Legal issues arising for Christian faith-based schools in NSW

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This paper has been prepared to provide an overview of legal issues arising for schools conducted in accordance with the principles of the Christian faith, in NSW. It addresses areas where they may be a conflict between the teachings of the Bible on sexual morality, sexuality and gender identity, and the majority views of the community, and in particular challenges that might be faced under discrimination laws.

1. Religious freedom protections in Australia- generally

Let's start by setting the scene for protection of religious freedom in Australia in general. The right to have and to live out religious beliefs is one of the key human rights recognised in international law. Article 18 of the *International Covenant on Civil and Political Rights* (the "ICCPR") reads as follows:

> 1. 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.
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> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
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> 3. 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.
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> 4. 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**. (emphasis added)

Art 18(4), of course, is a robust principle which lies behind the work of religious schools generally.

These are very important principles, but they are not directly enforceable under Australia law. They need to be implemented by domestic law, and so far, this has only been done in fairly patchy way.

One thing we don't have in Australia, which most other Western countries have, is a general protection of religious freedom which will over-ride other laws. In the USA of course there is protection provided by the First Amendment to their Constitution for "free exercise" of religion. In Canada their constitution contains general human rights protections, which include religious freedom, and similar laws are in place in the UK and in Europe.

Here we have one general provision in our Federal Constitution, s 116, but it is quite limited.

> **Commonwealth not to legislate in respect of religion**
> 116 The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

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This provision doesn't apply to State Parliaments, only to the Commonwealth Parliament (and probably, though there is some debate on this, to the Territory Parliaments), and it has been interpreted fairly narrowly by the courts on the few occasions when it has been relied on.

Perhaps surprisingly, however, a key aspect of protection of religious freedom in Australia comes from laws governing discrimination. Laws around Australia are in place to prohibit detrimental decisions in various areas of life being made on irrelevant grounds against people who share particular characteristics. The first set of laws of this sort dealt with race discrimination. But there are laws forbidding discrimination on other grounds, including sex, and sexual orientation, and gender identity.

There are two ways discrimination laws have an impact on religious freedom. *One* is that many such laws around the country **prohibit discrimination against someone on the grounds of their religious belief**. Those can be helpful in allowing Christians to express their faith without being subjected to being fired or refused service or otherwise being subjected to some form of detriment. But there are **no** such general laws of this sort in NSW.

The *second* way that discrimination laws can impact religious freedom, however, is where such laws forbid behaviour that religious beliefs might support. To take one obvious example, many Christians believe that the import of the Bible's teaching is that women ought not to be priests or pastors. Yet we have a general law forbidding sex discrimination. The way this is dealt with is that both in federal and state laws there are what I like to call **"balancing clauses",** which provide that a religious group such as the Roman Catholic Church does not commit unlawful discrimination when it refuses to ordain a woman as a priest.[2]

While the provision of single-sex schools is not really a matter of religious belief, there are also protections for such schools in laws otherwise forbidding sex discrimination. The general prohibition of sex discrimination in educational decision-making, in s 21 of the *Sex Discrimination Act* 1984 (Cth) ("SDA") is subject to the following exception:

> 21 (3) Nothing in this section applies to or in respect of a refusal or failure to accept a person's application for admission as a student at an educational institution where:
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> (a) the educational institution is conducted solely for students of a different sex from the sex of the applicant…

2. Religious freedom protections and faith-based schools, today

We turn, then, to the current protections provided for faith-based schools. Before we do, let me set out some circumstances where protections might be needed. It is just a mark of where our culture is now that some of these examples will involve differences between classical Biblical sexual morality and current accepted behaviour. But others will involve religious difference. Not all schools will make decisions in this area in the same way. But I want to highlight issues that will arise for many.

(i) There may be a challenge involving staffing.

a. A member of the teaching staff with responsibility for teaching the truths of the faith, may conclude that they can no longer affirm one of the elements of the school's doctrinal statement.

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[2] See *Sex Discrimination Act* 1984 (Cth) s 37; *Anti-Discrimination Act* 1977 (NSW) s 56. A "balancing clause" is a provision in legislation which balances different human rights- here, the right not to be discriminated against, with the right of believers and religious groups to freedom of religion. For more detail see Neil J Foster, "Freedom of Religion and Balancing Clauses in Discrimination Legislation" (2016) 5 *Oxford Journal of Law and Religion* 385 – 430.

b. Or such a member may have entered into a de facto relationship with someone of the opposite sex, contrary to the teaching of the Bible that sexual activity should be reserved for marriage.
c. Or a member of the teaching staff may have entered into a same-sex relationship or marriage or announced that they are in fact a new gender which does not match their biological sex.
d. One of the above may be true of someone in an administrative position, either public-facing (such as a receptionist) or behind the scenes (say a maintenance officer or cleaner.)

(ii) There may be a challenge involving students.
a. The school, in the interests of operating in accordance with Biblical values, may require that students agree to a behaviour code affirming that sexual activity and identity issues are to conform to Biblical standards.
b. Or a student may decide that they disagree with a fundamental part of the school's doctrinal basis and want to actively speak against it.

(iii) There may be a challenge involving government funding. A future government may decide that they will not provide financial support for students to study at an institution which cannot affirm the acceptability of homosexual activity or gender transition. Or there may be a decision to withdraw accreditation as a recognised education provider on similar grounds.

A number of these examples would give rise to possible actions by the persons affected under discrimination laws. Let me review some of protections provided at the moment. Most of these issues will involve a possible breach of laws relating to sex discrimination. There are general prohibitions on this kind of discrimination at both State and Federal levels.[3]

In NSW we have the *Anti-Discrimination Act* 1977. But, somewhat oddly, many prohibitions under this Act do not apply at all to "private educational authorities".[4] The definition in s 4(1) is:

> **"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 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.

However, it seems clear that similar prohibitions under federal law, the *Sex Discrimination Act* 1984 (Cth) ("the SDA"), **would** be applicable to NSW schools.[5] Obligations not to discriminate on various grounds are imposed under s 20 of the SDA on "educational authorities", defined as follows in s 4(1) of that Act:

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[3] The above examples include reference to someone departing from a doctrinal basis. In NSW (and in the Federal sphere at the moment) there is no general prohibition on religious discrimination, so there will be no legal problems in imposing sanctions for these decisions (the main exception is s 772 of the *Fair Work Act* 2009 (Cth), discussed in the text below). Hence the rest of this paper will mainly concentrate on the SDA issues.

[4] See the exemptions applying to "private educational authorities" in relation to discrimination in provision of education to students on the grounds of sex (s 31A(3)(a)), transgender grounds (s 38K(3)), marital or domestic status (s 46A(3)), disability (s 49L(3)(a)), homosexuality (s 49ZO(3)), and age (s 49ZYL(3)(b)). In addition, such authorities are also exempt from the prohibition against employment discrimination on the grounds of homosexuality (s 49ZH(3)(c)), transgender grounds (s 38C(3)(c)), sex (s 25(3)(c)), disability (s 49D(3)(c)), and marital or domestic status (s 40(3)(c)).

[5] Even if NSW law could be read as providing an implied right to NSW schools not to comply with discrimination law, under s 109 of the Constitution Commonwealth law would prevail.

> ***"educational authority"*** means a body or person administering an educational institution.
> ***"educational institution"*** means a school, college, university or other institution at which education or training is provided.

Under s 21 discrimination in relation to education provided to students is forbidden, where decisions are made on the grounds of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding. There is also a general prohibition on making decisions on the same grounds in the areas of employment (s 14) or engagement of contractors (s 16).

However, the SDA ss 37 and 38 provide clauses which balance out the right of students and staff not to be discriminated against, with the right of faith-based schools to operate in accordance with their religious commitments.[6]

> **Religious bodies**
> 37 (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…[7]
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> **Educational institutions established for religious purposes**
> 38 (1) Nothing in paragraph 14(1)(a) or (b) or 14(2)(c) renders it unlawful for a person to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity,marital or relationship status or pregnancy 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.
> (2) Nothing in paragraph 16(b) renders it unlawful for a person to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, marital or relationship status or pregnancy in connection with a position as a contract worker that involves the doing of work in 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.
> (3) Nothing in section 21 renders it unlawful for a person to discriminate against another person on the ground of the other person's sexual orientation, gender identity, marital or relationship status or pregnancy in connection with the provision of education or training by 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.

In broad terms, the areas which will provide freedom of religion for faith-based schools here are:

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[6] For my comment as to why I prefer to call these "balancing clauses" rather than "exceptions" or "exemptions", see N Foster, "Freedom of Religion and Balancing Clauses in Discrimination Legislation" (2016) 5 *Oxford Journal of Law and Religion* 385-430.

[7] Section 37(2) says that the rights under s 37(1) do not apply in relation to the provision of Commonwealth-funded aged care; but as this is not directly relevant to schools, I have omitted this.

- Under s 37(1)(c), selecting persons for "any religious observance or practice" would probably include decisions such as who leads (or preaches) at a regular "chapel" service or leading classroom prayer in the morning, if such happened. It could be argued that a "religious studies" class might fall into this category, though I think that would be less clear.
- Under s 37(1)(d) there is a broadly framed freedom in relation to "any other act or practice of a body established for religious purposes", so long as this is "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".
- There are then specific protections provided under s 38 for "an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed", in relation to engagement of employees and contractors, and the provision of education to students. Decisions here to be protected will need to be made "in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed".

There is an unresolved question (at least to my mind) as to why we have what at first glance seem to be duplicate protections provided under sections 37(1)(d) and 38. After all, isn't an "educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed", also a "body established for religious purposes"? When we drill down to the details, however, there are some differences.

One explanation may be that a "faith-based school" may be "conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed" (s 38) but not actually be currently *operated* by "a body established for religious purposes" (s 37). So, s 38 may protect a school where its governing documents require it to confirm to Christian principles, for example, even though the current board do not share those principles.

Are the protections provided by s 38 less than those provided by s 37? Table 1 suggests that they are, slightly.

Area of operation	**Section 37 SDA**	**Section 38 SDA**
Applies to…	"any other act or practice" of the religious group	Decisions in relation to employees, contractors and students
Which type of discrimination is excluded?	"Nothing in Division 1 or 2" will apply; ie discrimination based on all the prohibited grounds 1. Sex 2. sexual orientation, 3. gender identity, 4. **intersex status**, 5. marital or relationship status, 6. pregnancy or potential pregnancy, 7. **breastfeeding** or	Decisions protected are those based on 1. sex, 2. sexual orientation, 3. gender identity. 4. marital or relationship status or 5. pregnancy

	8. **family responsibilities**.[8]	
To what religious grounds does the exemption apply?	To "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"	To "discriminat[ion] in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed"

Table 1- difference between protections provided by sections 37 and 38, SDA.

The result of this comparison is that it does seem that the s 38 protections are not quite as extensive as those under s 37. This seems to have suggested to some that s 37(1)(d) may be seen to be not available to educational institutions. But this view is not persuasive. Section 37 contains no explicit indication that it is intended to operate completely separately from s 38, and such would have been easy to add.

In particular, a school that was actually conducted by a religious body could legitimately argue that it should be entitled to the full range of protections under s 37, since the s 38 lesser protections are only intended to be used by institutions which are only "historically" religious, in the situation noted above where the current management of the school does not share the religious beliefs on which the school is intended to operate. (This would give s 38 genuine work to do, as otherwise it could be argued that it would be otiose.)

(It is worth noting that the view that both sections are applicable to educational institutions conducted on religious grounds by religious bodies, seems to lie behind amendments which were introduced into Federal Parliament by Ms Sharkie (Independent) during the debate on the *Religious Discrimination Bill* and cognate legislation.[9])

So, these provisions will provide some protection for schools applying their faith commitments. Interestingly there seem to be no reported cases where these precise provisions have been considered. But there are two important decisions on similar laws which illustrate both how they might operate, and the possible limits that might be placed on the protection they provide.

I mention these briefly.[10] In *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155 (6 July 2010) a same-sex couple had approached the Wesley Mission Council to be accepted as possible foster parents for children in need. The Mission had a policy based on its religious commitments that it would only place children with a heterosexual couple. They were sued for "sexual orientation" discrimination, but in the end were able to successfully show that their policy fell within the balancing clause in s 56 of the NSW ADA. The Tribunal which ultimately determined the matter[11] found that the refusal to entertain the claimant's application 'conform[ed] to the doctrines of [the] religion' and that to

[8] Items in bold are not duplicated in s 38.

[9] See Ms Sharkie's amendment to the SDA, moved in the course of debate on the *Human Rights Legislation Amendment Bill* 2021 in the House of Representatives on 10 Feb 2022 (though recorded in the Hansard for 9 Feb 2022 as the debate took place after midnight): *House of Representatives Hansard Wed 9 February 2022*, at 280. The amendment repealed s 38(3) of the SDA and at the same time amended s 37 to make it clear that a religious school could not rely on s 37 once the relevant provision of s 38 had been removed. The amendment was notable in that it passed the House without the official support of the government, 5 members of the government crossing the floor. The amended package of legislation of which this was a part did not pass the Senate prior to the prorogation of Parliament for the 2022 election.

[10] For more detailed analysis of these and other cases from overseas, see Foster (2016) above n 6.

[11] *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293 (10 December 2010).

not allow homosexual foster carers was 'necessary to avoid injury to the religious susceptibilities of the adherents of that religion'.

While this was a sensible outcome, the course of the litigation illustrates one problematic aspect of these sort of provisions. At first instance the lower level of the Tribunal had ruled that the Mission could not demonstrate that its views on the Bible's teaching on marriage and sex were part of its "doctrines", and hence could not be used to excuse its decision. This was connected with a decision that any relevant doctrines had to be those shared by the whole of the denomination the Mission was attached to (the Uniting Church of Australia). Thankfully the NSW Court of Appeal overturned those initial views and held that the relevant doctrines were those actually held by the Mission itself (which was independent to a large extent from the denomination). This approach meant that the later Tribunal panel was able to rule that that the word "doctrine" was broad enough to encompass, not just formal doctrinal pronouncements such as the Nicene Creed, but effectively whatever was commonly taught or advocated by a body and included "moral" as well as "religious" principles.

While this was a good outcome, there was a more problematic decision handed down in Victoria. In *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75 (16 April 2014) a campsite run by an organisation connected to the Christian Brethren had been asked to provide accommodation for an event which was said to be aimed at affirming same-sex attraction to a group of young people. When the CYC people declined to accept the booking, saying that it was contrary to their religious commitments to support this message, the organisation was sued for sexual orientation discrimination.

CYC were held liable by a Tribunal and ordered to pay damages of $5000. Their appeal was rejected, though by a 2-1 decision where a strong dissent was given by one of the appeal judges, Redlich J. The CYC was held not to be a "body established for religious purposes" for the purposes of a defence under s 75 of the then-applicable legislation, the *Equal Opportunity Act* 1995 (Vic). The majority also ruled that even if it were such a body, its decision not to allow a booking here was not required by its "doctrines". Maxwell P in the majority accepted the reasoning of Judge Hampel in the Tribunal, who had adopted the submission of a theological expert that "doctrines" of the Christian faith were to be confined to matters dealt with in the historic Creeds, none of which mentioned sexual relationships.[12] This is clearly far too narrow a view. The majority decision also fails to deal with the question whether an organization can be seen to be providing support for a particular *viewpoint* which has been announced when a booking is made.

Application of balancing clauses to "religious groups", then, will partly depend on which organizations are allowed to count as "religious", and also on which of their religious beliefs are allowed to count as "doctrines". Even if, as the court here says, refusal to support a message about the "normality" of homosexuality is itself directly discriminatory, the proper application of the balancing clause here should in my view have allowed CYC to use their objection to that **message** as a reason not to provide the relevant service.[13]

While there seems to be a clash between the approaches of the appellate courts in the two different States, unfortunately the High Court of Australia declined special leave to appeal.[14] Insofar as there was a different approach taken in the *OV & OW* case to that taken in

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[12] *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75 at [276]-[277].

[13] For a more detailed analysis of the decision, see N Foster, "*Christian Youth Camps Ltd v Cobaw Community Health Services Ltd*: Balancing Discrimination Rights with the Religious Freedom of Organisations", ch 17 in Barker, Babie and Foster *Law and Religion in the Commonwealth: The Evolution of Case Law* with Renae Barker & Paul Babie (Oxford; Hart/Bloomsbury, 2022), pp 265-291.

[14] See my discussion of the High Court's refusal of special leave to appeal in the *CYC v Cobaw* litigation, Neil J Foster 'High Court of Australia declines leave to appeal CYC v Cobaw' (2014), at http://works.bepress.com/neil_foster/89 .

the *CYC v Cobaw* decision, in NSW we can rely on the more sensible ruling in *OV & OW*. But how this will unfold in the future is not clear. It would seem to be wise, then, for religious schools to be as clear as possible that their "doctrines" include the teaching of the Bible on issues of sexual morality and sexual identity.

It is worth briefly mentioning one other area where there is a balancing of religious freedom rights with the rights of an employer. The *Fair Work Act* 2009 (Cth) is a Commonwealth law which provides some protections to employees. In particular, for employees in NSW, some protection is provided by s 772 of that Act:

> FAIR WORK ACT 2009 - SECT 772
> **Employment not to be terminated on certain grounds**
> (1) An employer must not terminate an employee's employment for one or more of the following reasons, or for reasons including one or more of the following reasons: …
> (f) race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin…
> (2) However, subsection (1) does not prevent a matter referred to in paragraph (1)(f) from being a reason for terminating a person's employment if:
> (a) the reason is based on the inherent requirements of the particular position concerned; or
> (b) if the person is a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed--the employment is terminated:
> (i) in good faith; and
> (ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.

This provision would provide a remedy for an employee dismissed from their job on various grounds, including "religion" or "sexual orientation". But it does also say that for an "institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed", then those beliefs can be applied in good faith should it be necessary to terminate employment of a staff member whose beliefs or behaviour are inconsistent with the faith commitments of the institution.[15]

3. Some current issues

It may be helpful to consider the operation of the above provisions in relation to two specific issues: (a) how should a Christian school respond when called on to recognise a "gender transition" by a student or staff member? (b) is it reasonable for a Christian school to ask senior leadership to agree to support and comply with Biblical values on sexual morality and gender issues?

(a) Gender "transition" issues

One of the controversial areas where Christian schools may face a dilemma is when a student announces that they believe they are of the opposite sex (to that indicated by their biology) and would like to change name, or pronouns, or uniform, or use bathrooms or other

[15] It should be noted that, while s 351 of the FWA seems to provide protections to employees against "adverse action" on various grounds including "religion", that provision does not provide a remedy for discrimination where the relevant State or Territory law provides no remedy (so would not apply to decision in NSW based on "religion", which is not a protected ground under NSW law). If there is a claim based on another ground which *is* protected under NSW law, however, then s 351(2)(b) and (c) provide protections to religious institutions identical to the protections contained in s 772(2) noted above.

facilities provided for the opposite sex.[16] Most Christian schools will take the view that the implication of the Bible's teaching is that human beings are created either male or female,[17] and that God's purpose is that people live lives that reflect their identity as such,[18] which in the vast majority of cases reflects their physiological and chromosomal biology.

There is a prohibition in SDA s 21 on decisions in the educational area which amount to discrimination on the ground of a person's "gender identity". This term is somewhat opaquely defined in s 4(1) as follows:

> ***"gender identity"*** means 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.

Is a refusal to allow a girl to use a male toilet, discrimination of this sort? To constitute discrimination on the basis of gender identity, under s 5B(1) it must be shown that someone

> treats the aggrieved person less favourably than, in circumstances that are **the same or are not materially different**, the discriminator treats or would treat a person who has a different gender identity.

It could well be argued that denying a girl access to a male toilet, whereas a boy would be granted access, is to make a decision where the circumstances are **not** the same. The facilities are set up for reasons of decency to accommodate only biological males, and that is a material difference. In that case there would not even be a *prima facie* case of discrimination. Parkinson puts it this way:

> Nothing in the *SDA* states that an educational institution must treat any student as a different sex because their gender identity differs from their natal sex.[19]

But if it were concluded that this does seem to be discriminatory, then it would seem that a policy which could be justified as "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" would be able to be applied under s 37. This would allow the school to say that its religious belief required it to give priority to biological sex in making decisions about what students could do.

Suppose a child presented for enrolment into a single-sex faith-based school when their biological sex did not correspond to the sex served by that school. Could the school, if they were aware of this, decline to accept the enrolment?

As noted above, the Commonwealth SDA forbids adverse treatment on the grounds of "sex" and "gender identity". A girl's school which declined to enrol a biological male could not be guilty of discrimination on the basis of either sex or gender identity under s 21, as they could rely on the exception under s 21(3) "the educational institution is conducted solely for students of a **different sex from the sex of the applicant**". The SDA, it seems clear, means "biological" sex when it uses the word sex.

The only situation where s 21(3) might be argued not to apply, would arise where it could be said that the student had actually been deemed to change "sex" under NSW law. Under

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[16] I recommend a recent article by Professor Patrick Parkinson, "Adolescent Gender Identity and the Sex Discrimination Act: The Case for Religious Exemptions" (2022) 1 *Australian Journal of Law and Religion* 76-93, which deals with these issues in more detail than is possible here. Available at https://ausjlr.com/wp-content/uploads/2022/07/Volume-1-Parkinson.pdf .

[17] Genesis 1:27; Matt 19:4.

[18] See for example the prohibition on "cross-dressing" in Deut 22:5, exemplifying a principle that also finds reflection in 1 Cor 11:14-15 where Paul refers to "nature" as justifying norms for male and female attire.

[19] Above, n 16, at 91.

the *Births, Deaths and Marriages Registration Act* 1995 (NSW) ("BDMRA"), a person under the age of 18 may be able to formally "change sex" if their parents apply for this under s 32B(2) of that Act, which application requires proof that the child has "undergone a sex affirmation procedure". Under s 32A this means "a surgical procedure involving the alteration of a person's reproductive organs carried out--(a) for the purpose of assisting a person to be considered to be a member of the opposite sex". Mere "social transition" would not be sufficient for a change of the birth certificate.

If the birth certificate has been changed, however, then under s 32I BDMRA: "A person the record of whose sex is altered under this Part is, for the purposes of, but subject to, any law of New South Wales, a person of the sex as so altered."

There would presumably be very few such children. But even in the case of a child who has undergone surgery, there would still be a question as to whether the deeming of sex under the law of NSW automatically changes the reference of the word "sex" in the Commonwealth SDA. And even if so, there would still be room, should it be thought appropriate, to argue that sections 37 and 38 allow a religious school to apply its faith commitments in making this decision.

(b) Senior leadership commitment to values and doctrine

It would seem to be perfectly reasonable for a Christian school to ask those involved in senior management or governance positions to affirm their agreement with the school's faith commitments, including those around sexual morality and gender identity. The implication of sections 37 and 38, for example, is that Christian schools will operate in accordance with their faith commitments, and for this to happen it would be important that leaders within the organisation were prepared to live these principles out.

4. Possible future developments in religious freedom protections and faith-based schools

It is worth being aware of changes in discrimination law around Australia which may foreshadow a narrowing of protections provided to faith-based schools in the future. While no such changes have yet been made in NSW, it seems likely to me that there will at least be agitation to change in the future. The most likely model which will be pushed will be that which has just recently commenced in Victoria.

The relevant legislation in Victoria is the *Equal Opportunity Act* 2010 (Vic) ("EOA"). There were a number of important changes made to the "balancing clauses" in Victoria by the *Equal Opportunity (Religious Exceptions) Amendment Act* 2021 (Vic), significant parts of which came into force on 14 June 2022.[20]

The precise interpretation of some of these provisions may not be clear until we have seen some cases on them. But in broad terms the legislation replicates the pattern noted above set up by sections 37 and 38 of the SDA- it deals with "religious bodies" (under sections 82 and 82A), and then it provide for similar rules in relation to a "person or body, including a religious body, that establishes, directs, controls, administers or is an educational institution that is, or is to be, conducted in accordance with religious doctrines, beliefs or principles" (sections 83 and 83A). So, it seems to account for entities where the governing body is committed to acting on religious principles, and also for schools where the principles of the body are designed to be religious, even if the governing entity may not themselves be so committed.

[20] For my comments on the legislation as it was being debated, which are still valid as it went through Parliament unamended, see https://lawandreligionaustralia.blog/2021/10/28/victorian-religious-exceptions-amendment-bill-introduced/ (Oct 28, 2021).

In general, it seems to me that faith-based schools will be "religious bodies", and so I will confine my comments to sections 82 and 82A. (As with s 38 of the SDA, I think sections 83 and 83A are mainly relevant to institutions that are only "historically" religious).

The main impacts of the new sections 82 and 82A are to make it harder to run a school on principles drawn from a religious world view.

1. Section 82 deals with issues other than staffing decisions; so, this will relate to student matters and (perhaps) what is taught in courses. Section 82(1) replicates the general permissions given in s 37(1)(a)-(c) of the SDA by exempting issues relating to training and ordination of ministers of religion, and religious "observances", from the prohibitions in Part 4 of the EOA. However, when we come to the more general operation of the school, we find in s 82(2) that:
   - While there is a broad exemption for "anything done…on the basis of a person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity", where this "(a) conforms with the doctrines, beliefs or principles of the religious body's religion; or (b) is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religious body's religion", this is subject to that thing being "reasonable and proportionate in the circumstances".
   - A decision on what is reasonable and proportionate will have to be made by a secular tribunal or court.
2. In relation to *staffing* decisions, religious schools may not under s 82A of the amended *EOA* make these decisions based on whether or not the staff member agrees with fundamental **moral** values being taught by the school; the grounds on which a staff member can be hired or fired are limited to "religious belief" **alone** (and it seems from the way this is worded, to mean that this will apply even to someone hired as a "religious studies" teacher.)
   - All religious schools can *only* make an otherwise "discriminatory" staffing decision based on religious beliefs which is justified by demonstrating that the "inherent requirements" of the position require such a criterion- s 82A(1)(a).
   - The implication is that a secular Victorian tribunal or court will have to determine whether such requirements are applicable by examining the religious beliefs of the body or school for themselves.[21]
   - In addition it will need to be demonstrated (again to whatever secular body has to decide) that this decision is "reasonable and proportionate in the circumstances"- s 82A(1)(c).

To give some examples about how this will work in relation to staffing: first, someone will have to make a judgement about whether a requirement to live in accordance with the ethos of the school is an "inherent requirement" of the position. Who decides if the social studies teacher, for example, or a maths teacher, or a receptionist, is part of the team conveying important religious messages or modelling a godly life to students? Second, however, the school can only make employment decisions if the inherent requirement cannot be met because of "**religious** belief or activity".

Suppose a staff member decides to move in with a de facto partner. The staff member may say, I still believe, I just interpret the scriptures differently to allow me to live the way I choose. The school may see that as a "religious" difference. But a secular court or tribunal may

[21] See my more detailed analysis of the provisions in my blog post, "Victorian Religious Exceptions Amendment Bill introduced" (Oct 28, 2021) https://lawandreligionaustralia.blog/2021/10/28/victorian-religious-exceptions-amendment-bill-introduced/ .

say, no, that is not a religious matter; what you are concerned about is the person's "lawful sexual activity"[22] or "sexual orientation". Thirdly, even if the college overcomes the first two hurdles it will need to show that asking the staff member to stand down is "reasonable and proportionate". Again, this is a decision that will need to made by a court or tribunal which has no real sympathy for the school's religious ethos.[23]

Notice that all 3 criteria must be met. Even if the staff member is a "core" religious or Biblical studies teacher, and so would clearly satisfy para (a), the other criteria will present problems. In fact, let's suppose a Biblical studies teacher at a Christian school has become a Muslim, and so meets para (b) as well. Even then, para (c) will need to be considered by a secular tribunal: is it "reasonable and proportionate" to stand down the teacher? Maybe the person promises to keep using the same class notes, while taking every Friday off for prayers at the mosque. The school might be required by a tribunal to allow this Muslim convert to stay as a teacher, all the while (from the school's perspective) undermining the ethos of the school.

Just briefly, I note that a similar restricted view of freedoms given to religious educational bodies has now been adopted in the Australian Capital Territory. Under the *Discrimination Act* 1991 (ACT) s 46 decisions in relation to students and staff can only be made on grounds of religious belief, not on morality grounds. And even in those cases, where staffing is concerned, it must be shown that "the discrimination is intended to enable, or better enable, the institution to be conducted in accordance with those doctrines, tenets, beliefs or teachings".

Proposals to narrow protections provided to religious schools under State and Territory laws are also under consideration in other jurisdictions around Australia at the moment.[24]

One issue that arises in this area, then, whether this sort of law at a State or Territory level might clash so much with Commonwealth law, that it could be invalid. Under the Commonwealth Constitution, s 109 says that where there is a clash between Commonwealth and State law, the State law is rendered inoperative to the extent of the clash. Similar principles apply where there is a clash between over-arching federal law and a Territory law.

There has been no clear decision on this issue in the area of religious freedom and these sorts of balancing clauses, but I think, with lower level laws becoming increasingly restrictive, this argument might succeed in the future.[25] The argument would be: the Commonwealth law dealing with discrimination on sex, sexual orientation or gender identity, gives certain privileges to religious schools to operate in accordance with their beliefs; the State or Territory law purports to narrow these privileges; hence the State or Territory law will be inoperative as taking away benefits conferred by the Commonwealth law.

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[22] Unlike in NSW, "lawful sexual activity" is a prohibited ground for decision-making under the Victorian EOA- see s 6(g).

[23] For an article commenting on the question as to when secular courts should be deciding theological questions, see Neil J Foster, "Respecting the Dignity of religious organisations: Courts deciding theology?" (2020) 47 *University of Western Australia Law Review* 175 – 219, at: http://works.bepress.com/neil_foster/135/ .

[24] See some recent submissions made by Freedom for Faith on these proposals: "Submission to ACT Discrimination Law Reform Exposure Draft Bill Amending Discrimination Act 1991" (1 July 2022) https://freedomforfaith.org.au/articles/submission-to-act-discrimination-law-reform-exposure-draft-bill-amending-discrimination-act-1991/ ; "Submission on the Exposure Draft of the Anti-Discrimination Amendment Bill 2022 (NT)" (5 Aug, 2022) https://freedomforfaith.org.au/articles/submission-to-the-exposure-draft-of-the-anti-discimination-amendment-bill-2022-nt/ .

[25] See my recent article on this: N Foster, "Religious Freedom, Section 109 of the Constitution, and Anti-discrimination Laws" (2022) 1 *Aust Journal of Law and Religion* 36-56, available in full text at https://works.bepress.com/neil_foster/144/ .

5. The Religious Discrimination Bill and proposed amendments

There was, of course, a Bill presented to Federal Parliament in the last months of the former Coalition government which would have addressed religious discrimination as a topic of federal law.[26] Without going into all the details, I think the Bill, while not perfect, was a generally sensible one that would have been a step forward for religious freedom in Australia. Unfortunately, it was "torpedoed" at the last minute in the House of Representatives. An amendment was moved, not to the main *Religious Discrimination Bill*, but to an associated Bill, which would have removed the rights noted above for religious schools to apply their faith commitments around appropriate sexual activity and identity, in providing education (specifically, the protections provided by s 38(3) of the SDA). The government took the view, correctly in my opinion, that the package with this last-minute amendment (passed due the defection of 5 Government back-benchers), was worse than no Bill at all, and declined to move the legislation forward in the Senate.

With the calling of the recent federal election the Bill has now, of course, lapsed, and we await to see what form such legislation will have when introduced by the new ALP government. It seems likely, however, that any revised package will include some amendments to sections 37 and 38. The repeal of s 38(3) is seen as dealing with a supposed problem that Christian schools can expel gay or transgender children. There is actually no evidence that such is happening. But to repeal s 38(3) will be to force Christian schools to no longer apply Biblical sexual morality principles in relating to their students.

This would mean, for example, that a Christian school may be obliged to accept:

- Students running a "gay pride" club at lunchtimes, or otherwise actively agitating in school events for support for homosexual or transgender causes;
- A student demanding that they be allowed to bring a same-sex partner to a school "formal";
- A senior prefect who has become pregnant due to extra-marital sexual activity, demanding that they not be removed from their office.

There may also be increased pressure to support "gender transition" (though, as noted above, arguably declining to do so at the moment may not be a breach of the SDA).

In addition, there will be pressure to go "the whole hog" and to repeal the rest of s 38 SDA, dealing with staffing and employment issues. This will also create potential major problems for Christian schools.

6. What the future may bring

Those who follow the Lord Jesus know that the ultimate future will bring his return and taking his people to be with him in glory! In the short term we are called to be faithful and to proclaim his gospel, for our God desires all to be saved. Christian schools play a vital role in supporting Christian parents in raising their children to love and serve the Lord, and in presenting the gospel to those outside the church. In doing their work, schools can use the legal structures that are given in our society to defend their right to operate in accordance with truth. There are challenges ahead, but we know the end of the story and in whom we trust.

Neil Foster
28 Sept 2022

[26] For background and comments on the Bill as presented to Parliament, see https://lawandreligionaustralia.blog/2021/11/24/the-religious-discrimination-bill-arrives/ (24 Nov 2021), and for later developments see https://lawandreligionaustralia.blog/2022/02/10/religious-discrimination-bill-passes-lower-house-along-with-sda-amendment/ (10 Feb 2022).