MLC expressed his objection to any change as follows:

Should the *EO Act 1984* exemptions be removed, there will invariably be a conflicting and confusing situation for students who could be confronted with practices which are contrary to their religious beliefs and conscience. Removal of these discretions will change the face of religious schooling as we know it. It would also significantly impact religious freedom and autonomy within religious education. Family First does not want to see this happen.¹⁵⁹

6.1.29 Similarly, AISSA submits that s 34(c) is ‘crucial in enabling religious schools to employ staff with values and belief consistent with the ethos of the school,’¹⁶⁰ arguing that the conditions provided in the section make the exception sufficiently specific. AISSA argues that all of a religious school’s employees form part of an extended community and it is important that all staff, whether or not they are in teaching role, share and practice the precepts and values of a school’s particular faith.¹⁶¹ It is argued that no distinction can be validly drawn between teaching and non-teaching staff. AISSA argues that s 34(c) of the *EO Act 1984* is essential to allow for comprehensive exercise of the right of religious freedom and practice.

While it is accepted that privately held religious views should not be imposed on individuals in the public sphere, the area of education of children is so inextricably linked with the right of parents to organise private family life in accordance with their religion or belief-system in that both State and Federal equal opportunity law has recognised that education is an area warranting special exemption.¹⁶²

6.1.30 Similar concerns were raised by the Australian Association of Christian Schools who suggested that any change to the existing exceptions would:

¹⁵⁹ Issues Paper Submission No 360 (Hon Dennis Hood MLC) 2.

¹⁶⁰ Audit Report Submission No 43 (Association of Independent Schools of SA) South Australian Law Reform Institute, *LGBTIQ Reference* (30 June 2015), 1 (‘Submission 43’).

¹⁶¹ See also Greg Walsh, ‘The Merits of the Inherent Requirement Test for Regulating the Employment Decisions of Religious Schools under Anti-Discrimination legislation’ (2015) 6 *West Australian Jurist* 34, 55-57; Evans and Gaze, above n 50, 415.

¹⁶² Audit Report Submission No 43, 1.

- contradict the principles of government support for the ‘measured’ independence of non-government schools; parental choice in education; and freedom of belief, conscience, speech and religion; and
- undermine the parent’s right to determine their child’s education, or a school community’s right to operate freely within the framework of its religious beliefs and values.¹⁶³

6.1.31 These views were shared by many individual submission makers. For example, Barbara Giardina, in terms widely echoed elsewhere in the responses, argued:

I support stronger exemptions for religious organisations in *the Equal Opportunity Act*. The State should not deny the right of parents to choose a particular religious school to teach their children their own moral convictions via staff (both teaching and administrative) who model their values. Removing religious exemptions undermines the fundamental human freedoms of religion and association. I do not want to see changes in the law which would allow any of the following:

- Religious schools forced to employ staff whose lifestyle does not support the school’s values – such as openly practising homosexuals.
- Religious associations forced to admit persons who do not support the association’s faith-based membership requirements.
- Religious organisations denied any state funding for health care or education services unless they agree to employ staff who oppose their values.
- Red Cross forced to allow practising homosexual men to donate blood. I believe it is biblically wrong, totally against my Christian beliefs.

Please remember that our Constitution and moral fabric of Australian society are founded on Christian and Christian Biblical beliefs and morals. So to undermine any foundation weakens the building and leads to the eventually collapse of the building or community or society.¹⁶⁴

6.1.32 Margaret Kessner told SALRI:

I am very concerned that the/my Christian religion is being continually ignored as presumably having no significance, while other beliefs have been given major acceptance. This is not equality in any sense of the word. I know Christianity has huge significance, and want our Christian schools to have the right to employ those who have Christian beliefs. Teachers may know something about education but nothing about Christian teaching. Why put them into Christian Schools? Parents also need to have equal opportunity to send their children to their school of choice. Christians should be able to send their children to Christian schools. Parents can select ‘music’ schools, ‘sports’ schools – why not Christian schools? I am glad of the opportunity to voice my concerns and hope that you will listen, and add mine to those of others.¹⁶⁵

6.1.33 Paul and Kay Linder said:

Historically our laws were based on Biblical principles. Regrettably, our law makers are submitting

¹⁶³ Issues Paper Submission No 357 (Australian Association of Christian Schools) 2.

¹⁶⁴ Issues Paper Submission No 130.

¹⁶⁵ Issues Paper Submission No 176.

to the vocal minorities in our communities and we are being led into unnecessary legislation changes which are designed to benefit and silence these minority groups. Government legislative change should be for the betterment of the majority in our community. A couple of quick points: Most people would not want to receive blood from a practicing homosexual. Most people who send their children to Christian schools would want their teachers and administrators to live their Christian teachings and be a positive role model to the students. Accordingly, Christian schools and organizations should employ people who exhibit their Christian teachings and philosophies. Government funding of religious school students is the same amounts paid for students in the public system. We chose to send our boys to a Christian school because of the Christian ethos and teaching. We chose to pay the extra fees as we, as parents, are responsible for what our children were taught. Not some politician, government department or legislation.¹⁶⁶

6.1.34 The Australian Association of Christian Schools described the implications of the reforms outlined in the Issues Paper as including that:

- Christian schools will no longer be permitted to employ staff in line with the school's doctrines, tenets, beliefs and teachings.
- Christian schools will possibly need to show that conforming to religious beliefs of the school is an inherent requirement of an advertised employment position.
- The rights of non-religious teachers would take precedence over the rights of parents to choose a school that expresses a holistic faith commitment.¹⁶⁷

6.1.35 In response to a comment in the Issues Paper querying the ongoing necessity for the exception to apply to non-teaching staff such as groundkeepers, secretaries or accountants of religious schools, Christian Schools Australia and Adventist Schools Australia¹⁶⁸ and the Australian Association of Christian Schools submitted that this is to 'misunderstand the holistic approach to education that is intrinsic to a Christian school'.¹⁶⁹ Under this approach, 'all employees work as a united and focused team within the Christian educational community.'¹⁷⁰

6.1.36 It was submitted that it is unrealistic in this context to 'draw the line' between teaching and non-teaching staff and that it is more appropriate to distinguish between employees and contractors when determining the scope of the exception.¹⁷¹

6.1.37 In having regard to this feedback, SALRI also notes that the religious school sector is both diverse and complicated and there are likely to be great differences in how religious schools approach

¹⁶⁶ Issues Paper Submission No 63.

¹⁶⁷ Issues Paper Submission No 365 (Australian Association of Christian Schools) 2.

¹⁶⁸ Issues Paper Submission No 357 (Christian Schools Australia and Adventist Schools Australia).

¹⁶⁹ Issues Paper Submission No 365 (Australian Association of Christian Schools) 3.

¹⁷⁰ Ibid.

¹⁷¹ Ibid 4.

anti-discriminations laws and the use of exceptions such as in the *EO Act 1984*.¹⁷² As a 2010 study observed,

[l]egislators deciding on whether discrimination provisions need to be tightened should be wary of claims that suggest the religious school sector is homogenous or even that all the schools from a particular religious tradition are united in their positions towards the exceptions or unconditionally support the position of their religious hierarchy. The diversity within the religious school sector makes the role and use of the law, such as the religious exceptions, more complex than a simple conflict between freedom of religion and equality.¹⁷³

6.1.38 For these reasons, SALRI does not assume that all those involved in religious schools in South Australia necessarily share the views expressed by submissions in response to the Issues Paper.

Discrimination with respect to student enrolments

6.1.39 The Australian Association of Christian Schools also supports the continuation of the existing exception in s 50(1)(c) which can potentially be applied to lawfully discriminate against students attending a religious school:

not so as to discriminate against LGBTIQ students but so that the school can manage its admission policies in accordance with its beliefs and values. Christian schools seek to work in partnership with parents who understand, accept and support the faith-based outlook that the school espouses.¹⁷⁴

6.1.40 It was submitted that students at one of the religious schools represented by the Australian Association of Christian Schools who expressed ‘an alternative view regarding their gender identity or sexual orientation’ would be supported by the school and protected from bullying. Australian Association of Christian Schools made it clear that no form of harassment or vilification should be tolerated.¹⁷⁵

Alternative Approach: A Positive Affirmation of Freedom of Belief, Conscience, Speech and Religion

6.1.41 As well as generally opposing reform to the existing exceptions available to religious bodies under the *EO Act 1984*, the Christian Schools Australia and Adventist Schools Australia and the Australian Association of Christian Schools suggested an alternative approach to the existing exception regime, which they describe as ‘a more positive expression that affirms freedom of belief,

¹⁷² Walsh, above n 161, 35; Evans and Gaze, above n 50, 423-424.

¹⁷³ Evans and Gaze, above n 50, 423.

¹⁷⁴ Issues Paper Submission No 365 (Australian Association of Christian Schools) 4.

¹⁷⁵ Ibid.

conscience, speech and religion is at the very heart of Australian democracy.¹⁷⁶ The Australian Association of Christian Schools suggested that possible form of words could be:

the religious school is free to express its religion in accordance with its doctrines, tenets, beliefs and teachings, subject to appropriate limitations (like considerations to the public health, order, health or morals, or the fundamental rights and freedoms of others) that do not compromise that freedom.¹⁷⁷

6.1.42 For the Australian Association of Christian Schools this approach would strike a more appropriate balance between important human rights.

When legislation frames religious freedom as an exception, it conveys the message that special treatment is afforded to a certain group. In actuality, the rights to non-discrimination and religious freedom exist concurrently and within prescribed limits or accommodations. In the Australian context, where the single right of non-discrimination has been over-legislated, most other freedoms start to look like special pleading to an established rule. This includes infringements on freedom of speech by laws like s 18C of the *Racial Discrimination Act 1975* (Cth) and s 17(1) of the *Anti-Discrimination Act 1998* (Tas) as much as freedoms like conscience, religion and association. This is a fundamentally incorrect narrative that is not supported in international human rights law or common law, within which freedom is assumed unless specific prohibitions of law are articulated.¹⁷⁸

6.1.43 Christian Schools Australia also endorsed this approach and noted the recent observations of ALRC with respect to religious freedom

concerns about freedom of religion should be considered in future initiatives directed towards the consolidation of Commonwealth anti-discrimination laws, or harmonisation of Commonwealth, state and territory anti-discrimination laws.¹⁷⁹

6.1.44 The Christian Schools Australia drew particular attention to the ALRC recommendation that ‘further consideration should be given to whether freedom of religion should be protected through a general limitations clause rather than exemptions.’¹⁸⁰

6.1.45 SALRI notes that the general limitation clause considered by the ALRC is very similar to that described in Option C of the Issues Paper and discussed above. This issue warrants further scrutiny.

6.1.46 While SALRI does not prefer Option C as a model for reform in this Report, it has recommended that a more positive approach to recognising freedom of religious belief be included in the comprehensive review of the *EO Act 1984* in Recommendation 10 of this Report. SALRI

¹⁷⁶ Ibid 5.

¹⁷⁷ Ibid 5-6.

¹⁷⁸ Ibid.

¹⁷⁹ Issues Paper Submission No 357 (Christian Schools Australia and Adventist Schools Australia). See also ALRC, above n 125, [5.154].

¹⁸⁰ ALRC, above n 125, [5.154].

further notes that such a review could also look in more detail at whether a general limitations clause such as that considered by the ALRC should be incorporated in the South Australian *EO Act 1984*.

Concerns with the Scope of the Existing Exceptions for Religious Organisations

6.1.47 While almost all submission makers acknowledged the fundamental nature of the freedom of religious belief, some expressed strong concern at the scope of the existing exceptions for religious bodies in the *EO Act 1984*. For example, the Law Society of South Australia submitted that:

We support the rights of those who ascribe to religious teachings, however these rights must be balanced with other considerations in respect of service-providing organisations and schools operated by religious institutions.¹⁸¹

6.1.48 Concerns as to the current exceptions granted to religious bodies under *EO Act 1984* were expressed in many submissions in response to the Audit Report process¹⁸² and in the more recent Issues Paper consultation.

6.1.49 Similar concerns have been expressed elsewhere by commentators,¹⁸³ and in previous reviews of anti-discrimination Acts, both in South Australia¹⁸⁴ and elsewhere,¹⁸⁵ and in inquiries into the human rights of LGBTIQ Australians.¹⁸⁶

6.1.50 These concerns include that the current exceptions are (a) inconsistent with Australia's human rights obligations relating to freedom from non-discrimination and the right to equal treatment before the law, and (b) out of step with comparable international jurisdictions (including New Zealand and

¹⁸¹ Issues Paper Submission No 364 (Law Society of South Australia).

¹⁸² See Bec Koch, Submission No 13, South Australian Law Reform Institute, *LGBTIQ Reference* (2015) ('Submission No 13'); Mary Heath, Submission No 27, South Australian Law Reform Institute, *LGBTIQ Reference* (2015) ('Submission No 27'); Roz Daniell, Submission No 32, South Australian Law Reform Institute, *LGBTIQ Reference* (2015) ('Submission No 32'); Submission No 33; Margaret Davies, Submission No 38, South Australian Law Reform Institute, *LGBTIQ Reference* 6 July 2015) ('Submission No 38'); Equal Opportunity Commission SA, Submission No 40, South Australian Law Reform Institute, *LGBTIQ Reference* (15 July 2015) ('Submission No 40'); Human Rights Law Centre, Submission No 44, South Australian Law Reform Institute, *LGBTIQ Reference* (25 August 2015) ('Submission No 44').

¹⁸³ See, for example, Mortensen, above n 46; Tobin, above n 47.

¹⁸⁴ See, for example, South Australian Attorney-General's Department, 'Proposal for a new law against Religious Discrimination and Vilification: Discussion Paper' (Discussion Paper, Attorney-General's Department, 2002) 10-11; Government of South Australia, 'Review of Equal Opportunity Legislation Framework Paper' (Framework Paper, Attorney-General's Department, 2004) 24.

¹⁸⁵ See, for example, Scrutiny of Acts and Regulations Committee, Parliament of Victoria, above n 47, 64-65; Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, above n 128, 99-101 [7.32]-[7.39]; Attorney-General's Department, above n 123, 41.

¹⁸⁶ See, for example, Australian Human Rights Commission, 'Addressing sexual orientation and sex and/or gender identity discrimination: Consultation Report' (Consultation Report, Australian Human Rights Commission, 2011).

the UK), as well as concerns that they are having real and deleterious impacts on the lives of South Australians.

6.1.51 These concerns generally stem from the lack of acceptance of bisexuality, homosexuality and gender diversity within many religious faiths. This lack of acceptance and moral condemnation of homosexuality and gender diversity was evident in some of the stronger feedback received by SALRI.¹⁸⁷

6.1.52 Family Voice Australia included the following extract in its submission:

The Church, obedient to the Lord who founded her and gave to her the sacramental life, celebrates the divine plan of the loving and life-giving union of men and women in the sacrament of marriage. It is only in the marital relationship that the use of the sexual faculty can be morally good. A person engaging in homosexual behaviour therefore acts immorally.¹⁸⁸

6.1.53 Family Voice Australia also submitted that:

The reality is that ‘sex change’ is a myth. Neither hormone treatment nor surgery can actually change a person’s sex.

6.1.54 For some submission makers, these views demonstrate the risks of harm arising from discrimination by religious bodies against people on the grounds of their sexual orientation and gender identity. As the Australian Coalition for Equality submitted:

[These views] can result in discrimination on the basis of gender identity, lawful activity, relationship status and sexual orientation in religious observances and practices.

Some religious bodies — which operate schools, hospitals and other social services — believe their right to act according to the principles of their religion should also extend to discriminating in these ancillary institutions. Often such discrimination is not made clear to those receiving the service.¹⁸⁹

6.1.55 As discussed further below, particular concerns have been raised with respect to discrimination experienced by LGBTIQ children or children of LGBTIQ families. As Mark Dodd told SALRI:

I have developed a strong concern about the lack of protection from discrimination under this act for the children of LGBTIQ individuals. Under s 85T there is explicit reference to discrimination on the grounds of the identity of spouse or domestic partner, and references related to children. However, I cannot see any reference to discrimination based on the identity of a parent. This is a

¹⁸⁷ See, for example, Issues Paper Submission No 1.

¹⁸⁸ Issues Paper Submission 358 (Family Voice Australia) quoting from ‘Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons’, Congregation for the Doctrine of the Faith (1 October 1986) [5], [6] <http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19861001_homosexual-persons_en.html>.

¹⁸⁹ Australian Coalition for Equality Discussion Paper, 14.

potentially a form of discrimination that my children, or children of any LGBTIQ person, might be forced to endure.¹⁹⁰

6.1.56 Other submission makers directed their concerns at the breadth of the current exceptions and the impact this has on the ability of people who have experienced discrimination to pursue a complaint. For example, the Law Society of South Australia's Women Lawyers Committee told SALRI that:

13. Members of our Women Lawyers Committee (WLC) have worked within the Equal Opportunity Commission (EOC) jurisdiction and seen examples of cases where discrimination claims could not be pursued because of this wide-ranging exemption.

13.1 One reported example from our WLC is a member acting for a woman who was dismissed from a religious-run school for moving-in to the house of her fiancée's parents, where her fiancée also lived. For noting is that the woman lived in a separate room due to having problems finding suitable housing. She was dismissed because the school believed co-habitation of unmarried couples was against their teachings and would set a bad example.

13.2 Another reported example from our WLC is that of a religious-run charity, which provided services to the public, finding out that a worker identified as gay. This was learnt outside of the organisation, even though the worker did not discuss this with the staff or clients. The worker was subsequently dismissed.¹⁹¹

Discrimination with respect to students at religious schools

6.1.57 Many submission makers emphasised the tangible harm caused to children and students who are subject to discrimination on the grounds of their own or their family member's sexual orientation, gender identity or intersex status at school.

6.1.58 For example, SALRI has been informed that there is now significant documentation of the degree and impact of homophobia and transphobia experience by LGBTIQ students in Australia.¹⁹² The bullying of such students is a very real problem.¹⁹³ A 2015 report by the United Nations Office

¹⁹⁰ Issues Paper Submission No 193.

¹⁹¹ Issues Paper Submission No 364 (Law Society of South Australia).

¹⁹² L Hillier, T Jones, M Monagle, N Overton, L Gahan, J Blackman and A Mitchell, 'Writing Themselves In 3: The third national study on the sexual health & well-being of same-sex attracted and gender questioning young people' (Report, Australian Research Centre in Sex, Health & Society (ARCSHS), La Trobe University, 2010); Kerry Robinson, Peter Bansel, Nida Denson, Georgia Ovenden and Cristyn Davies, 'Growing Up Queer: Issues Facing Young Australians Who Are Gender Variant and Sexuality Diverse' (Report, Young and Well Cooperative Research Centre, Melbourne, February 2014); Elizabeth Smith, Tiffany Jones, Roz Ward, Jennifer Dixon, Anne Mitchell and Lynne Hillier, 'From Blues to Rainbows: The mental health and well-being of gender diverse and transgender young people in Australia' (Report, Australian Research Centre in Sex, Health and Society (ARCSHS), La Trobe University, September 2014).

¹⁹³ See, for example, Janet Murray, 'Gay young people still face bullying at school', *The Guardian* (online), 3 July 2012, <<http://www.theguardian.com/education/2012/jul/02/homophobic-bullying-in-schools>>; Tanya Chilcott, 'Bullying teachers, peers make school hell for gays, and Queensland is most homophobic of all', *Courier-Mail* (online), 21 February 2013, <<http://www.couriermail.com.au/news/queensland/bullying-teachers-peers-make-school-hell>>

for the High Commissioner for Human Rights identified the continuing existence and impact of discrimination against LGBTIQ students worldwide.¹⁹⁴ These studies appear to draw similar conclusions about the link between homophobic abuse and experiences including feeling unsafe at school, excessive drug use, self-harm and suicide attempts.¹⁹⁵ Other studies suggest that LGBTIQ students associated with religion were less likely to receive support from teachers, and more likely to experience bullying, social exclusion and to report self-harm and suicidal thoughts.¹⁹⁶ These studies also suggest that affiliation with a religion that espouses a positive attitude towards diverse sexual orientation and gender diversity can help protect against the impact of discrimination.¹⁹⁷

6.1.59 The United Nations Human Rights Commissioner’s statement in 2015 on discrimination and violence against individuals based on their sexual orientation and gender identity explained the global impact of discrimination in the area of education as follows:

55. Many children and adolescents perceived as LGBT or gender non-conforming experience discrimination, harassment and, in some cases, violent abuse both in and outside of school. Such abuse can force students to skip or drop out of school, and can lead to feelings of isolation and depression, even suicide.

56. High levels of bullying have been recorded in all regions. A European Union study found that 80 per cent of school-age children surveyed heard negative comments or saw negative conduct directed at schoolmates perceived as lesbian, gay, bisexual or transgender. A survey conducted by the United Nations Educational, Scientific and Cultural Organization (UNESCO) of students in Thailand found that more than half of LGBT respondents had been bullied in the previous month, and more than 30 per cent had experienced physical abuse. These findings mirror those of studies conducted in other countries. (footnotes omitted).¹⁹⁸

6.1.60 Some commentators have also argued that legally sanctioned discrimination by a school can validate broader exclusion or intolerance of young LGBTIQ people in the community. For example, Evans observes:

Law has a legitimising as well as a regulating function and when religious schools are permitted to

for-gays-and-queensland-is-most-homophobic-of-all/story-e6freoof-1226582239965>; Eryk Bagshaw and Amy McNeilage, ‘Homophobic bullying rife in high school PE lessons’, *Sydney Morning Herald* (online), 9 August 2014, <<http://www.smh.com.au/national/education/homophobic-bullying-rife-in-high-school-pe-lessons-20140808-101vy4.html>>; Rebecca Shaw, ‘There is no such thing as a “gay manual” but I wish I’d had this when I was a child’, *The Guardian* (online), 11 February 2016, <<http://women.mg.co.za/there-is-no-such-thing-as-a-gay-manual-but-i-wish-id-had-this-when-i-was-a-child/>>.

¹⁹⁴ UN Office of the High Commissioner for Human Rights, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 29th sess, Agenda Items 2 and 8, UN Doc A/HRC/29/23 (4 May 2015) 15 [55].

¹⁹⁵ Hillier et al, above n 192; Robinson et al, above n 192; Smith et al, above 192.

¹⁹⁶ Maurice Gattis, Michael Woodford and Yoonsun Han, ‘Discrimination and Depressive Symptoms Among Sexual Minority Youth: Is Gay-Affirming Religious Affiliation a Protective Factor?’ (2014) 43(8) *Archives of Sexual Behaviour* 1589.

¹⁹⁷ *Ibid.*

¹⁹⁸ United Nations High Commissioner on Human Rights, above n 194.

avoid discrimination laws it may serve to legitimate discrimination, conveying to a group of impressionable children that equality is a goal of limited value.¹⁹⁹

6.1.61 These findings have caused particular concern and alarm for submission makers given the potential for s 50 of the *EO Act 1984* to provide an exemption for religious schools who may discriminate with respect to the enrolment and treatment of LGBTIQ children or LGBTIQ families at their schools.

Scope of existing section 50

6.1.62 Section 50(1)(c) of the *EO Act 1984* provides a broad exemption from the protections against discrimination in Part 3 with respect to ‘any other practice of a body established for religious purposes that conforms with the precepts of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion’.

6.1.63 This provision has been criticised as providing a ‘blank cheque’ for religious organisations to discriminate in any number of areas, including employment, education, health and service delivery.²⁰⁰ The EOC expresses concern that this exception provision can be used to exclude LGBTIQ students from religious education institutions.²⁰¹ Similar concerns have been expressed elsewhere.²⁰²

6.1.64 For example, under the Western Australian Act that is similar to the South Australia *EO Act 1984*, the father of a seven year old girl at a religious school was asked to withdraw his child from the school after the principal learnt that the father was gay.²⁰³ The daughter mentioned her father’s male partner in a class discussion and the father was later told to either withdraw his daughter from the school or explain that she must never again discuss her father’s identity or partner at school.²⁰⁴ The father withdrew his child from the school. The father sought legal redress but was unable to make a legal complaint due to the exception from discrimination laws for religious schools. The same act undertaken by a principal at a State school would have exposed the school to a potential claim of discrimination.

6.1.65 SALRI notes that when debating the *Equal Opportunity (Miscellaneous) Amendment Act 2009* (SA), Government MPs assumed that the changes they were implementing — which included the introduction of new protections against discrimination on the grounds of sexuality and chosen gender

¹⁹⁹ Carolyn Evans, *Legal Protections of Religious Freedom in Australia* (Federation Press, 2012) 140-144.

²⁰⁰ Audit Report Submission No 33, 3.

²⁰¹ Audit Report Submission No 40, 4.

²⁰² Australian Human Rights Commission, ‘*Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights National Consultation Report?*’ (Consultation Report, Australian Human Rights Commission, 2015) 41-42.

²⁰³ Nathan Hondros, ‘Gay man’s daughter not welcome at Mandurah Christian school’, *WA Today* (online), 30 October 2015, <<http://www.watoday.com.au/wa-news/gay-mans-daughter-not-welcome-at-mandurah-christian-school-20151028-gklh0d.html?deviceType=text>>.

²⁰⁴ *Ibid.*

— would ensure that students would not be subject to lawful discrimination by religious educational institutions. For example, the relevant Minister in the Legislative Council, the Hon Gail Gago MLC, observed:

On the topic of sexuality discrimination, I point out that the Bill would change the present law about the rights of religious institutions to discriminate on the ground of sexuality. By section 50(2), the present law provides an exemption for an institution that is run in accordance with the precepts of a religion. Such an institution can discriminate in its administration on the ground of sexuality, if the discrimination is founded on the precepts of the religion.

At present, this exemption is used chiefly by religious schools to avoid hiring homosexual staff. Indeed, the Government’s consultation on the framework paper did not disclose any other use of this exemption. The wording of the exemption, however, appears broad enough to allow many other uses. For instance, **it could allow a religious school to expel a homosexual student or to restrict that student’s participation in school activities.** A church-run hospital could use it to refuse to employ a homo sexual doctor or nurse. An aged-care home associated with a church could use it to refuse places to homosexual applicants for lodging. **The Government has seen no evidence that any such institutions use or wish to use the exemption in these ways.** It is clearly wanted for one thing only: to stop homosexuals teaching in religious schools.

The Government gave much thought to whether such an exemption should be allowed to continue. ... The Government accepts that some South Australians are taught by their religion, and sincerely believe, that homosexuals should not teach in schools. In general, the State ought not to interfere in the practice of religion and ought not to compel any person to act against his or her conscience. Consequently, the Bill proposes to limit this exception to the only thing for which it is known to be used. It would not be available to all institutions run on religious principles, but would be limited to schools. **It would not apply to the treatment of students but only the hiring of staff.**²⁰⁵

6.1.66 Similar comments were made by the then Attorney General, the Hon Michael Atkinson.²⁰⁶

6.1.67 The Archbishop of Adelaide takes issue with the comments in the Issues Paper insofar as there is a suggestion of the possibility that s 50(1)(c) or indeed s 34(c) would or could be used to justify discrimination against *students* on the grounds of their sexual orientation or gender identification. Similarly, the Archbishop submits that questions of discrimination against anyone in the provision of emergency health care is simply unsupported by any reliable evidence.²⁰⁷

6.1.68 Despite these comments, it is clear to both the EOC and a number of submission makers representing religious schools in South Australia, that there is at least a perceived fear that the scope of s 50(1)(c) extends to discriminatory treatment of students attending religious schools.

6.1.69 Similar concerns were raised in the context of the 2013 reforms to the *Sex Discrimination Act 1984* (Cth), which introduces specific protections against discrimination on the grounds of sexual

²⁰⁵ South Australia, *Parliamentary Debates*, Legislative Council, 26 November 2008, 865 (Gail Gago) [emphasis added].

²⁰⁶ South Australia, *Parliamentary Debates*, House of Assembly, 30 April 2009, 2563 (Michael Atkinson, Attorney-General).

²⁰⁷ Issues Paper Submission No 363.

orientation, gender identity and intersex status. Debate ensued as to the operation of the general religious bodies' exemption in s 37 of that Act, which is drafted in almost identical terms to s 50 of the *EO Act 1984*. Following a detailed parliamentary inquiry, the Government adopted an approach that specifically excludes the provision of 'aged care' services from the scope of the general exemption. This 'carve out' of Commonwealth funded aged care services from the broader exception was explained in the Explanatory Memorandum to the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* as arising out of the broader community consultation conducted with respect to the Government's draft *Human Rights and Anti-Discrimination Bill* where it received significant feedback of

the discrimination faced by older same-sex couples in accessing aged care services run by religious organisations, particularly when seeking to be recognised as a couple. When such services are provided with Commonwealth funding, the Government does not consider that discrimination in the provision of those services is appropriate. This applies regardless of whether the Commonwealth is the sole or even dominant funder of these services (that is, this applies even if the services are provided with a combination of Commonwealth and other resources). This position is also consistent with the Government's broader aged care reforms.²⁰⁸

6.1.70 As noted above and below, many submission makers to SALRI expressed the view that essential public services such as health and education should not fall within the scope of the general religious bodies exception in the *EO Act 1984*, for the same reasons that aged care services were excluded from the operation of the general religious bodies exception at the Commonwealth level.

Discrimination with respect to employment in religious schools

6.1.71 The exceptions permitting religious schools to discriminate in the employment of staff were also the subject of particular criticism in submissions to the Audit Report on the grounds that it is harmful to LGBTIQ teachers and students at religious schools and also promotes anti-LGBTIQ stigma and homophobia more widely in the community. As one person submitted:

Some of my lesbian friends employed at religious schools have lived with a constant fear of their sexuality being discovered ... this has not been good for them or for their friends. And I cannot be good for the community to have people living double lives like this. Additionally, it must have an appalling impact on LGBTI students at these schools. And it will enforce homophobic values in other students at these schools.²⁰⁹

²⁰⁸ Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013, Supplementary Explanatory Memorandum
<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr5026_ems_3afab29a-1766-4409-baac-5c1217ee6ad9%22>

²⁰⁹ Audit Report Submission No 32, 1. See also Evans and Gaze, above n 50, 414, citing Peter Norden, 'Not So Straight: A national study examining how Catholic Schools can best respond to the needs of same sex attracted students' (Report, Jesuit Social Services, September 2006) 41, 45-55. Norden's report found young people experienced isolation, depression and bullying because of their sexual orientation and felt unacknowledged by their schools or judged because of their sexuality. Such young people had much higher rates of self-harm and suicide than their 'straight' peers: see also at 12, 28-29. See generally Lynne Hillier, Alina Turner and Anne Mitchell, 'Writing Themselves in Again: 6 Years

6.1.72 Matt Jessett told SALRI:

As a teacher who also happens to be gay I need to know my work place with support me as a person no matter where I work. I deserve to be free of discrimination no matter where I work and should be entitled to work in any school that I am capable of working in.²¹⁰

6.1.73 Though reliable empirical evidence does not exist for various reasons,²¹¹ SALRI has been informed of a number of instances of teachers not being hired or being dismissed from their employment and even of students excluded from schools due to their or their family’s sexual orientation.²¹² For example, Christian Paterson describes:

It is sad to note that many are second class citizens in our country. I have heard of instances in which people are forced to conceal their sexual orientation for fear of losing employment in a religious school which would have the consequence of threatening their working visa and thus separating them from their Australian born children. This illustrates that these exemptions are causing real harm to people. This is unacceptable in a modern secular state. These exemptions must be removed immediately to prevent significant psychological harm and social isolation for many members of our community. Religious belief is not sufficient to warrant acting with discrimination. Institutions which seek to discriminate on the basis of sexual orientation need to be considered as similar to organisations which promote racial discrimination and vilification.²¹³

6.1.74 Some submission makers also raised the issue of pluralism, that is, that the religious values that underpin discrimination against LGBTIQ people in employment may not be held by all in the school community. As one submission to SALRI notes:

It is likely that many school communities and their leadership hold modern views about sexuality at odds with the official and outdated views of the religious organization. The exemptions to the *Equal Opportunity Act* may be a hindrance to school communities, and pander to elite religious hierarchies

On — ‘The 2nd National Report on the Sexual Health and Well-Being of Same-Sex Attracted Young People in Australia’ (Report, Latrobe University, 2005).

²¹⁰ Issues Paper Submission No 282.

²¹¹ Walsh, above n 46, 113-116.

²¹² See, for example, Ibid 116-121; Matthew Benns, Eamonn Duff and Hannah Edwards, ‘Catholic school principal sacked for getting married’, *Sydney Morning Herald* (online), 16 April 2006 <<http://www.smh.com.au/news/national/sacked-for-getting-married/2006/04/15/1144521541555.html>>; Farrah Tomazin, ‘Christian school rejects teacher’, *The Age* (online), 25 March 2009 <<http://www.theage.com.au/national/christian-school-rejects-teacher-20090324-98y0.html>>; Melissa Fyfe, ‘Teacher scorned for chosen lifestyle’, *The Age* (online), 4 October 2009 <<http://www.theage.com.au/national/teacher-scorned-for-chosen-lifestyle-20091003-ghbl.html>>; Bridie Jabour, ‘Teacher sacked over pregnancy’, *Brisbane Times* (online), 1 May 2012, <<http://www.brisbanetimes.com.au/queensland/teacher-sacked-over-pregnancy-20120501-1xw79.html>>; Hondros, above n 203. See further for an analysis of discrimination by religious schools on the grounds of student or staff homosexuality and pregnancy, Deb Wilkinson, Richard Denniss and Andrew Macintosh, ‘The Accountability of Private Schools to Public Values’ (Discussion Paper No 71, The Australia Institute, 2004) 21-36.

²¹³ Issues Paper Submission No 4.

rather than reflecting the views of regular members.²¹⁴

Public funding and religious organisations providing services

6.1.75 A particular issue raised by some submission makers supporting reform or removal of the current exceptions was the fact that a religious institution that receives government funding may discriminate in providing apparently secular services such as education. It has been suggested that the State can, and indeed should, insist as a precondition for receiving Government funding or support, that the religious institution accepts the same laws, especially anti-discrimination laws that would apply if the activity was being provided by a non-religious institution.²¹⁵

6.1.76 For these submission makers, religious institutions should be free to apply their precepts and to discriminate on that basis (for example, by refusing to hire an atheist or openly²¹⁶ gay teacher), but only if they do not wish to receive government funding. For example, Jessica Liddle informed SALRI:

I agree that the State and church should be separate. However, where a church based group provides a service such as health care or education, they must obey the law and not be allowed to discriminate based on gender or sexuality. The law of the church is no longer our guiding principle, the government is the law. Thank you for considering the rights of LGBTIQ people.²¹⁷

6.1.77 The Law Society of South Australia explained its position as follows:

The Society suggests that consideration be given to limiting the general exemption for religious institutions to the operation of the religious institution itself and not extending it to services it operates, such as schools and aged care services.

Exemptions for religious institutions, in areas outside of their core business, could then be limited to those specifically applied for and granted.

If this were the case, the Society suggests that, in considering whether to grant such an exemption in relation to employment, for example, emphasis should be placed on the central purpose of the

²¹⁴ Audit Report Submission No 38, 1. It is significant that both many members of that religion (see Evans and Ujvari, above n 46, 55-56; Tobin above n 47, nn 65-67) and even senior members of staff at a religious school may well not share the formal views of their religion: Evans and Gaze, above n 50, 401, 411-414, 417; Tobin, above n 47, n 70. For example, evidence was provided to Victorian Scrutiny of Acts and Regulations Committee from the Victorian Independent Education Union that on many occasions school employers and even priests did not adhere to the official policy of the Catholic Church because they 'view such a policy as uncaring, harmful, intolerant and in conflict with the social justice teachings of the Catholic Church': Victorian Independent Education Union, Submission, Victoria Government Department of Justice, *Review of Exceptions and Exemptions in the Equal Opportunity Act 1995* (April 2008) [5.1.3].

²¹⁵ This arises with respect to government funding to healthcare providers. See Submission No 27, 1; Submission No 38, 2.

²¹⁶ One study showed that a sizeable number of schools within the study took a 'don't ask, don't tell' approach to a range of issues to do with sexuality. See Evans and Gaze, above n 50, 412-413. Staff might take a similar approach. 'In fact the evidence that is available suggests that staff living lifestyles that are inconsistent with official Catholic principles often 'avoid confronting the Catholic Church' and 'choose to self-regulate by maintaining secrecy': Tobin, above n 47, n 88.

²¹⁷ Issues Paper Submission No 21.

institution applying.

For example, where a religious institution provides aged care facilities, the service receives public funding and is (at least theoretically) made available to the general public, there should be little justification for allowing religious-based discrimination in the employment of aged care workers.²¹⁸

6.1.78 A similar argument was advanced to support the provisions in the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013 (Cth)*, which contains a general exception for religious bodies but makes it clear that this exception does not apply to religious bodies who are receiving Commonwealth funds to provide aged care services. In the Explanatory Memorandum to that Bill, the Government explained:

When such services are provided with Commonwealth funding, the Government does not consider that discrimination in the provision of those services is appropriate. This applies regardless of whether the Commonwealth is the sole or even dominant funder of these services (that is, this applies even if the services are provided with a combination of Commonwealth and other resources).

6.1.79 The Discrimination Law Experts Group, in its submission to the Senate Standing Committee on Legal Affairs Inquiry into the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013 (Cth)*, stated:

[A]s a matter of principle ... public funding should not be spent on *any* activities that are discriminatory. Allowing religious-based discrimination in publicly funded schools has the potential to undermine community harmony by allowing children to be isolated from the experiences of other groups in society, and confined to a narrower range of experiences. This is not an effective way for a society to prepare the next generation to work together harmoniously with people who have different customs and beliefs. A religious group that operates an organisation or school with public funding should not be excused from complying with a basic human rights guarantee of non-discrimination. The same argument is made for public funding of services generally, and for health services in particular.²¹⁹

6.1.80 This position was supported by other submissions to the Commonwealth Inquiry, such as the Human Rights Council of Australia who argued:

[A]ny religious exception [should] not apply to any activity which is partially or wholly funded by public funds. In such cases no question of expression of religious freedom arises. Rather it is reasonable for the State to require public funds to be expended and applied wholly in accordance with principles of non-discrimination.²²⁰

6.1.81 Applying this argument to the current reform options would mean that the exceptions contained in s 34 and s 50 of the *EO Act 1984* would be made conditional on the religious bodies or

²¹⁸ Issues Paper Submission No 364.

²¹⁹ Discrimination Law Experts Group submission to Senate Standing Committee on Legal Affairs Inquiry into the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013 (Cth)* (2013).

²²⁰ Human Rights Council of Australia submission to the Senate Standing Committee on Legal Affairs, Report: Inquiry into the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013 (Cth)* (2013).

religious educational institutions not receiving State funding for the provision of educational (or other public) services.

6.1.82 This argument can be used both ways as was raised in the Issues Paper and was discussed by the South Australian Government when it confronted this issue in 2004.²²¹

6.1.83 On the one hand, it may be argued that functions of publicly funded religious institutions such as providing education, housing, social work activities or health have close parallels with similar services run by secular institutions and agencies and as such, these functions are not religious, nor are they integral to the religious institution. It can be argued that a body (whether religious or otherwise) that receives government funds for secular purposes such as education should be required to comply with the equal opportunity and anti-discrimination standards of the community as expressed in legislation enacted by the Parliament.²²² As the Human Rights Council of Australia has argued, '[i]t is reasonable for the State to require public funds to be expended and applied wholly in accordance with principles of non-discrimination.'²²³

6.1.84 On the other hand, it can be argued that to remove this exemption amounts to an unacceptable intrusion by the State into religious issues and matters. On this view, the use of public funds is immaterial. The religious institution exists primarily because persons of shared particular religious views and values have established and maintained it in accordance with and for the purposes of their faith. Secular parallels notwithstanding, it can be argued that the religious institution provides a service (often a crucial service)²²⁴ not available from their secular counterparts because the religious ethos is an important aspect of the service — for example, the education received from a religious school may provide a uniquely strong school community based on religious morality and values. It may be argued that the Government accepts the value of this service by providing funding but this does not give the Government the right to interfere in the delivery of the service in accordance with its religious ethos and values that are its *raison d'être*.²²⁵

6.1.85 This is a difficult argument to resolve. It is tenable to suggest that State funding to non-government agencies should be linked to compliance with the anti-discrimination laws (as is now the case with health care funding by the Commonwealth), but this complex issue is ultimately beyond the

²²¹ South Australia, *Parliamentary Debates*, Legislative Council, 26 November 2008, 865 (Gail Gago).

²²² Government of South Australia, above n 184, 25.

²²³ Tovey, above n 49.

²²⁴ In 2008, for example, there were 1 169 737 full time students enrolled in 2729 non-government schools comprising 34.1% of the total number of students and 28.5% of the total number of schools. Total government funding from both States and Commonwealth for non-government schools in 2007-08 was \$7.67 billion. See Evans and Gaze, above n 50, 393. In 2014, 35% of Australia's school students were enrolled in non-government schools consisting of 21% (757,749) in the Catholic sector and 14% (529,857) in other independent schools.

²²⁵ Government of South Australia, above n 184, 25.

scope of this Report to resolve. For now, public funding to a non-government educational institution cannot be a conclusive consideration.

Ordainment of priests, ministers of religion or members of a religious order

6.1.86 With the exception of the Australian Coalition for Equality's 2009 Discussion Paper that questioned the scope of the exceptions relating to the ordainment or appointment of priests, ministers of religion or members of a religious order, SALRI did not receive any feedback expressing concern with the operation of ss 50(1)(a)–(b) of the *EO Act 1984*. Indeed, these provisions appear to be accepted as practical and necessary to protect freedom of religion.²²⁶ Section 50(1)(ba) was similarly seen as justifiable in relation to the 'operation of explicitly or overtly religious bodies (like churches)' but not to other institutions operated by religious bodies that do not have a predominant religious purpose such as hospitals.²²⁷

Reform Options

Narrow scope of exception for employment in religious schools

6.1.87 One existing exception in the *EO Act 1984* is that applying to employment by a religious educational authority. Currently this exception permits religious schools to discriminate on the grounds of sex, sexuality and chosen gender when employing staff, provided the discrimination is founded on the precepts of a particular religion and the school has a publicly available written policy setting out its position.²²⁸ One reform option could be to narrow the existing exception to require a closer connection between the particular role the person is being employed to undertake and the tenets, beliefs, teachings, principles or practices of the particular religion.

6.1.88 In short, this approach would introduce a 'genuine occupational requirement', as well as a 'reasonableness in the circumstances' test. This is the model currently in place in Queensland (described above).²²⁹ Criteria could be prescribed to help determine reasonableness in the circumstances, as occurs in Queensland, where relevant factors include (a) whether the action taken or proposed to be taken by the employer is harsh or unjust or disproportionate to the person's actions; and (b) the consequences for both the person and the employer should the discrimination happen or not happen.

²²⁶ Audit Report Submission No 33, 3; Audit Report Submission No 38, 2.

²²⁷ Audit Report Submission No 33, 3.

²²⁸ *EO Act 1984* s 34(3).

²²⁹ *Anti-Discrimination Act 1991 (Qld)* s 25(2).

6.1.89 A related reform option would be to slightly amend the current provision that permits general exceptions to be made with respect to religious organisations, to require both a clear connection with the precepts of the religion and evidence that the exception is necessary in the circumstances.

6.1.90 The Christian Schools Australia and Adventist Schools Australia, as well as the Australian Association of Christian Schools²³⁰ expressed concern at the adoption of the Queensland ‘genuine requirements of the occupation’ approach to the exception relating to employment by religious educational authorities. Christian Schools Australia and Adventist Schools Australia told SALRI that the Queensland approach represents a further erosion of religious freedom and has been shown in practice to only apply in circumstances where a person acts in a manner contrary to the religious beliefs of the faith-based schools. It was noted that in Queensland, this exception provision works together with s 124 of the Queensland Act, that prohibits a person from seeking information in relation to a potentially discriminatory attribute. Christian Schools Australia and Adventist Schools Australia said that this means that:

faith-based schools ‘cannot ask a prospective employee or student what there [sic] religious beliefs are’. This is simply untenable and certainly contrary to the stated intention of these amendments.²³¹

...

These provisions taken together are a recipe for hypocrisy. They construct a ‘can’t ask, don’t tell’ environment where faith-based schools are forced to accept and may not be able to take any action against staff members who may have a fundamentally antithetical faith position if they are able to comply with the external forms and practices of a faith as expressed in the school. This approach serves to entrench the concern about living ‘double lives’ raised in a submission to the Audit Paper.²³² From a school’s perspective leading such a ‘double life’ undermines the fundamental duty of fidelity and good faith that employees owe to an employer. Duplicity and deceit regarding such foundational matters are not in anybody’s interests and are not sustainable.²³³

6.1.91 SALRI notes that the South Australian *EO Act 1984* does not contain an equivalent provision to s 124 of the Queensland *Anti-Discrimination Act 1991*.

Tasmanian model for limited religious exceptions

6.1.92 An alternative option would be to replace the current s 34 of the *EO Act 1984* with provisions based on those in Tasmania. Under the *Anti-Discrimination Act 1998* (Tasmania), the legislative exceptions for religious organisations extend only to the protected grounds of ‘religious belief or affiliation’ and ‘religious activity’, and not to other attributes such as ‘sexual orientation’ or ‘gender

²³⁰ Issues Paper Submission No 365 (Australian Association of Christian Schools) 4.

²³¹ Issues Paper Submission No 357 (Christian Schools Australia and Adventist Schools Australia).

²³² Audit Report, above n 2, 101 [311] also quoted in Issues Paper, above n 15, 20 [44].

²³³ Issues Paper Submission No 357 (Christian Schools Australia and Adventist Schools Australia).

identity’.²³⁴ At the time of the Senate Standing Committee on Legal Affairs Inquiry into the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth), the then Tasmanian Anti-Discrimination Commissioner, informed the Committee that this legislative model has operated in Tasmania for over a decade with few problems:

Tasmania does have exceptions, but they are the narrowest of any state or territory. They have been in place for the entirety of the legislation’s history—12 years of legislation. I am not aware of complaints during my period as commissioner—and I deal with all of the complaints—where a religious body has sought to rely on one of those exceptions ... In the main, what I see are organisations, including religious bodies, relying on an argument that in fact what they did was not discriminatory ...

I think that what it has meant in Tasmania is that religious bodies have perhaps turned their minds in different ways to how they ensure that their religious practice does respect the rights of others to the greatest extent possible without interfering with their doctrinal approach. They have done that, and I think they have done that very effectively. I know that I have had very open and honest conversations with religious bodies in Tasmania about some issues for schools, and those are very respectful conversations. ... I think that we are proof that you can do it; you can have very constrained exceptions, and that can work for the faith based organisations.²³⁵

6.1.93 The Christian Schools Australia and Adventist Schools Australia also opposed the Tasmania approach to religious bodies exceptions and queried the description of this approach as ‘best practice’, as it was described in the Issues Paper.²³⁶ These organisations support approaching religious freedom in a different, more positive way, for example by incorporating religious belief as part of the definitional or protective provisions of the *EO Act 1984*, or by providing access to a general limitations clause.

Clarify the general religious bodies exception in s 50(1)

6.1.94 A further reform option requiring consideration is to clarify or narrow the scope of the general religious bodies exception in s 50(1) of the *EO Act 1984*, to make it clear that it does not apply to

²³⁴ *Anti-Discrimination Act 1998* (Tas) s 51 provides: ‘(1) A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to employment if the participation of the person in the observance or practice of a particular religion is a genuine occupational qualification or requirement in relation to the employment.

(2) A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to employment in an educational institution that is or is to be conducted in accordance with the tenets, beliefs, teachings, principles or practices of a particular religion if the discrimination is in order to enable, or better enable, the educational institution to be conducted in accordance with those tenets, beliefs, teachings, principles or practices.’

²³⁵ Submission from the Tasmanian Anti-Discrimination Commissioner to the Senate Standing Committee on Legal Affairs Inquiry into the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) (2013)
<http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/antidiscrimination2012/report/footnotes#c05f66>.

²³⁶ Issues Paper Submission No 357 (Christian Schools Australia and Adventist Schools Australia).

discrimination with respect to potential or current students of religious educational institutions, and only applies to action that is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

6.1.95 SALRI notes that this reform would bring the provision into line with the description of this provision in the Second Reading Speeches introducing the *Equal Opportunity (Miscellaneous) Amendment Act 2009* (SA) (quoted above). It would also ensure that the type of discrimination described above relating to the primary school student and her gay father in Western Australia cannot occur in South Australia.

SALRI's View

6.1.96 It is clear from the submissions received that religious schools and families attending religious schools vigorously defend their right to administer those schools in accordance with their values and beliefs, even where these values and beliefs would otherwise amount to unlawful discrimination under the *EO Act 1984*. It is said that parents make a conscious decision to send their children to such schools for perfectly valid reasons.

6.1.97 It is also clear from past reviews of both the *EO Act 1984* and similar legislation elsewhere and from a comparative analysis of other Australian jurisdictions, that the Parliament is anxious to ensure that equal opportunity laws recognise and respect the entitlement of religious organisations to discriminate, particularly with respect to their core religious functions, such as the ordainment of priests, and the appointment of teachers in schools.

6.1.98 SALRI has also been provided with individual accounts of the harm caused as a result of discrimination by religious bodies, and received references to extensive academic literature and comprehensive survey information that demonstrates the very real harm arising from discrimination and exclusion on the grounds of LGBTIQ status.

6.1.99 This suggests that (a) there is a need to provide an exception for religious bodies to the protections against unlawful discrimination in Part 3 of the *EO Act 1984* and (b) that significant clarification or narrowing of these exceptions is required to guard against the type of harm identified as potentially arising from discrimination on the grounds of sexual orientation and gender identity, particularly when such discrimination is aimed at students or their families.

Discrimination against students of religious schools

6.1.100 SALRI considers it appropriate to maintain the existing exception in s 50(1)(a)–(ba) relating to the training, education, ordination or appointment of priests, ministers of religion or members of a religious order and the administration of a body established for religious purposes (such as a church, synagogue or mosque) in accordance with the precepts of that religion.

6.1.101 However, noting the negative impact of discrimination on the lives of LGBTIQ students (and students with LGBTIQ family members), SALRI recommends that s 50(1)(c) should be removed to

make it clear that it does not apply to discrimination with respect to potential or current students of religious educational institutions.

6.1.102 This is a necessary measure and would remove any doubt and send a clear message that discrimination directed at a student of a religious school on the grounds of their (or their families’) sexual orientation or gender identity cannot be exempt on any grounds. It would also bring the provision into line with the expectations in the Second Reading Speeches introducing the *Equal Opportunity (Miscellaneous) Amendment Act 2009 (SA)* that proceeded on the basis that the 2009 Act would produce this effect.

6.1.103 SALRI further notes that while it received a large number of emails and submissions raising strong concerns about the need to ensure the continuation of the exception for religious bodies in the area of employment, it did not receive any submissions explicitly endorsing exceptions that would permit religious schools to directly discriminate against LGBTIQ students who may already be attending a religious school.

6.1.104 SALRI further notes that the need to clarify that the general religious bodies’ exemption does not apply to the provision of key public services is consistent with the Commonwealth’s approach to the general religious bodies’ exception and the provision of aged care services.

Discrimination in Employment by Religious Schools

6.1.105 SALRI heard in its consultation from over 300 submission makers who expressed the strong view that the present exceptions in s 34 are not only necessary, but in fact should be strengthened. Some parties noted that this is important to ensure that a holistic approach to education in religious schools can continue to be pursued. As emphasised above, for many of these submission makers, it was vital that the law respect their rights as parents to choose to send their child to a school that upholds and reflects their religious faith or values.

6.1.106 SALRI also heard from those who consider that the exception in s 34(3) of the *EO Act 1984* should be removed or reformed, either on the grounds that it sanctions discrimination that can cause real harm to LGBTIQ South Australians, and/or that educational authorities receiving State funds and providing a public service should not be exempt from compliance with the protections in the *EO Act 1984*.

6.1.107 SALRI further notes that from a comparative perspective, there are aspects of the existing South Australian provision that have been cited as ‘best practice’, particularly those relating to the requirement for the religious school develop and publish a policy outlining their intention to discriminate in employment, and should be retained.

6.1.108 This combination of feedback supports a cautious approach to reform in this area to be adopted that (a) acknowledges the genuine need for religious educational institutions to ensure that

their staff share the faith and values of the school of the school and (b) guards against unfair treatment of potential staff on the basis of inherent attributes such as sexual orientation or gender identity.

6.1.109 For these reasons, SALRI recommends that the existing exemption available to religious educational authorities with respect to employment in s 34(3) of the *EO Act 1984* — which permits discrimination on the grounds of sex, sexuality and chosen gender — be replaced with an exemption that permits discrimination by religious educational authorities in the area of employment on the basis of religious belief.

6.1.110 This replacement exemption should be based on s 51 of the *Anti-Discrimination Act 1998* (Tas) but should preserve the requirement in the current South Australian provision for the religious educational authority to have a written policy outlining the basis on which it seeks to rely upon the exemption, and that this policy be made publicly available.

6.1.111 The replacement exemption should also include a requirement that the discrimination on the grounds of religious belief be not unreasonable in the circumstances. Guidance should be provided as to what is reasonable in the circumstances, as in s 25(5) of the *Anti-Discrimination Act 1991* (Qld) which requires consideration of: (a) whether the action taken or proposed to be taken by the employer is harsh or unjust or disproportionate to the person's actions; and (b) the consequences for both the person and the employer should the discrimination happen or not happen.

6.1.112 SALRI notes that this approach appears to be in line with the submissions received from the Archbishop of Adelaide and other submission makers who have focused on the need for staff in religious schools, particularly those responsible for communicating with students and families, to share the faith and values of the school. For example, the Archbishop of Adelaide told SALRI:

Certainly some institutions, such as schools, discriminate in the services they provide and the people they employ. However, from an Archdiocesan point of view, such discrimination only occurs when and if permitted by law and, we would submit, only insofar as such discrimination is necessary to facilitate the provision of relevant services in a religious way. That is, insofar as there is discrimination it is not on the basis that a specific person should be excluded because of the presence of some or other unreasonably disqualifying factor, but rather because they lack a relevant feature, such as for example the skills to teach religious education.²³⁷

6.1.113 The Archbishop went on to observe:

As has been submitted elsewhere, Catholic education contributes to society in various ways

The advancement of [the objectives of Catholic education] necessitates, in practical reality (and allowing for the possibility for exceptions) that the persons who teach these principles, apart from their curricular activities, have a knowledge and belief in religious principles at the heart of the institution at issue.

So to say is not to suggest that people who do not share those beliefs should necessarily be

²³⁷ Issues Paper Submission No 363.

discriminated against; rather, the experience of those trained in human resources in the Catholic Education sector would easily attest to the fact that it would pose undue complexity to adopt a policy which did not require a teacher to at least have a working knowledge of, and ability to, teach students in a religious context.

6.1.114 SALRI notes that the changes recommended to this exception would preserve the exception in s 34(2) which provides that the unlawful discrimination protections relating to sex, sexuality and chosen gender do not apply

to discrimination on the ground of sex, chosen gender or sexuality in relation to employment or engagement for which it is a genuine occupational requirement that a person be a person of a particular sex, a person of a chosen gender or a person of a particular sexuality.

6.1.115 This would preserve the right for religious educational institutions to specify that particular roles in their school are required to be filled by a person of a particular sex sexual orientation or gender identity.

Applying the human rights analytical framework

6.1.116 SALRI recognises that religious bodies in South Australia, including religious schools, have the right to express their religious beliefs and to act in accordance with the principles of their religion and for parents to educate their children in line with those principles and beliefs.

6.1.117 SALRI also recognises that LGBTIQ people have the right to be treated equally when seeking employment and accessing education, and not detrimentally due to their inherent personal attributes including their sexual orientation and gender identity.

6.1.118 These two fundamental rights can coexist, if great care is taken to ensure that any limitations of either right are necessary and proportionate, having regard to the human rights analytical framework described above.

6.1.119 In reaching the above views, SALRI applied the human rights analytical framework described above and determined that the recommended reforms:

- (a) Recognise the right to freedom of religious belief as a fundamental human right and one that should be protected in the context of the *EO Act 1984* by (i) permitting discrimination by religious educational authorities in employment with respect to religious belief (rather than sexual orientation or gender identity) and (ii) retaining the existing provisions that exempt religious bodies from the unlawful discrimination provisions with respect to the training, education, ordination or appointment of priests, ministers of religion or members of a religious order, the administration of a body established for religious purposes (such as a church, synagogue or mosque).

- (b) Have regard to rights of non-discrimination recognised under international law, and articulated recently by the UN Human Rights Commissioner²³⁸ and the Australian Human Rights Commission²³⁹ by improving the scope of the existing legal protections against discrimination on the grounds of sexual orientation and gender identity.
- (c) Focus on addressing the well documented harm caused by discrimination on the grounds of sexual orientation and gender identity to LGBTIQ employees, LGBTIQ students, or students with LGBTIQ families.
- (e) Have been developed having regard to whether any alternative mechanisms are available by evaluating and rejecting the other reform options that would remove the current exceptions for religious bodies in their entirety or make them available only on an individual application basis.

6.1.120 SALRI also notes that in accordance with Recommendation 10, it supports consideration of a more positive recognition of the freedom of religious belief as a protected attribute in the *EO Act 1984* as part of a wider, comprehensive and independent review of the *EO Act 1984*.

Recommendation 2: Clarify that exceptions relating to religious bodies do not extend to provision of public services including health and education

SALRI recommends that paragraph (c) be removed from the existing religious bodies exemption in s 50(1) of the *EO Act 1984* to clarify that it does not apply to discrimination undertaken by religious bodies with respect to the provision of public services, such as health and education.

This would ensure that this general exception could not be relied upon to exempt discrimination on the grounds of sexual orientation or gender identity undertaken with respect to current or potential students or patients.

In making this recommendation, SALRI emphasises that the existing exemption available to religious bodies in ss 50(1)(a)-(ba) of the *EO Act 1984* should remain in place, insofar as it relates to the ordination or appointment of priests, ministers of religion or members of a religious order; the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order; or the administration of a body established for religious purposes in accordance with the precepts of that religion.

In the event that the above recommendation is not adopted, an alternative option would be to list the specific services that should be removed from the potential scope of the exception in s 50(1)(c), following the approach adopted in s 37 of the *Sex Discrimination Act 1984* (Cth), which excludes aged care services from the scope of the general religious bodies exception. Specific services that should be excluded include (at a minimum) education, health, housing and adoption services.

²³⁸ UN Office of the High Commissioner for Human Rights, above n 194, 15.

²³⁹ Australian Human Rights Commission, above n 202.

Recommendation 3: Replace religious educational authorities exception with one based on religious belief

SALRI recommends that the existing exemption available to religious educational authorities with respect to employment in s 34(3) of the *EO Act 1984* — which permits discrimination on the grounds of sex, sexuality and chosen gender — be replaced with an exemption that permits discrimination by religious educational authorities in the area of employment on the basis of religious belief.

This replacement exemption should be based on s 51 of the *Anti-Discrimination Act 1998* (Tas) but should preserve the requirement in the current South Australian provision for the religious educational authority to have a written policy outlining the basis on which it seeks to rely upon the exemption, and that this policy be made publicly available.

The replacement exemption should also include a requirement that the discrimination on the grounds of religious belief be not unreasonable in the circumstances. Guidance should be provided as to what is reasonable in the circumstances, as in s 25(5) of the *Anti-Discrimination Act 1991* (Qld) which requires consideration of: (a) whether the action taken or proposed to be taken by the employer is harsh or unjust or disproportionate to the person's actions; and (b) the consequences for both the person and the employer should the discrimination happen or not happen.

6.2 Sport

Nature of the Existing Exceptions

6.2.1 Section 48 of the *EO Act 1984* provides that it is lawful to discriminate on the ground of **sex** in relation to sporting activity in the following situations:

- (a) if the sporting activity is one in which the strength, stamina or physique of the competitor is relevant to the outcome of the competition;
- (b) if the exclusion is genuinely intended to facilitate or increase the participation of persons, or a class of persons, of a particular sex in the sporting activity and—
 - (i) it is unlikely that those persons will participate, or that there will be an increase in participation by those persons, in the sporting activity if the exclusion is not made (having regard to all of the circumstances of the persons or class of persons); and
 - (ii) there are reasonable opportunities for excluded persons to participate in the sporting activity in another competition;
- (c) if—
 - (i) the exclusion is reasonably required to enable participants in the sporting activity to advance to competitions at a level higher than that in which the exclusion is to occur (being a requirement that is due to the structure of, or restrictions in, the higher level competitions); and
 - (ii) there are reasonable opportunities for excluded persons to participate in the sporting activity in another competition;

(d) in such other circumstances as may be prescribed by the regulations.

6.2.2 It is important to note that this provision does not allow for lawful discrimination on the basis of ‘chosen gender’. This means that, under the language of the current *EO Act 1984*, it is not lawful to discriminate against a person who ‘identifies on a genuine basis as a member of the opposite sex by assuming characteristics of the opposite sex’ in relation to sporting competitions.²⁴⁰ As noted above, SALRI has recommended that the term ‘chosen gender’ be replaced with the term ‘gender identity’, as defined in the *Sex Discrimination Act 1984* (Cth) as ‘the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person’s designated sex at birth’.²⁴¹

Rationale Behind the Sports Related Exceptions

6.2.3 As explained by the Australian Equality Coalition, the policy underpinning exceptions to discrimination on certain grounds in the area of sport is to encourage fair participation in competitive sporting activity by all groups within the community.²⁴² Discrimination on the grounds of sex, age and disability is seen as acceptable as these factors ‘can lead to significant differences in performance ability that would effectively negate sporting participation by some social groups.’²⁴³

6.2.4 The intersection between discrimination in sporting competitions and by sports clubs or associations should also be noted, recalling that it is currently generally unlawful for clubs or associations to discriminate in membership on the basis of sex, chosen gender or sexuality.²⁴⁴

Concerns with the Scope of the Existing Exceptions for Sports Clubs

6.2.5 In its 2009 Discussion Paper, the Australian Coalition for Equality submitted that:

Sport has traditionally provided for single sex competitions, having regard to stamina, strength and physique of competitors. This can compromise the ability of transgender and intersex persons to participate according to the sex with which they identify.

ACE believes anti-discrimination laws should provide, to the greatest extent possible, for the effective and fair participation of transgender and intersex people in competitive sport according to the sex with which they identify.²⁴⁵

²⁴⁰ Equal Opportunity Commission SA, Audit Report Submission No 10; Australian Human Rights Commission, *Sexual Orientation, Gender Identity and Intersex Rights National Consultation*, (6 February 2015) 5. Note the recommendation of SALRI to change the term ‘chosen gender’ to ‘gender identity’ and add an additional provision for intersex. This amendment would not affect the operation of this section.

²⁴¹ *Sex Discrimination Act 1984* (Cth) s 4.

²⁴² Australian Coalition for Equality Discussion Paper, 10.

²⁴³ *Ibid.*

²⁴⁴ *EO Act 1984* s 35.

²⁴⁵ Australian Coalition for Equality Discussion Paper, 7.

6.2.6 A similar view was expressed by Natalya Giffney who told SALRI that:

I support all transgender people having a legal right to participate in single sex/gender sports at all levels of competition, including transgender women.²⁴⁶

6.2.7 SALRI has heard from a number of submission makers, including the South Australian EOC and the South Australian Office for Recreation and Sport about the potential complexities arising from the application of provisions designed to permit sex-based discrimination in sport to gender diverse and intersex people. For example, the Office for Recreation and Sport told SALRI that:

Many sports are structured around competition where strength, stamina and physique must be considered particularly with respect to fairness and safety.

Gender and age are the bases that are commonly used for the separation between certain competitions. Therefore as it is not lawful to discriminate against a person who identifies, on a genuine basis, as a member of the opposite sex, associated risks may arise of this person competing, despite an unfair advantage due to strength, stamina and physique.²⁴⁷

6.2.8 The EOC has elsewhere acknowledged that:

the issues relating to participation in sport by transgender persons are complex and there remains a need to balance the right of individuals to participate in sport as their chosen gender against the right of individuals to compete in a fair competition which aligns with their strength, stamina and physique and in which other competitors do not have an unfair advantage in that sense.²⁴⁸

6.2.9 Despite the *EO Act 1984* prohibiting discrimination on the basis of chosen gender in sport, the EOC has received a number of enquiries relating to transgender people participating in sporting competitions in South Australia, often in relation to requirements to provide a birth certificate or Gender Recognition Certificate. The EOC suggests that such requirements by sporting clubs may be unlawful under the *EO Act 1984*.

6.2.10 The EOC has told SALRI that one of most concerning existing rules about participation of intersex people in sport relates to elite competitive levels such as the national or Olympic level.²⁴⁹ Frameworks such as the International Olympic Committee's statements on sex reassignment and female hyperandrogenism restrict participation in sporting competitions on the basis of gender.²⁵⁰

²⁴⁶ Issues Paper Submission No 154.

²⁴⁷ Issues Paper Submission No 361 (Office for Recreation and Sport).

²⁴⁸ Equal Opportunity Commission SA, Audit Report Submission No 33, 6.

²⁴⁹ Ibid 6.

²⁵⁰ International Olympic Committee, *Statement of the Stockholm consensus on sex reassignment in sports*, (12 November 2003) International Olympic Committee <http://www.olympic.org/documents/reports/en/en_report_905.pdf>; Medical and Scientific Department, *IOC Regulations on Female Hyperandrogenism*, (22 June 2012), International Olympic Committee, <http://www.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2012-06-22-IOC-Regulations-on-Female-Hyperandrogenism-eng.pdf>.

Such provisions may lead ‘elite women athletes with intersex variations to be excluded from competition, even while the IAAF [International Association of Athletics Federations] evidence shows that there is no scientific basis for the exclusion of women athletes with intersex variations.’²⁵¹ The current provisions of the *EO Act 1984*, as amended in 2013, would appear to mirror this approach, making it lawful to discriminate on the grounds of sex if the discrimination enables participants to progress to elite level (national and international) competitions.²⁵² This allows sporting associations to conduct single-sex competitions where qualification to an elite level of the sport must occur through single-sex qualification tournaments.

6.2.11 These features of the current *EO Act 1984* may operate to preclude or dissuade participation in sport by gender diverse or intersex South Australians, and prevent them from bringing a discrimination complaint under the *EO Act 1984*.

Reform Options

Expanding the current exception to apply to discrimination on the grounds of gender identity

6.2.12 SALRI notes that in its February 2016 report entitled *Laws Regulating Sexual Reassignment and Registration of Sex and Gender*,²⁵³ it recommended a process for changing a person’s registered sex or gender on the Births Deaths and Marriages Registrar that would be based on the existing change of name provisions and would not require sexual reassignment surgery or other medical evidence. This would suggest that once a person has changed his or her registered sex or gender on the Births Deaths and Marriages Register, it would be unlawful to discriminate against that person in the area of sport on the grounds that their registered sex or gender is different to their birth sex or physical sex characteristics.

6.2.13 SALRI recognises that gender diversity takes many forms and can be manifest through a range of hormonal and physiological changes, some of which may also alter a person’s strength, stamina or physique. However, a transition from one sex or gender to another without medical intervention, as recognised under the changes proposed by SALRI, may also give rise to concerns that a gender diverse person may have an unfair advantage in terms of strength, stamina or physique when it comes to competitive sporting activity.

6.2.14 It may be that, having regard to this change, it is considered necessary to expand the existing exception relating to sport to include discrimination the grounds of gender identity. This is the approach adopted at the Commonwealth level, where a person can also change the sex or gender on

²⁵¹ Australian Human Rights Commission, above n 202, 21 quoting M Carpenter for Organisation Intersex International Australia, Submission No 6, Australian Human Rights Commission, *Sexual Orientation, Gender Identity and Intersex Rights National Consultation*, (1 February 2015) 13.

²⁵² *EO Act 1984* s 48(c).

²⁵³ South Australian Law Reform Institute, *Laws Regulating Sexual Reassignment and Registration of Sex and Gender* (February 2016) <https://law.adelaide.edu.au/research/law-reform-institute/documents/bdm_sra_report.pdf>.

their passport without the requirement to demonstrate surgery or medical intervention. Section 42(1) of the *Sex Discrimination Act 1984 (Cth)* provides:

(1) Nothing in Division 1 or 2 renders it unlawful to discriminate on the ground of sex, gender identity or intersex status by excluding persons from participation in any competitive sporting activity in which the strength, stamina or physique of competitors is relevant.

6.2.15 SALRI did not receive any submissions supporting this particular reform option, but notes that in its 2009 Discussion Paper, the Australian Coalition for Equality’s suggested that if sports based exceptions relating to discrimination on the grounds of sex or gender identity are included in anti-discrimination law (which they advised against) they should only be available where:

- the strength, stamina or physique of the competitors is relevant;
- a person would have a significant performance advantage over other competitors arising from the person’s sex or past sex (notwithstanding the person’s current gender); and
- any exclusion is reasonable in the circumstances.²⁵⁴

Clarifying scope of sports exception

6.2.16 In the Issues Paper, SALRI noted that many other Australian jurisdictions make it clear that the exceptions to sex-based discrimination in sport only apply to *competitive sporting activity*²⁵⁵ and do not apply to other areas relating to sport, including employment opportunities, coaching or umpiring.²⁵⁶ These jurisdictions also make it clear that the exception does not apply to sport competitions for children under 12.

6.2.17 For example, s 42 of the *Sex Discrimination Act 1984 (Cth)* provides that:

(1) Nothing in Division 1 or 2 renders it unlawful to discriminate on the ground of sex, gender identity or intersex status by excluding persons from participation in any competitive sporting activity in which the strength, stamina or physique of competitors is relevant.

(2) Subsection (1) does not apply in relation to the exclusion of persons from participation in:

- (a) the coaching of persons engaged in any sporting activity;
- (b) the umpiring or refereeing of any sporting activity;
- (c) the administration of any sporting activity;
- (d) any prescribed sporting activity; or

²⁵⁴ Australian Coalition for Equality Discussion Paper, 10.

²⁵⁵ See, for example, *Equal Opportunity Act 2010 (Vic)* s 72; *Anti-Discrimination Act 1991 (Qld)* s 111.

²⁵⁶ *Ibid.*

(e) sporting activities by children who have not yet attained the age of 12 years.

6.2.18 As the current exception in s 48 of the *EO Act 1984* refers to ‘sporting activity’ without defining the term, a possible amendment consistent with interstate practice would be to make it clear that the exception *does not extend* to the areas of coaching, umpiring, administration or to competitions for children under the age of twelve.

6.2.19 Such an amendment has received support from the Office for Recreation and Sport.²⁵⁷

6.2.20 It is also consistent with the *Play by the Rules* initiative first developed by the South Australian Department for Sport and Recreation in 2001 as an interactive education and information website (see <www.playbytherules.net.au>) on discrimination, harassment and child protection in sport. Its website provides that:

Play by the Rules is now a unique collaboration between the Australian Sports Commission, Australian Human Rights Commission, all state and territory departments of sport and recreation, all state and territory anti-discrimination and human rights agencies, the Office of the Children’s Guardian and the Australian and New Zealand Sports Law Association (ANZSLA). These partners promote *Play by the Rules* through their networks, along with their own child safety, anti-discrimination and inclusion programs.

Play by the Rules provides information, resources, tools and free online training to increase the capacity and capability of administrators, coaches, officials, players and spectators to assist them in preventing and dealing with discrimination, harassment, child safety and integrity issues in sport.²⁵⁸

6.2.21 *Play by the Rules* has also developed a range of materials specifically designed at addressing homophobia and promoting inclusion in sport. The website describes these materials as including:

The Anti-homophobia Inclusion Framework for Australian Sport contains guidance on how sports can implement policies based on key pillars and action areas. Five of the major sporting codes in Australia have committed to creating such policies in 2014.

The Inclusive Sport Survey Report is a study completed by Sport and Recreation Services on the sport experiences of lesbian, gay, bisexual, transgender and intersex people living in the ACT and its surrounding regions.

Our ‘Got an Issue’ section has information on ‘homophobia and sexuality discrimination’ which includes examples of sexuality discrimination, harassment and homophobia in sporting clubs. This section has information for ‘Administrators’, ‘Coaches’ and ‘Players’, including: what to do now, what to do next and options/links for more information.

Our online ‘Interactive scenarios’ on ‘Homophobia and sexuality discrimination’ provides: myths and stereotypes about homosexuality; the rights and responsibilities of club administrators, coaches and players in relation to sexuality issues in sport; and the actions administrators can take to

²⁵⁷ Issues Paper Submission No 361 (Office of Recreation and Sport).

²⁵⁸ Further information is available on the *Play by the Rules* website <<http://www.playbytherules.net.au/about-us>>.

provide positive leadership.

Guidelines with respect to gender diverse people and sport

6.2.22 SALRI has heard from a number of submission makers that are concerned about the complexities associated with gender-identity based discrimination in competitive sporting activity.

6.2.23 In Victoria, this issue has been addressed by the production of a *Guideline: Transgender people and sport – complying with the Equal Opportunity Act 2010* produced in 2015 by the Victorian Equal Opportunity and Human Rights Commission, pursuant to s 148 of the *Equal Opportunity Act 2010* (Vic). Under this provision, the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) may issue practice guidelines on any matter relating to the Act.²⁵⁹ As noted above, s 149 of the Act makes it clear that any Practice Guidelines are not legally binding but a court or the Tribunal may consider evidence of compliance with any Practice Guidelines if relevant to any matter before the court or Tribunal under this Act.

6.2.24 This Guideline outlines the relevant obligations under the Victorian *Equal Opportunity Act 2010* regarding discrimination against transgender people in sport. It provides practical guidance for sporting clubs and organisations about promoting an inclusive environment, being proactive in preventing discrimination and responding appropriately if it occurs. For example, the Guideline provides information on exceptions in the Act relating to participation in single-sex competitions, which may allow discrimination on the basis of sex or gender identity in some circumstances.

6.2.25 The Guideline also offers practical information about gender identity issues more broadly and provides support about how to approach issues that people might not be familiar with or find challenging. For example, the Guideline outlines the range of considerations that a sports club may need to consider when seeking to rely upon the sports-related exemption in the Victorian Act. These include:

What are the key aspects of your sport that make strength, stamina or physique relevant?

What are the relevant differences between the sexes in strength, stamina or physique? Will differences in size and strength give players of one sex a competitive advantage?

Even if you’ve established that the strength, stamina and physique of players is relevant to your sport, you may also want to consider whether it’s necessary to apply the exception in this case. Consider:

If a transgender person is seeking to participate, would having them involved in the competition lead to an unfair advantage? In what way?

Does the person’s individual circumstances, skill level, experience and ability indicate that the person

²⁵⁹ Victorian Human Rights and Equal Opportunity Commission, *Guidelines on Transgender People and Sport* (2015) <<http://www.humanrightscommission.vic.gov.au/index.php/our-resources-and-publications/eoa-practice-guidelines/item/1125-guideline-transgender-people-and-sport-complying-with-the-equal-opportunity-act-2010>>.

will not have a competitive advantage in the relevant game?

6.2.26 The Guidelines also provide a range of case study examples, including case law examples, as well as detailed information relating to matters such as collecting information from players, use of facilities and uniforms.

6.2.27 The development of similar guidelines in South Australia could help address the complexities identified above as arising from the current provisions.

SALRI's View

6.2.28 Under the *EO Act 1984* it is presently not lawful to discriminate on the grounds of chosen gender or sexual orientation with respect to sport. However, it is lawful to discriminate on the grounds of sex, in certain circumstances, for example in sporting activity where strength, stamina or physique of competitors is relevant.

6.2.29 While this should provide protection against discrimination with respect to LGBTIQ people, SALRI has heard that sports clubs and individuals may struggle with the complexities of applying the current provisions, particular with respect to gender diverse people.

6.2.30 These complexities have also been encountered interstate, and initiatives such as *Play by the rules* have been established to provide practical guidance to sports clubs and officials. In Victoria, this guidance is supplemented by an official Guideline, prepared by VEOHRC under the Victorian *Equal Opportunity Act 2010* (Vic).

6.2.31 SALRI supports and recommends implementing this approach in South Australia.

6.2.32 It further recommends the amendment of the existing exception in s 48 of the *EO Act 1984* to clarify that the exception applies only to competitive sporting activity, and does not apply to sporting competitions for children under twelve and other aspects of sport, such as coaching, umpiring or administration.

6.2.33 SALRI also notes that as a result of its previous recommendations relating to the legal recognition of sex and gender, it may be necessary to consider extending the current exception relating to sport to apply to discrimination on the grounds of gender identity as well as with respect to sex. As it received no submissions in support of this approach, SALRI does not recommend amending the current provisions, but suggests that if such an extension of the current exception is considered necessary, it should only be available where:

- the strength, stamina or physique of the competitors is relevant;
- a person would have a significant performance advantage over other competitors arising from the person's sex or past sex (notwithstanding the person's current gender); and

- any exclusion is reasonable in the circumstances.²⁶⁰

Recommendation 4: Practice guidelines for sport

In line with Recommendation 9 (below), SALRI recommends that the Equal Opportunity Commission issue practice guidelines with respect to gender identity and sport, having regard to the *Play by the rules* initiative and other relevant sources

Recommendation 5: Clarifying the scope of sporting activity

SALRI recommends that s 48 of the *EO Act 1984* should be amended to clarify that ‘sporting activity’ does not include:

- (a) the coaching of persons engaged in any sporting activity;
- (b) the umpiring or refereeing of any sporting activity;
- (c) the administration of any sporting activity;
- (d) any prescribed sporting activity; or
- (e) sporting activities by children who have not yet attained the age of 12 years.

6.3 Health Care

Nature of the Existing Exceptions

6.3.1 Section 79A contains a specific exemption from the general prohibition on discrimination on the grounds of disability contained in Part 5 of the *EO Act*. The term ‘disability’ is defined in s 5 of the *EO Act* to include ‘the presence in the body of organisms capable of causing disease or illness’. Section 79A provides that discrimination on the ground of disability is lawful if it,

- (a) is directed towards ensuring that an infectious disease is not spread; and
- (b) is reasonable in all the circumstances.

6.3.2 As noted above, similar exceptions exist in other Australian jurisdictions.

6.3.3 Section 50 also contains a general religious bodies exemption that applies to the general prohibition on discrimination on the grounds of sex, sexuality and chosen gender in Part 3 of the *EO Act*. As discussed in detail above s 50(1)(c) provides that it is not unlawful to discrimination with respect to ‘any other practice of a body established for religious purposes that conforms with the precepts of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.’

²⁶⁰ Australian Coalition for Equality Discussion Paper, 10.

Concerns with the Scope of the Existing Exceptions for Health Care

6.3.4 SALRI has heard these two exceptions give rise to particular concerns for some members of the LGBTIQ communities in South Australia in so far as they relate to the provision of health services and eligibility for blood donation.

Blood donation

6.3.5 In its submission, the EOC noted that the ‘infectious diseases’ exception in s 79A of the *EO Act 1984* raises concerns²⁶¹ particularly in the area of blood donation, where it has been relied upon to exclude men who have had homosexual contact within the previous 12 months from donating blood on the grounds that they present a greater risk of contracting HVI.²⁶² The EOC argues that this measure is directed to avoiding the spread of HIV and is reasonable, based on statistics such as the following:

HIV has been concentrated among gay men in Australia since the epidemic began; 75% of all HIV infections diagnosed in Australia with recorded exposure category are due to male homosexual contact.

HIV continues to predominantly affect gay and other [men who have sex with men] in Australia with 70% of all diagnoses in 2013 among this group.²⁶³

6.3.6 SALRI also received feedback strongly supporting the continuation of the exception in so far as it operated to exclude gay men from donating blood. For example, Jewel Hanson strongly opposes ‘practising homosexual men donating blood’.²⁶⁴ Mandy Shepard similarly submitted:

Also it is risky to make the Red Cross accept blood donations from practising homosexuals. The health risks are well documented from this lifestyle and if the Red Cross then has to do extra screens for Aids and other diseases on the blood donated so the community is keep safe and not harmed by the donation, then it will have cost implications to the running of this vital organisation.²⁶⁵

6.3.7 Family Voice Australia also expressed concern with any change to these exceptions:

SALRI has recommended that s 79A be watered down to prevent discrimination against gay men. Such a move places political correctness ahead of the safety of the blood supply system, which should be the paramount concern. The health of the recipients of donated blood should not be compromised to appease homosexuals. Given that 17% of gay men have HIV and 70% of new HIV cases are gay men, restrictions placed upon blood donation by active gay men are entirely

²⁶¹ See Jess Attard, Audit Report Submission No 28, South Australian Law Reform Institute, *LGBTIQ Reference* (2015) (‘Submission No 28’); Submission No 40, 4.

²⁶² Audit Report Submission No 28. See also Robert Simms, ‘Greens call to scrap gay blood donor ban’ (Media Release, 28 Oct 2015) <<http://robert-simms.greensmps.org.au/content/media-releases/greens-call-scrap-gay-blood-donor-ban>>.

²⁶³ The Kirby Institute and Centre for Social Research in Health, *HIV in Australia, Annual Surveillance Report 2014 Supplement* (2014) The Kirby Institute, <https://kirby.unsw.edu.au/sites/default/files/hiv/resources/HIVASRsuppl2014_online.pdf>.

²⁶⁴ Issues Paper Submission No 218.

²⁶⁵ Issues Paper Submission No 46.

appropriate, justifiable and must not be outlawed. A note should be added to the legislation that given the high incidence of HIV in gay men it is permissible to restrict donation of blood by them.²⁶⁶

6.3.8 However, SALRI has also heard that this provision can have significant discriminatory effects on gay men by reproducing social stigma and homophobic assumptions about a person’s infection status. One submission comments:

Current laws also discriminate against gay men giving blood. I assume this is in relation to AIDs [sic], but since AIDs can be contracted by men, women, gay, straight and all else then this is just a case of purposely excluding a group in the population and, doubly, calling them unclean.²⁶⁷

6.3.9 The Australian Red Cross Blood Service maintains that ‘the Blood Service does not discriminate based on sexual orientation’, but rather bases its position on ‘safety reasons based on medical research’.²⁶⁸ The Australian Red Cross Blood Service explains:

Asking men who have sex with men to wait 12 months before donating blood is based on two factors; the statistically higher incidence of some blood borne diseases (including HIV) in this group, and the existence of infections undetectable by testing.

The reasoning behind the screening practice is sound, as patients rely on donated blood to be as safe as possible. Any risk that the blood could carry disease is a risk borne completely by the patient who receives the blood, and that could be you or someone you care about.²⁶⁹

6.3.10 In 2012, the Australian Red Cross Blood Service established an independent expert committee to conduct a study on the appropriateness and necessity of the 12-month deferral period for men who have sexual contact with other men. The report, entitled *Review of Blood Donor Referrals Relating to Sexual Activity*, recommended that the deferral time be reduced to six months.²⁷⁰ This recommendation was, however, rejected by the Therapeutic Goods Administration.²⁷¹

Provision of Health Services by Religious Bodies

6.3.11 The Australian Human Rights Commission recently found that ‘LGBTI people experience both the fear of, and actual, discrimination in essential service provision. This includes primary healthcare, crisis intervention, aged care, mental health and disability service.’²⁷² This fear and anxiety can lead to ‘reduced health seeking behaviours and can leave providers in a position of being unable

²⁶⁶ Issues Paper Submission No 358 [footnotes omitted].

²⁶⁷ Audit Report Submission No 28.

²⁶⁸ Jennifer Williams, *Blood Service Deferrals* (2015) Australian Red Cross Blood Service, <<http://www.donateblood.com.au/blood-service-deferrals>>.

²⁶⁹ Ibid.

²⁷⁰ *Review of Blood Donor Referrals Relating to Sexual Activity* (2012) <<http://www.bloodrulesreview.com.au/>>.

²⁷¹ Audit Report Submission 40, 5.

²⁷² Australian Human Rights Commission, above n 202, 38.

to provide an appropriate service as a consequence of clients' reluctance to disclose information about their sexuality, gender status or intersex status.²⁷³

6.3.12 Submissions to the Australian Human Rights Commission's report further found that concerns mostly related to the discriminatory provision of healthcare by religious institutions. SALRI notes that the *EO Act 1984* enables South Australian religious institutions to discriminate in providing health-related services under s 50(1)(c), discussed above.²⁷⁴

6.3.13 Section 50(1)(c) of the *EO Act 1984* provides religious institutions in South Australia with an exemption to discriminate against LGBTIQ people where the discrimination 'conforms with the precepts of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.'²⁷⁵ The EOC and some submission makers raised concerns that this provision could potentially extend to the provision of health care to LGBTIQ people, for the same reasons as those described above with respect to the provision of religious education. SALRI notes that the Archbishop of Adelaide does not accept that the current exception in s 50(1)(c) can be used in this way.

6.3.14 In other jurisdictions, this concern has been alleviated by provisions that specifically link government funding for religious care institutions to non-discrimination in the provision of such services.²⁷⁶ The inclusion of such a condition was suggested by a number of submissions received by SALRI.²⁷⁷

Exemptions from anti-discrimination legislation for religious bodies must be removed from the *Equal Opportunity Act 1984*, particularly if those bodies receive State funding or any exemptions from, or reduction in, State rates and charges. This is more important than ever as government funded services contract and people have correspondingly few choices other than to use services from religious providers.²⁷⁸

6.3.15 SALRI also heard from a number of submission makers who supported the continuation of an exception that would permit religious bodies to discriminate with respect to the provision of health services. For example Rob and Margaret Lineage said:

The *International Covenant on Civil and Political Rights* (Article 18 (4)) gives parents the right to determine their children's moral education, and this right should continue to be upheld by retaining the current exemptions in the *Equal Opportunity Act*. These exemptions could also apply to Catholic hospitals who choose not to perform abortions, because of their strongly held, Biblically-based beliefs on the

²⁷³ Ibid 37, quoting ACON, Submission No 11, Australian Human Rights Commission, *Sexual Orientation, Gender Identity and Intersex Rights National Consultation*, (6 February 2015) 3.

²⁷⁴ *EO Act 1984* s 50(1)(c).

²⁷⁵ Ibid s 50(c).

²⁷⁶ *Sex Discrimination Act 1984* (Cth) s 37(2).

²⁷⁷ Audit Report Submission No 38, 2; Audit Report Submission No 27, 1.

²⁷⁸ Audit Report Submission No 27, 1.

value of every human being, right from the time of conception. There are other places performing abortions that women could go to, if that is their wish, having considered all sides of the issue. Therefore, it should be the right of the Catholic hospitals to have an exemption on employing doctors and nurses who openly support and promote abortion. Exemptions in the *Equal Opportunity Act* (eg, sections 34, 50 and 85ZM) correctly recognise the right to freedom of religion. Therefore the exemptions for religious organisations should be maintained

SALRI’s View

6.3.16 SALRI has considered the submissions provided above raising concerns about the existing exception in s 79A relating to infectious diseases. While SALRI acknowledges the concerns arising with respect to the application of this provision in relation to blood donations, it also notes that the Therapeutic Goods Administration, which has a regulatory function with respect to blood donor screening tests, has rejected the Australian Red Cross Blood Service’s recent recommendations for changes to the exclusion periods applying to gay men. This suggests that amending the relevant South Australian provision at this time may not address the concerns raised in the submissions received. For this reason, SALRI does not recommend any amendments to s 79A but rather recommends that the proposed guidelines function recommended above be utilised to enable the South Australian EOC to issue practice guidelines with respect to s 79A. These should include reference to current, reliable statistical data relating to the prevalence of infectious diseases including HIV and address any myths and stereotypes giving rise to discrimination against LGBTIQ people.

6.3.17 With respect to the provision of health services by religious bodies, in line with Recommendation 2 above, SALRI recommends that s 50(1)(c) of the *EO Act 1984* be removed or reformed to make it clear that the exception for religious bodies does not extend to the provision of health services.

6.3.18 SALRI considers that this recommendation is supported by a similar human rights analysis undertaken with respect to the exceptions relating to religious schools. An amendment of this nature would not disturb the other religious bodies exceptions contained in s 50(1).

Recommendation 6: Practice guidelines for health

Having regard to Recommendation 9, SALRI recommends that the Equal Opportunity Commission issue practice guidelines with respect to the health care related exception in s 79A, that should include reference to current, reliable statistical data relating to the prevalence of infectious diseases including HIV and address any myths and stereotypes giving rise to discrimination against LGBTIQ people.

Recommendation 7: Limitation on exception for religious bodies

Having regard to Recommendation 2, SALRI recommends that s 50(1)(c) of the *EO Act 1984* should be amended or removed to make it clear that the exception for religious bodies does not extend to the provision of health services.

6.4 Assisted Reproductive Treatment

Nature of the Existing Exceptions

6.4.1 The *EO Act 1984* currently excludes certain services from the scope of the protective provisions in the Act, including those in Part 3 relating to discrimination on grounds of sex, sexuality and chosen gender.

6.4.2 Section 5(2) of the *EO Act 1984* provides that

(2) A reference in this Act ... to the provision of a service does not include, and will be taken never to have included, the carrying out of either of the following fertilisation procedures: (a) artificial insemination; or (b) the procedure of fertilising an ovum outside the body and transferring the fertilised ovum into the uterus.

Concerns with the Scope of the Existing Exceptions for Health Care

6.4.3 Section 5(2) of the *EO Act 1984* operates in conjunction with provisions of the *Assisted Reproductive Treatment Act 1988* (SA) to limit access to ART on certain criteria including sexual orientation and gender identity.²⁷⁹ The impact of these laws was described by Luran Wilkes as follows:

I think it is disgraceful that my partner and I are forced to travel interstate to access assisted reproductive treatment. This greatly increases the financial burden on us and is logistically very challenging. None of my heterosexual friends have to go through this. It is unacceptable that same sex couples need to prove that they have lived together for 3 years in order to both be on the birth certificate. Heterosexual couples using a sperm donor do not have to do this. It is blatant discrimination and has significant ramifications for our lives and how we parent our children. It is not in the interests of the child at all. We need immediate change in this state. It is an embarrassment that we treat our same sex families so incredibly poorly. I support changing the laws immediately to allow same sex couples to access ART in SA.²⁸⁰

6.4.4 Such criticism is compelling. In the Audit Report, SALRI recommended amending the ART Act to ensure that people seeking to undergo ART procedures must not be discriminated against on the basis of their sexual orientation, relationships or gender identity and to amend the *EO Act 1984* correspondingly.²⁸¹

6.4.5 SALRI has since issued a further Report addressing these issues, that recommends that the relevant provisions of the *Assisted Reproductive Treatment Act 1988* (SA) and the *Family Relationships Act 1984* (SA) should be amended to permit access to ART by singles and non-heterosexual couples without the need to demonstrate ‘medical infertility’ and without the need for couples to satisfy cohabitation requirements.

²⁷⁹ Stephen Page, Audit Report Submission No 34, South Australian Law Reform Institute, *LGBTIQ Reference* (6 July 2015), 5.

²⁸⁰ Issues Paper Submission No 15.

²⁸¹ Audit Report, above n 2, 85, rec 2.2.

6.4.6 In accordance with this Report, SALRI recommends the repeal of s 5(2) of the *EO Act 1984*.

Recommendation 8: Remove exception for Assisted Reproductive Treatment

SALRI recommends the repeal of s 5(2) of the *EO Act 1984*, which currently excludes assisted reproductive treatment from the definition of ‘services’ in the Act.

6.5 Clubs and Associations

6.5.1 Section 35 of the *EO Act 1984* makes it unlawful for clubs and associations to discriminate in membership or provision of services or benefits on the basis of sex, chosen gender or sexuality. The *EO Act 1984* does not define the terms club or association.

6.5.2 Section 35(2) provides that discrimination by clubs or associations will be lawful in relation to the use or enjoyment of a service or benefit provided by an association

- (a) if it is not practicable for the service or benefit to be used or enjoyed simultaneously by both men and women, but the same, or an equivalent, service or benefit is provided for the use or enjoyment of men and women separately from each other or at different times,
- (b) if it is not practicable for the service or benefit to be used or enjoyed to the same extent by both men and women, but both men and women are entitled to a fair and reasonable proportion of the use or enjoyment of the service or benefit.

6.5.3 Section 35(2a) provides that discrimination by a club or association in relation to membership will not be unlawful if the club or association is established for

- (a) persons of a particular sex; or
- (b) persons of a chosen gender; or
- (c) persons of a particular sexuality (other than heterosexuality),

and, consequently, such an association may discriminate against an applicant for membership so as to exclude from membership persons other than those for whom the association is established.

6.5.4 In the Issues Paper, SALRI identified options for clarifying and modernising the operation of the exceptions relating to clubs and association. The reform options identified were:

- Remove the term ‘club’ from the *EO Act 1984*. Define the term ‘association’ with reference to the *Associations Incorporation Act 1985 (SA)*.
- Remove the phrase ‘for men and women’ from s 35(3); replace with ‘for one sex’.

6.5.5 SALRI did not receive any submissions directly relating to this exception, other than short statements in support of the continuation of the exceptions among broader calls to maintain the status quo. As a result, SALRI does not make any recommendations for any amendment, beyond noting the

recommendations made in other related Reports by SALRI concerning the use of non-binary language.

6.5.6 SALRI also notes the recommendation made above at Recommendation 1 relating to the need for a comprehensive and independent review of the *EO Act 1984*. SALRI suggests that such a review should specifically consider the scope of the current exceptions relating to clubs and associations, as well as whether it is appropriate to define the meaning of the term ‘club’ and ‘association’, as per the options identified in the Issues Paper.

6.6 Measures Intended to Achieve Equality

6.6.1 Section 47 of the *EO Act 1984* creates a general exception to the anti-discrimination framework for acts done,

for the purpose of carrying out a scheme or undertaking intended to ensure that persons of the one sex, persons of a chosen gender, or persons of a particular sexuality, have equal opportunities with, respectively, persons of the other sex, persons who are not persons of a chosen gender or persons of another sexuality, in circumstances to which this Part applies.

6.6.2 While this provision is widely perceived as generally commendable, some concerns have been raised regarding its application to intersex and gender diverse people. For example, the Human Rights Law Centre noted that ‘some laws fail to specifically recognise how an intersex or gender diverse person is to be treated. This potential creates a lacuna which leaves an intersex or gender diverse person vulnerable to discrimination.’²⁸² In relation to special measures under s 47, there is a concern that a scheme intended to promote the interests of one sex could exclude intersex people who identify as that gender. For example, a scheme to promote participation of women in leadership positions may exclude or discriminate against intersex people who identify as women, or transgender women who do not fit the gender binary expressed by the special measure.²⁸³ Amending the *Acts Interpretation Act 1915* (SA) to address this specific concern was recommended by SALRI in the Audit Report.²⁸⁴

6.6.3 The Issues Paper outlined a number of ways to improve the clarity of the current anti-discrimination laws and to ensure they meet the competing needs of protecting against unlawful discrimination and permitting different treatment if such treatment is necessary to achieve a legitimate public aim. This included a proposal to insert s 47(2):

where a measure is intended to achieve equality between sexes, or exists for the benefit of one sex, the measure must not discriminate against people based on their gender identity or intersex status unless reasonable and necessary in all the circumstances.

²⁸² Audit Report Submission No 44 (appendix), 12.

²⁸³ Dami Barnes, Audit Report Submission No 6, South Australian Law Reform Institute, *LGBTIQ Reference* (2015), 3.

²⁸⁴ Audit Report, above n 2, 11, [1.3].

6.6.4 SALRI did not receive many submissions directly relating to this option. However the Law Society of South Australia supported exemptions allowing positive discrimination to address underlying inequality and considers that these should be expanded as per the option outlined above.²⁸⁵

6.6.5 Given the limited feedback with this option, SALRI does not make any recommendations for any amendment, beyond noting the recommendations already made to replace the terms ‘sexuality’ with ‘sexual orientation’ and ‘chosen gender’ with ‘gender identity’.

6.6.6 SALRI also notes the recommendation made at Recommendation 10 relating to the need for a comprehensive and independent review of the *EO Act 1984*. SALRI suggests that such a review should specifically consider the scope of the current provisions relating to ‘special measures’. SALRI further notes that the recommended amendment to enable the South Australian EOC to issue practice guidelines could also operate to clarify the practical scope and application of the special measures provisions, for example by providing appropriate case study examples.

6.7 Insurance

6.7.1 The *EO Act 1984* contains a general exception for complying with the protective provisions in Part 3 of the Act, where the activity relates to insurance. Section 49 provides:

This Part does not render unlawful discrimination on the ground of sex in the terms on which an annuity, life assurance, accident insurance or other form of insurance is offered or may be obtained, if the discrimination—

- (a) is based on actuarial or statistical data from a source on which it is reasonable to rely; and
- (b) is reasonable having regard to that data.

6.7.2 While SALRI did not receive many submissions with respect to this provision, Dami Barnes told SALRI that it can operate to unfairly discriminate against gender diverse people, or people who do not identify as a binary gender. Dami Barnes explains:

My issue arises in the ambiguity of gender where it is not binary, the point was raised in section 32 for instance about insurance companies discriminating based on the sex/gender of the person for insurance purposes. This is pertinent for those that don’t identify as male or female but the insurance company will insist for statistical or computer entry purposes. These are the sort of areas that should never have the excuse of ‘we can’t accommodate for you as our system doesn’t allow it’.²⁸⁶

6.7.3 SALRI notes that under the *Anti-Discrimination Act 1998 (Tas)*, discrimination on the grounds of gender, marital status or relationship status in the provision of services relating to insurance or superannuation is only permitted if—

- (a) the discrimination arises because of the application of prescribed standards under the

²⁸⁵ Issues Paper Submission No 364.

²⁸⁶ Issues Paper Submission No 277.

Superannuation Industry Supervision Act 1993 of the Commonwealth; or

(b) the discrimination –

(i) is based on actuarial, statistical or other data from a reliable source; and

(ii) is reasonable having regard to such data and any other relevant factors.²⁸⁷

6.7.4 Given the relative lack of feedback on this option, SALRI does not make any recommendations for any amendment, but considers s 49 to provide another example of the benefit of the power for the EOC to issue practice guidelines. For example, the EOC could issue practice guidelines that could make it clear that, having regard to the protective provisions making discrimination on the grounds of gender identity unlawful, insurance companies should not rely upon s 49 to discriminate against a person who does not identify as a binary sex. The Tasmanian provision could provide important guidance in this area for any future practice guidelines or amendments to s 49 of the *EO Act 1984*.

6.8 Specific Power for Equal Opportunity Commissioner to Issue Authoritative Practice Guidelines

6.8.1 Unlike other Australian jurisdictions,²⁸⁸ the South Australian EOC does not have the power to issue preventative or educative guidelines with respect to the protections or exceptions contained in the *EO Act 1984*. While the South Australia EOC has a clear educative function and produces fact sheets and other materials for individuals and businesses,²⁸⁹ the absence of a specific power to issue practice guidelines means that it may be more limited in its capacity to provide detailed and authoritative information about particular legal obligations and to promote compliance.

6.8.2 SALRI recommends that the *EO Act 1984* should be amended to enable the EOC to issue practice guidelines with respect to the protection and exception provisions of the *EO Act 1984*, based on Part 10 of the *Equal Opportunity Act 2010* (Vic). Section 148 of the Act provides:

(1) The Commission may issue practice guidelines on any matter relating to this Act.

(2) In preparing practice guidelines, the Commission must consult with persons or bodies that the Commission considers represent the areas or persons to whom the practice guidelines will relate.

6.8.3 Section 149 of the Act makes it clear that practice guidelines are not legally binding but a court or the Tribunal may consider evidence of compliance with practice guidelines if relevant to any matter before the court or Tribunal under this Act. The remaining provisions in Part 10 set out how practice

²⁸⁷ *Anti-Discrimination Act 1998* (Tas) s 30.

²⁸⁸ See, for example, *Sex Discrimination Act 1984* (Cth) s 48(1)(ga); *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(n); *Anti-Discrimination Act 1998* (Tas) s 6(f); *Anti-Discrimination Act 1977* (NSW) s 120A.

²⁸⁹ See, for example, the Facts available on the South Australian Equal Opportunity Commission's website at <<http://www.eoc.sa.gov.au/eo-resources/publications/fact-sheets>>.

guidelines should be published (s 150), the circumstances in which the Commission can undertake a review of compliance with the guidelines and the provision of advice about action plans designed to promote compliance with the practice guidelines and the Act.

6.8.4 Similar powers to issue practice guidelines or codes of practice exist in New South Wales, Tasmania and at the Commonwealth level,²⁹⁰ and have been used interstate to provide detailed information, standards and frameworks for schools, businesses, employers and sports clubs seeking to prevent discrimination on grounds such as gender identity and sexual orientation.

6.8.5 As discussed elsewhere in this Report, such guidelines can play a crucial role in educating the community about the scope of protections and exception in the *EO Act 1984*, and can be particularly critical with respect newly protected attributes, such as gender identity. This reform would be an important practical step forward towards improving equality and tolerance within the South Australian community and a preventative measure to guard against both unlawful discrimination and the bringing of unsubstantiated discrimination complaints.

6.8.6 The power to issue practice guidelines would support and enhance these existing functions of the Equal Opportunity Commissioner listed in s 11 of the *EO Act 1984* as:

- (1) The Commissioner must foster and encourage amongst members of the public informed and unprejudiced attitudes with a view to eliminating discrimination on the grounds to which this Act applies.
- (2) The Commissioner may institute, promote or assist in research, the collection of data and the dissemination of information relating to discrimination on the grounds to which this Act applies.
- (3) The Commissioner may make recommendations to the Minister as to reforms, whether of a legislative nature or otherwise, that the Commissioner believes will further the objects of this Act.

6.8.7 In making this recommendation, SALRI acknowledges the significant contribution already made by the South Australian EOC in terms of its Fact Sheets, Reference Guides and other publications.²⁹¹ The power to issues authoritative practice guidelines would build upon — rather than duplicate — this existing educative role.

Recommendation 9: Power to issue practice guidelines

SALRI recommends that the *EO Act 1984* should be amended to enable the Equal Opportunity Commission to issue practice guidelines with respect to the protection and exception provisions of the *EO Act 1984*, based on Part 10 of the *Equal Opportunity Act 2010 (Vic)*.

²⁹⁰ See, for example, *Sex Discrimination Act 1984* (Cth) s 48(1)(ga); *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(n); *Anti-Discrimination Act 1998* (Tas) s 6(f); *Anti-Discrimination Act 1977* (NSW) s 120A.

²⁹¹ See, for example, the Facts available on the South Australian Equal Opportunity Commission’s website at <<http://www.eoc.sa.gov.au/eo-resources/publications/fact-sheets>>.

6.9 Need for Comprehensive, Independent Review of the *EO Act 1984*

6.9.1 The focus of this Report is the current exceptions relating to discrimination on the grounds of sexuality and chosen gender, currently contained in Part 3 of the *EO Act 1984* (noting that SALRI has already recommended that these attributes be described as ‘sexual orientation, gender identity and intersex status’). This focus arises from the feedback received during the Audit Report process which indicated that these exceptions were priority areas for reform.

6.9.2 However, SALRI is also aware of the many other features of the *EO Act 1984* that impact on the way the protections work in practice for anyone relying upon the anti-discrimination regime — from employers or businesses seeking to comply with their legal obligations, to individuals seeking to make a complaint of unlawful discrimination, and for the Commission in its efforts to undertake preventative community education.

6.9.3 The EOC has informed SALRI that these features can have a significant impact on how the protections and exceptions in Part 3 of the Act work in practice. In particular, the EOC identified the current features of the *EO Act 1984* as requiring urgent review and reform:

Test for Discrimination and Burden of Proof

6.9.4 The EOC has told SALRI that the current test for direct and indirect discrimination and the current burden of proof provisions are difficult for many users to understand, and can be almost impossible for a complainant to discharge. This can be particularly problematic in employment scenarios where the complainant may have been asked for information about their sexual orientation or gender identity but may not have access to information about how certain information was used by the employer or prospective employer. Other Australian jurisdictions have considered these issues and developed alternative approaches, including prohibiting requests for information about protected attributes such as gender identity that may be worth considering in South Australia.

Extending Protections Relating to Harassment and Vilification to Broader Range of Attributes

6.9.5 The scope of certain protections in the *EO Act 1984* do not extend to providing protection against harassment and vilification on the grounds of sexual orientation, gender identity or intersex status. This can cause misunderstanding and can limit the effectiveness of preventative educational campaigns. As Shine Schools SA has explained, this can also leave complaints who suffer harassment and vilification on grounds such as sexual orientation, gender identity or intersex status with no legal remedy unless the threshold of discrimination can be met.²⁹²

6.9.6 For example, the EOC told SALRI that in recent years, it has been approached on a number of occasions regarding ‘anti-gay’ propaganda being distributed and persons preaching anti-gay

²⁹² Issues Paper Submission No 352 (SHine SA).

messages in public spaces²⁹³ but has limited options to respond to such complaints because, unlike New South Wales and Tasmania,²⁹⁴ South Australian law does not contain prohibitions on vilification on the grounds of sexual orientation or gender identity.

6.9.7 The City of Marion noted with concern that buildings and homes throughout the City of Marion were ‘letterboxed’ with ‘gay hate’ material following the City’s decision in June 2015 to permanently fly the rainbow flag outside of its Administration building.²⁹⁵ The City of Marion has since referred the matter to the South Australian Police, and resolved to raise the issue with the Minister for Social Inclusion and the EOC with a view to seeking support to strengthen existing South Australian laws to provide improved protections against homophobic activities such as that experienced within their City.²⁹⁶ The EOC submitted that if the *EO Act 1984* had similar provisions to New South Wales or Tasmania, it could allow the Commissioner to take some action such as that recently undertaken in Tasmania.²⁹⁷

Extending the Range of Protected Attributes

6.9.8 The EOC has told SALRI that there are a range of attributes that could be considered as in need of protection under the *EO Act 1984* that are protected in other Australian jurisdictions, including domestic violence, industrial action, political actions, lawful sexual activity, irrelevant criminal record, and personal association. SALRI notes that including the attribute of ‘domestic violence’ has been recommended in other recent reports.²⁹⁸

6.9.9 As noted below, it may also be appropriate to consider whether ‘religious belief’ should be included as a protected attribute as an alternative approach to dealing with religious bodies under the *EO Act 1984*. This would align with a proposal advanced by the Association for Australian Christian Schools, outlined below.

²⁹³ Audit Report Submission No 40, 5.

²⁹⁴ Anti-discrimination legislation in both New South Wales and Tasmania makes vilification on the basis of sexuality unlawful. New South Wales legislation covers public acts such as remarks in publications, graffiti, posters, and speeches among others. Tasmanian legislation covers any incitement, by a public act, hatred, serious contempt for, or severe ridicule on the basis of sexual orientation (as well as other grounds such as race).

²⁹⁵ Ibid.

²⁹⁶ Audit Report Submission 41.

²⁹⁷ See ABC News, ‘Tasmanian man who distributed anti-gay pamphlets ordered to apologise’ *ABC News* (online), 30 June 2015, <<http://www.abc.net.au/news/2015-06-30/anti-gay-pamphleteer-ordered-to-apologise-for-offending/6585264>>. Section 146 of the *Criminal Justice Act 2003* (UK) provides for increases in sentences for aggravation in certain classes of offences related to either disability or sexual orientation. See further the Crown Prosecution Service *Guidance on Prosecuting Cases of Homophobic and Transphobic Crime*, <http://www.cps.gov.uk/legal/h_to_k/homophobic_and_transphobic_hate_crime/>.

²⁹⁸ See, for example, South Australian Parliament Social Development Committee, *Report into Domestic and Family Violence* (39th Report) (April 2016) 23, rec 31.

6.9.10 SALRI notes that the recently amended *Anti-Discrimination Act 1998* (Tas)²⁹⁹ includes protection against discrimination on the grounds of industrial activity; political belief or affiliation; political activity; religious belief or affiliation; religious activity; irrelevant criminal record; irrelevant medical record and association with a person who has, or is believed to have, any of these attributes.

6.9.11 Including domestic violence as a protected attribute under State and Territory law has also been strongly supported by the Australian Human Rights Commission:

There is a sound case for introducing domestic or family violence as a protected attribute within existing anti-discrimination legislation at the federal, state and territory level. Such a protected attribute would recognise that those who are or have experienced domestic and family violence should not be subjected to discrimination as a result of that experience.³⁰⁰

6.9.12 Many of these features of the *EO Act 1984* have been considered before, including in the 1994 review of the *Equal Opportunity Act 1984* conducted by Brian Martin QC and in the 2003 Framework Paper on the Review of South Australian Equal Opportunity Legislation (the ‘Martin Review’) prepared by the South Australian Attorney General’s Department. The outcomes of these reviews and consultations were reflected to some degree in the Equal Opportunity (Miscellaneous) Amendment Bill 2006 (that did not pass), the *Statutes Amendment (Domestic Partners) Act 2006* (SA) that advanced various reforms directed at removing discrimination on the grounds of sexuality and relationship status, and most significantly through the *Equal Opportunity (Miscellaneous) Amendment Act 2009* (SA).

6.9.13 Now, more than two decades after the Martin Review and seven years since the last significant legislative reform, SALRI’s consultations suggest that it is now appropriate to undertake a comprehensive and independent review of the *EO Act 1984* and its operation. Such a review is timely, if not imperative, given the significant legislative changes occurring at the Commonwealth level and across other Australian jurisdictions to ensure that, where appropriate, South Australian anti-discrimination laws are consistent with those in force in other Australian jurisdictions. A similar holistic review was completed by the ACT Law Reform Advisory Council in 2015.³⁰¹ Such a review would also have benefit in a South Australian context. It would obviously be an issue entirely for Government as to who would be best placed to carry out such any such review.

6.9.14 Such a review should be conducted following the commencement of the specific legislative changes recommend in this Report. SALRI understands that such a review is also supported by the EOC, the Law Society of South Australia and the Office for Recreation and Sport.

²⁹⁹ *Anti-Discrimination Act 1998* (Tas) s 16.

³⁰⁰ Australian Human Rights Commission, *Fact sheet: Domestic and family violence – a workplace issue, a discrimination issue*, (December 2014) <<https://www.humanrights.gov.au/our-work/family-and-domestic-violence/publications/fact-sheet-domestic-and-family-violence-workplace>>. This issue was also raised by Relationships Australia in consultation to SALRI.

³⁰¹ ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)*, Final Report (18 March 2015).

6.9.15 As discussed above, a holistic review of the *EO Act 1984* would also allow for a more thorough examination of the alternative approach advanced by a number of religious schools. Under this approach, the *EO Act 1984* could be amended to include a more positive recognition of the freedom of religious belief. For example, Christian Schools Australia and Adventist Schools Australia explain that:

Consistent with the broader human rights framework and reflecting the need for balancing rights, we argue that protection for religious freedom could be tackled as a definitional issue (rather than either the exceptions and exemptions or inherent requirements approaches). For example, it could be established *as a definitional matter* that activities done in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, undertaken in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed, would not constitute discrimination.³⁰²

6.9.16 The review of the ACT *Anti-Discrimination Act 1991* completed by the ACT Law Reform Advisory Council in 2015 included extensive consideration of how to ensure the competing human rights in this area are appropriately recognised and balanced within the anti-discrimination framework.³⁰³

Recommendation 10: Broader review of *EO Act 1984*

That the Government undertake an independent, comprehensive review of the *EO Act 1984* to determine whether it continues to meet its equality objectives and remains accessible, fair, and effective. The review’s terms of reference should include, at a minimum, consideration of whether the *EO Act 1984* should include protections against harassment and vilification with respect to all protected attributes; whether the test for discrimination and the burden of proof associated with this test is fair for all users; and whether additional attributes, such as religious belief, domestic violence and irrelevant criminal record, should be included in the *EO Act 1984*.

Such a review should commence following the implementation of the specific recommendations made in this Report.

6.9.17 As a matter of administrative and practical effectiveness, as well as normal rules of statutory construction, SALRI recommends that any changes to the *EO Act 1984* recommended in this Report do not apply retrospectively. SALRI further highlights the benefit of appropriate information and guidance materials relating to each of the proposed changes be provided in writing to all sports clubs, schools, religious bodies and others who may be affected by the changes recommended in this Report, along with a broader public awareness campaign.

Recommendation 11: No retrospective application

SALRI recommends that the above changes to the *EO Act 1984* do not apply retrospectively, so that cases of discrimination can only be raised from the commencement of any amended *EO Act 1984*.

³⁰² Issues Paper Submission No 357 (Christian Schools Australia and Adventist Schools Australia).

³⁰³ ACT Law Reform Council, above n 301.

SALRI further recommends that information and guidance materials relating to each of the proposed changes be provided in writing to all sports clubs, schools, religious bodies and others who may be affected by the changes, along with a broader public awareness campaign.

Part 7: Conclusion

7.1.1 This Report has enabled SALRI to hear a wide range of views about the proper role of anti-discrimination law in our community. SALRI has heard compelling and articulate accounts of how important faith is for many families making decisions about their child's education. SALRI has also heard from parents of transgender or gay children about the pain of exclusion or discrimination against their child in schools.

7.1.2 While analytical frameworks exist for balancing rights that offer some guidance in this area, it is clear that the debate over the appropriate scope of both the protective features of the *EO Act 1984* and its exceptions, remains contentious.

7.1.3 SALRI does not seek to hold a privileged position in this debate, but rather sees its role as part of its broader reference to identify laws or regulations that discriminate on the grounds of gender identity, sexual orientation and intersex status. From this perspective, it is clear that the *EO Act 1984* exceptions require some reform. From SALRI's subsequent consultation, it is clear that this reform must be measured and incremental rather than more robust. Perhaps most significantly, it is clear that further work is required in this space, in the form of a comprehensive and independent review of the entire *EO Act 1984* to determine whether it is meeting its equality objectives, and also proving an effective and accessible tool for the broader community. Such a review could examine whether it is timely to include religious belief as a protected attribute, or whether it is appropriate to extend the protections against racial vilification to other grounds. It could also consider whether the current tests for discrimination are able to be understood and applied in practice, or whether they are hindering efforts to understand and apply the law.

7.1.4 For these reasons, SALRI has made recommendations that would ensure that the *EO Act 1984* moves into its next stage of any reform in a considered, evidence based way. It has also sought to empower the EOC to perform its vital educative and preventative role, including by issuing practice guidelines with respect to key components of the Act.

7.1.5 SALRI has also recommended changes that seek to clarify that the exceptions relating to religious bodies — whilst essential to underscore the respect the community holds for freedom of religious belief — must not extend to the provision of key public services such as education or health services. These exceptions should be limited to the activities directly related to the religious institutions themselves.

7.1.6 SALRI has also recommended changes to ensure that in the area of employment, religious educational authorities have the right to require that their staff share their faith and religious beliefs, but not the right to treat people unfairly due to their sexual orientation or gender identity. This can be achieved by permitting discrimination on the grounds religious belief, but only in circumstances

where the discrimination is not unreasonable and the justification for this discrimination is made available to the public.

7.1.7 SALRI has also made recommendations to update exceptions relating to sport and to align this Report with its further work relating to access to assisted reproductive treatment.

7.1.8 SALRI has been humbled by the considered and timely participation of over 350 individuals and organisations in the preparation of this Report, and is particularly grateful to those who have shared personal stories of hardship or pain.

7.1.9 The changes proposed in this Report are not radical, but they are important. So too is the need to continue to review and reform this important area of law, that not only serves as a complaints resolution mechanism, but provides an important normative statement about equality and tolerance in modern South Australia.

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Appendix 1

Submissions/Responses Received to YourSAy Consultation and Meetings Held

Submission Number	Organisation	Contact Name	Submission Number	Organisation	Contact Name
1		Richard	48		Dion Murdoch
2		Dean Gloede	49		Bernadette and Leo Henderson
3		Jennifer Jones	50		Olwyn Clothier
4		Christian Paterson	51		Arnold W. Joppich
5		Chris Wright	52		Theresa Kewley
6		Jen Cousins	53		Anonymous
7		Sean	54		Scott Sands
8		Sam	55		Margaret Smyth
9		Kate Rubock	56		Ken Jaworski
10		Sheila Kavanagh	57		Malcolm Wilson
11		Glennis Smart	58		Linda M Knock
12		Anonymous	59		Paul & Maria Van Gangelen
13		Jessica Brodie	60		Benajmin Graetz
14		Anonymous	61		David Hall
15		Lauren Wilkes	62		Peter Atherton
16		Anonymous	63		Pau & Kay Lindner
17		Anonymous	64		David Squirrell
18		Anonymous	65		Alfred and Alison Chehade
19		Bernie McGinnes	66		Chris Meyer
20		Anonymous	67		Paul and Jane Kidney
21		Jessica Liddle	68		Jeffrey Byerley
22		Lexie Schwerdt	69		Barry lock
23		Natalie Felikson	70		Brita Robyn Stertern-Gill
24		Tamsin Anspach	71		Ryan Graetz
25		Rob Parry	72		Tim Sutton
26		Anonymous	73		Jenni Callander
27		Danielle	74		Chris Haskard
28	Aldinga Bay Baptist Church	Andrew Downes	75		Jeff and Lynne Sutton
29		Russell Elston	76		Kevin Deuter
30		Geoff and Joy Mills	77		John Schwerdt
31		Joseph Stephen	78		Libby and Michael Hammond
32		Ken Grundy	79		Luke Hague
33		David McCall	80		Cameron Hawke
34		DC Wallace	81		Marion and Des Zerk
35		Lynn Ellison	82		Peter Boesch
36		Hessel Baartse	83		Peter
37		David Hoffman	84		Steve Bown
38		Roscoe Hilton	85		Rae J Rix
39		Jane Leech	86		Grant Lock
40		Jim Overduin	87		Peter Jonsen
41		Radley King	88		Rosalie Krieg
42	Harvest Australia Church	Marty Manuel	89		Irene Joppich
43		T&A Pfitzner			
44		Jen Jones			
45		Linda Knock			
46		Mandy Shepherd			
47		Mandy Shepherd			

Submission Number	Organisation	Contact Name
90		L.N. Guidera
91		Noreen Baker
92		Ken Smith
93		Carol Sullivan
94		Deborah Buck
95		Robert Morton
96		Coral Kernick
97		Bob Wybrow
98		Peter and Robin McGlone
99		Marcel Smith
100		Raewyn Sutherland
101		Paul and Gina Voskullen
102		John Seidel
103		Peter Budimir
104		Helen Drabsch
105		Malcolm Reed
106		Alan and Janet Broadstock
107		Colin and Dorothy Schumacher
108		Dennis and June Jenke
109		John Waston
110		Karen Kirchner
111		Geoffrey Bean
112		Beverley Morey
113		Trevor Dawes
114		Dennis Canute
115		Carol Sullivan
116		Rober Willcocks
117		Virginia Brookes
118		A. Bailey
119		Colin Jones
120		Michael Brady
121		Bruce Hambour
122		Matthew Thorpe
123		Trevor
124		C.J. Edwards
125		Amy Gogoll
126		RC Brewer
127		Elena
128		Janet and Greg Le Page
129		Jeffrey Newman
130		Barbara Giardina
131		Les Crawford
132		Ross Herrmann
133		Brian Thiele
134	Tea Tree Gully Uniting Church	Richard Banham
135		Brian Brady
136		Bill Penaluna
137		Jody Bird
138		Rodney Martin
139		Kon Heyer

Submission Number	Organisation	Contact Name
140		C J Scholar
141		Jos de Bruin
142		Bronte and Tania Hollow
143		Carl Strehlow
144		Doug and Judy Warmington
145		John Gerhardy
146		Malcolm Harris
147		Roland and Sonia Peters
148		Lee Anne Dunn
149		Wendy Newman
150		Hayley Jacka
151		Colette Williams
152		Graham and Chris Haggie
153		Wendy Burrill
154		Natalya giffney
155	Burnside City Uniting Church	Matthew Bond
156		Brian A Kroehn
157		Margaret Scholz
158		Cheryl Milloss
159		Lynne Newbold
160		Neil kluge
161		Des Kuhl
162		Helen Wendt
163		Jude Brown
164		Paul Vodopianoff
165		Tim brown
166		Susan Hughes
167		Glyn and Wendy Byrne
168		Chris and Amy Herman
169		Christina Schroder
170		Everard and Ruth Noack
171		Frank Gathercole
172		Robert J Sands
173		Joan E. Parham
174		Bob and Lynne Seidel
175		Richard Sullivan
176		Margaret Kessner
177		Martin Bleby
178		Lye-Kheng Wong
179		Carol Sullivan
180		Jo and Kim Smith
181		Michael Schubert
182		Jesper Andersen
183		Jim Bishop
184		Sylvia Modra
185		Philip Wilson
186		Jennifer and Gordon Sweeney

Submission Number	Organisation	Contact Name
187		Robert Hoerisch
188		Susanne Cook
189		Pauline Horscroft
190		Rebecca Tolhurst
191		Robert Hunt
192		Michael Russell
193	Gay Dads SA	Mark Dodd
194		Max Schubert
195		Brian & June Huckel
196		Vi Maidment
197		Adrian & Priscilla Irrgang
198		Sarah Graham
199		Ariana Crowley
200		Allan Ball
201		Daniel Austin
202		Kate Bishop
203		Janine M Graetz
204		Darren K Graetz
205		Sam Lemanski
206		Susan Cristie
207		Rob Christie
208		Sante Bartemucci
209		Jan Bean
210		Matthew Campbell
211		Jenny Harders
212		Antonio Bartemucci
213		Tegan Mitchell
214		Tibor Ferencz
215		Brenton weidenhofer
216		Joy D Rodrigues
217		Brian McElroy
218		Jewel Hansen
219		Diana Beltrame
220	The Australian Presbyterian Bible Church	Robert Donaldson
221		Andy Webber
222		Warren Featherstone
223		Christine Lawton
224	Adelaide Christian Schools	Kym Golding
225		Andrea Burvill
226		Roger Chapman
227		Stephen Graham
228		Lionel W Rodrigues
229		James Giesbrecht
230		Brendan Thomas
231		Elvis I Šeman
232		Pauline and Johan Overbeeke
233		Roger Collins
234		Tina Rosenzweig
235		Dawn Giddings
236		Hadyn Jacka
237		Jennifer Stevens

Submission Number	Organisation	Contact Name
238		John & Rosemary Peter
239		Donald & Gwenneth Mackenzie
240		Sam Lemanski
241		Sam Lemanski
242		Sam Lemanski
243		Dan and Adeline Keenan
244		Elen Blyth
245		Gweneth McCallum
246		David Miller
247		Matthew Loader
248	Humanist Society of SA	Brigid Venables
249		Sven & Rachel Trenholm
250		Marty Rosenberg
251		John Wills
252		Nick & Sheila Chehade
253		Gillian Aitchison
254		Will Coleman
255		Avis Clarke
256		Peter Jaensch
257		Ann Sheffield
258		Helen Povall
259		Helen Povall
260		Lincoln Schultz
261		Jess S
262		Sammy Parts
263		Roger McCauley
264		Alex Brookes
265		Marilyn Joan Potter
266		Alan Glen
267		Denis Story
268		David Mountford
269		Graeme Schultz
270		Tim Andrew
271		Greg Perry
272		Warren Mack
273		Noreen and Jim Klein
274		Evan Johnson
275	(MMVED)	Anonymous
276		Michael De Nieuwe
277		Dami Barnes
278		Yvonne Dawson
279	GLITF (Gay & Lesbian Immigration Task Force)	Ron Phillips
280		Betty & Rex Goodall
281		David & Margaret Hutchinson

Submission Number	Organisation	Contact Name
282		Matt Jessett
283		Robyn LaBroot
284	St Martin's Lutheran Church	John & Lyn Frahn - email forwarded by Secretary of the church Cassie Williams on behalf of these members of the congregation
285		Sharlotte Newsham
286		Noelene Howis
287		Diane March
288		Julieanne Bingham
289		Christine Mills
290		Bob & Maragret Lineage
291		Bronwyn Hein
292		Laura Hein
293		Bruce Andrews
294		Wally Filipenko
295		Nina Filipenko
296	Mt Barker Baptist Church Organisation	Barbara Kupke (on behalf of council members Mr Cameron Hawke, Adjunct Assoc Prof CJ (Keith) Kikkert, Dr Brice Douglas, Mrs Pamela Garwood, Mr Chris How, Mr Andrew Lawson)
297		Anneke Van De Loo
298		Anonymous
299		Judith Wright
300		Christientiae Saint-Piaf
301		Robert Saldanah
302		Cynthia Clinton
303		John Marshall
304		Terry Tolhurst
305		Jonathon Size
306		Marcus Patterson
307		Zoey Campbell
308		Rosalind & Leigh Duffett
309		Joe Pathinathan
310		Roger Chapman
311		Rosemary Duigan
312		Rob Pollnitz
313		Erin Booth
314		Roger & Judith Neale
315		Ron Edwards
316		Ron & Helen Tyson
317		Bernard Mageean
318		Christine Jenkins
319		Wayne Maddox

Submission Number	Organisation	Contact Name
320		Mary & Peter Agnew
321		John & Jill Riggs
322		Irene Lowde
323		Graeme Harrison
324		Robert
325		Daniel Zaharuiko
326		Robert Finster
327		Edna Eldridge
328		Boyd Heidenreich
329	Mt Barker Baptist Church Council	Chris How
330		Malcolm Eglinton
331		Althea Riding-Williams
332		Jackie Hill
333		Stephen Pollard
334		Yvonne Pollard
335		Ellen Pettingill
336		Colin Oldfield
337		Betty Oldfield
338		Graeme Denholm
339	Salvation Army	Sarah Innes
340		Dieter Fisher
341		Shirley Teusner
342		Dean & Janet McIntyre
343		Maurice Lorenz
344		Robert Lowde
345		Dennis Mattiske
346		Kathryne Browne
347		E D Lang
348		Anthony Leverenz
349		Anthony Moore
350		Russell Parrington
351		Roncia Baker
352	ShineSA	Jill Davidson (CEO)
353	ShineSA, Safe Schools Coalition SA	Natlya Giffney
354	Australian Christian Lobby	Kieren Jackson (Research Officer); Daniel Flynn (Victorian Director)
355	Te Board of Adelaide Christian Schools Inc ('ACS')	Edward Hewett Barnard-Brown ('Hew' Barnard-Brown)
356	Christian Schools Australia (CSA) & Adventist Schools Australia (ASA)	Mark Spencert (Executive Officer, National Policy); Submission written by: Stephen O'Doherty (CEO); Daryl Murdoch (National Director)
357	Family Voice Australia (FAVA)	Dr David Phillips (National Director)

Submission Number	Organisation	Contact Name
358	Gay & Lesbian Health Alliance (SA) (GLHA)	Ian Purcell AM
359	Hon Dennis Hood MLC	Donna Krieg (personal assistant)
360	Office for Recreation & Sport (ORS)	Richard Mellon (Manager Industry Support - Sport & Recreation Development)
361		Sally Bramwell
362	Catholic Archdiocese of Adelaide	Adelaide Archbishop Philip Wilson
363	Law Society of South Australia	
364	Australian Association of Christian Schools	

Meeting No	Interested Party	In person/telephone
1.	Jane Bartlett, South Australian Government, Office of Recreation and Sport	Telephone
2.	Anastasia Kaldi and Tricia Spargo, South Australian Equal Opportunity Commission	Telephone
3.	Anna Brown, Human Rights Law Centre	Telephone
4.	Mark Dodd	In person
5.	Matthew Loader, Australian Coalition for Equality	In person
6.	South Australian Humanist Society	In person

Appendix 2

Exception Provisions in the *Equal Opportunity Act 1984* (SA)

5—*Interpretation*

...

(2) A reference in this Act or in the repealed *Sex Discrimination Act 1975* to the provision of a service does not include, and will be taken never to have included, the carrying out of either of the following fertilisation procedures:

- (a) artificial insemination; or
- (b) the procedure of fertilising an ovum outside the body and transferring the fertilised ovum into the uterus.

34—*Exemptions*

(1) This Division does not apply in relation to—

- (a) an employer employing a person for purposes not connected with a business carried on by the employer; or
- (b) a principal engaging a natural person as an independent contractor for purposes not connected with a business carried on by the principal.

(2) This Division does not apply to discrimination on the ground of sex, chosen gender or sexuality in relation to employment or engagement for which it is a genuine occupational requirement that a person be a person of a particular sex, a person of a chosen gender or a person of a particular sexuality.

(3) This Division does not apply to discrimination on the ground of chosen gender or sexuality in relation to employment or engagement for the purposes of an educational institution if—

- (a) the educational institution is administered in accordance with the precepts of a particular religion and the discrimination is founded on the precepts of that religion; and
- (b) the educational authority administering the institution has a written policy stating its position in relation to the matter; and
- (c) a copy of the policy is given to a person who is to be interviewed for or offered employment with the authority or a teacher who is to be offered engagement as a contractor by the authority; and
- (d) a copy of the policy is provided on request, free of charge—
 - (i) to employees and contractors and prospective employees and contractors of the authority to whom it relates or may relate; and
 - (ii) to students, prospective students and parents and guardians of students and prospective students of the institution; and
 - (iii) to other members of the public.

(4) This Division does not apply to discrimination on the ground of chosen gender in relation to employment or engagement if the discrimination is for the purposes of enforcing standards of appearance and dress reasonably required for the employment or engagement.

35—Discrimination by associations

...

(2) This section does not apply to discrimination on the ground of sex in relation to the use or enjoyment of a service or benefit provided by an association—

(a) if it is not practicable for the service or benefit to be used or enjoyed simultaneously by both men and women, but the same, or an equivalent, service or benefit is provided for the use or enjoyment of men and women separately from each other or at different times; or

(b) if it is not practicable for the service or benefit to be used or enjoyed to the same extent by both men and women, but both men and women are entitled to a fair and reasonable proportion of the use or enjoyment of the service or benefit.

(2a) This section does not render unlawful an association established for—

(a) persons of a particular sex; or

(b) persons of a chosen gender; or

(c) persons of a particular sexuality (other than heterosexuality),

and, consequently, such an association may discriminate against an applicant for membership so as to exclude from membership persons other than those for whom the association is established.

(2b) This section does not apply to discrimination on the ground of chosen gender or sexuality if the association is administered in accordance with the precepts of a particular religion and the discrimination is founded on the precepts of that religion.

37—Discrimination by educational authorities

(3) This section does not apply to discrimination on the ground of sex in respect of—

(a) admission to a school, college, university or institution established wholly or mainly for students of the one sex; or

(b) the admission of a person to a school, college or institution (not being a tertiary level school, college or institution) if the level of education or training sought by the person is provided only for students of the one sex; or

(c) the provision at a school, college, university or institution of boarding facilities for students of the one sex.

38—Discrimination by person disposing of an interest in land

...

(2) This section does not apply to the disposal of an interest in land by way of, or pursuant to, a testamentary disposition or gift.

39—Discrimination in provision of goods and services

...

(2) If the nature of a skill varies according to whether it is exercised in relation to men or to women, a person does not contravene this section by exercising the skill in relation to men only, or women only, in accordance with the person's normal practice.

40—Discrimination in relation to accommodation

...

(3) This section does not apply to discrimination in relation to the provision of accommodation if the person who provides, or proposes to provide, the accommodation, or a near relative of that person, resides, and intends to continue to reside, in the same household as the person requiring the accommodation.

(4) This section does not apply to discrimination on the ground of sex in relation to the provision of accommodation by an organisation that does not seek to secure a pecuniary profit for its members, if the accommodation is provided only for persons of the one sex.

45—Charities

This Part does not—

- (a) affect a provision in a charitable instrument for conferring benefits wholly or mainly on—
 - (i) persons of the one sex; or
 - (ia) persons of a chosen gender; or
 - (ii) persons of a particular sexuality; or
- (b) render unlawful an act done to give effect to such a provision.

47—Measures intended to achieve equality

This Part does not render unlawful an act done for the purpose of carrying out a scheme or undertaking intended to ensure that persons of the one sex, persons of a chosen gender, or persons of a particular sexuality, have equal opportunities with, respectively, persons of the other sex, persons who are not persons of a chosen gender or persons of another sexuality, in circumstances to which this Part applies.

48—Sport

This Part does not render unlawful the exclusion of persons from participation in a competitive sporting activity on the ground of sex in the following circumstances:

- (a) if the sporting activity is one in which the strength, stamina or physique of the competitor is relevant to the outcome of the competition;
- (b) if the exclusion is genuinely intended to facilitate or increase the participation of persons, or a class of persons, of a particular sex in the sporting activity and—
 - (i) it is unlikely that those persons will participate, or that there will be an increase in participation by those persons, in the sporting activity if the exclusion is not made (having regard to all of the circumstances of the persons or class of persons); and

- (ii) there are reasonable opportunities for excluded persons to participate in the sporting activity in another competition;
- (c) if—
 - (i) the exclusion is reasonably required to enable participants in the sporting activity to advance to competitions at a level higher than that in which the exclusion is to occur (being a requirement that is due to the structure of, or restrictions in, the higher level competitions); and
 - (ii) there are reasonable opportunities for excluded persons to participate in the sporting activity in another competition;
- (d) in such other circumstances as may be prescribed by the regulations.

49—Insurance etc

This Part does not render unlawful discrimination on the ground of sex in the terms on which an annuity, life assurance, accident insurance or other form of insurance is offered or may be obtained, if the discrimination—

- (a) is based on actuarial or statistical data from a source on which it is reasonable to rely; and
- (b) is reasonable having regard to that data.

50—Religious bodies

(1) This Part does not render unlawful discrimination in relation to—

- (a) the ordination or appointment of priests, ministers of religion or members of a religious order; or
- (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order; or
- (ba) the administration of a body established for religious purposes in accordance with the precepts of that religion; or
- (c) any other practice of a body established for religious purposes that conforms with the precepts of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

79A—Exemption in relation to infectious diseases

This Part does not render unlawful a discriminatory act if the act—

- (a) is directed towards ensuring that an infectious disease is not spread; and
- (b) is reasonable in all the circumstances.

85Z—Exemptions

(1) This Division does not apply in relation to—

- (a) an employer employing a person for purposes not connected with a business carried on by the employer; or
- (b) a principal engaging a natural person as an independent contractor for purposes not connected with a business carried on by the principal.

(2) This Division does not apply to discrimination against same sex domestic partners on the ground of marital or domestic partnership status in relation to employment or engagement for the purposes of an educational institution administered in accordance with the precepts of a particular religion if Part 3 Division 2 does not apply in relation to discrimination on the ground of sexuality in relation to the employment or engagement (see section 34(3)).

85ZB – Discrimination by Associations

...

- (2) This section does not render unlawful an association established—
- (a) for persons of a particular marital or domestic partnership status; or
 - (b) for spouses or domestic partners of a particular class; or
 - (c) for persons with caring responsibilities or particular caring responsibilities,

and, consequently, such an association may discriminate against an applicant for membership so as to exclude from membership persons other than those for whom the association is established.

(3) This section does not apply to discrimination against same sex domestic partners on the ground of marital or domestic partnership status if the association is administered in accordance with the precepts of a particular religion and the discrimination is founded on the precepts of that religion.

85ZL—Exemption relating to identity of spouse or domestic partner

This Part does not apply to discrimination on the ground of the identity of a spouse or domestic partner if the discrimination is, having regard to all the circumstances of the particular case, reasonably necessary to preserve confidentiality, avoid conflicts of interest or nepotism or reasonably apprehended conflicts of interest or nepotism or protect the health or safety of persons.

85ZM—Religious bodies

This Part does not render unlawful discrimination on the ground of marital or domestic partnership status in relation to—

- (a) the ordination or appointment of priests, ministers of religion or members of a religious order; or
- (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order.

92—The Tribunal may grant exemptions

(1) The Tribunal may, on application under this section, grant exemptions from a provision of this Act in relation to—

- (a) a person, or class of persons; or
- (b) an activity, or class of activity; or
- (c) circumstances of a specified nature.

(2) An exemption under this section—

- (a) may be granted unconditionally or on conditions; and

- (b) may be revoked by the Tribunal on breach of a condition; and
 - (c) subject to revocation, remains in force for a period, not exceeding three years, determined by the Tribunal, but may be renewed from time to time for a further period, not exceeding three years, determined by the Tribunal.
- (3) An application for the grant, renewal or revocation of an exemption may be made to the Tribunal by the Commissioner or any other person.
- (4) The following persons are entitled to appear and be heard by the Tribunal on an application under this section:
- (a) the applicant;
 - (b) if the Commissioner is not the applicant—the Commissioner;
 - (c) a person in whose favour the exemption in question is sought, or has been granted.
- (5) A person referred to in subsection (4) may call or give evidence in support of, or against, the application.
- (6) In determining an application under this section, the Tribunal may—
- (a) have regard (where relevant) to the desirability of certain discriminatory actions being permitted for the purpose of redressing the effect of past discrimination; and
 - (b) have regard to other factors that the Tribunal considers relevant.
- (7) Notice of the grant, renewal or revocation of an exemption under this section must be published in the Gazette.
- (8) Notice of the grant or renewal of an exemption under this section must state—
- (a) the period for which the exemption has been granted or renewed; and
 - (b) the conditions (if any) to which the exemption is subject.