



briefing paper



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Anti-Discrimination Amendment (Private Educational Authorities) Bill 2013

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by Gareth Griffith and Lenny Roth

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Anti-Discrimination Amendment
(Private Educational Authorities) Bill
2013

by

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SUMMARY

On 19 September 2013, Alex Greenwich MP introduced into the Legislative Assembly the [*Anti-Discrimination Amendment \(Private Educational Authorities\) Bill 2013*](#). The object of the 2013 Bill is:

...to amend the Anti-Discrimination Act 1977 to remove the exemption of private educational authorities from provisions that make it unlawful to discriminate against a student or prospective student.

The exemptions for private educational authorities currently apply in relation to most grounds covered by the Act, namely: sex, marital or domestic status, homosexuality, disability, age, and transgender status.

The Bill focuses on the exceptions that apply in the area of education and does not propose to remove the exceptions for private educational authorities in the area of employment. In addition, the Bill would not modify the general exception for religious bodies in section 56(d), which states that nothing in the Act affects:

(d) any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

In summary, the following comparisons can be made between the 2013 Bill and past proposals for reform in NSW:

- ***NSW Law Reform Commission report (1999)***: The 2013 Bill adopts the Law Reform Commission's recommendations to repeal the exceptions for private educational authorities in the area of education. However, it does not adopt the Commission's recommendations to insert a specific exception for religious educational authorities that would only apply to the grounds of sex, domestic status, sexuality, and transgender; and to repeal section 56(d). The 2013 Bill might, in practical terms, achieve the same result. This is because it may be difficult for religious educational institutions to rely on section 56(d) in relation to grounds such as race, age and disability. The Bill does not adopt the Commission's similar recommendations in relation to the exceptions for private educational authorities in the area of employment.
- ***Private Members Bill – Lee Rhiannon (2005)***: Like the 2013 Bill, Lee Rhiannon's 2005 Private Member's Bill proposed repealing the exceptions for private educational authorities in the area of education. However, the 2005 Bill also proposed amending the general exception in section 56(d) so that it would not apply in the area of education. In addition, the 2005 Bill proposed removing the exceptions for private educational authorities in the area of employment.

In summary the following comparisons can be made between the 2013 Bill and the laws at the Commonwealth level and in other States and Territories:

- ***Commonwealth laws***: The 2013 Bill would make the NSW Act more consistent with the Commonwealth *Sex Discrimination Act* and *Age*

Discrimination Act (which do not provide an exception for private educational authorities but which have an exception for religious bodies in similar terms to the NSW Act). The NSW Act would, at least in form, remain inconsistent with the *Racial Discrimination Act* and the *Disability Discrimination Act*, which do not contain a general exception for religious bodies. However, as noted above, it may be difficult for a religious educational institution to rely on the exception for religious bodies in the NSW Act in relation to these grounds (i.e. race and disability).

- ***Laws in other States/Territories:*** The Bill would bring the law in NSW more into line with other Australian jurisdictions. However, the NSW Act would continue to have broader exceptions for religious educational institutions than in four other States. In Queensland the exception for religious bodies does not apply to education and in three other States the exception is expressly limited to certain grounds: in Tasmania, it only applies to the ground of gender; in South Australia, it only applies to the grounds of sex, chosen gender, and sexuality; and in Victoria it does not apply to the grounds of pregnancy, race and disability. As noted above, however, it may be difficult in NSW for religious educational institutions to rely on the general exception for religious bodies in section 56(d) in relation to certain grounds such as race, age and disability.

1. INTRODUCTION

On 19 September 2013, Alex Greenwich MP introduced into the Legislative Assembly the [Anti-Discrimination Amendment \(Private Educational Authorities\) Bill 2013](#) (“the 2013 Bill”). The object of the 2013 Bill is:

...to amend the Anti-Discrimination Act 1977 to remove the exemption of private educational authorities from provisions that make it unlawful to discriminate against a student or prospective student.¹

In his second reading speech on the Bill, Mr Greenwich noted that on all grounds except for race, the Anti-Discrimination Act contains “exemptions for private schools and other private education authorities allowing them to discriminate or condone discrimination against students in ways that are unlawful for public schools”.² Further to this, Mr Greenwich commented:

Discrimination can involve being treated unfairly in comparison to other students. It can also involve being singled out and targeted, being coerced to leave, or having authorities turn a blind eye to or tolerate bullying or harassment. Students at private schools can legally be expelled or pressured into leaving if they are pregnant, or they can be singled out and be provided with no assistance to combat bullying if they are gay. Private education institutions, including universities, colleges and specialty schools like business schools, are also subject to the exemptions. These institutions can also deny entry to people with a disability and kick out students who are gay or lesbian, transgender, single, too old, or pregnant.

While most schools and institutions choose not to allow this discrimination, there is limited legal protection if they do. Students from private schools who suffer from discrimination cannot go to the Anti-Discrimination Board. Opponents of the bill say that change is not necessary because private schools no longer discriminate or permit discrimination, but this contradicts the stories I have heard. I will share some of those stories with the House so that members can understand that discrimination does happen and does impact on students and children...³

This briefing paper begins with an overview of the *Anti-Discrimination Act 1977* (NSW). It then outlines the specific exceptions for private educational authorities in the provision of education, and the general exceptions for religious bodies. Next, it presents relevant findings from a NSW Law Reform Commission report on the Act in 1999. The paper then refers to a 2005 Private Members’ Bill which proposed removing the exceptions in the Act for private educational authorities in relation to students and employment. A summary of the anti-discrimination laws at the Commonwealth level and in the other States and Territories is also presented. The paper then provides a comparative analysis of the Bill in relation

¹ Mr Greenwich had previously published on his website for consultation, [Ending Discrimination in Private Schools: Discussion Paper](#), 2013

² A Greenwich, *NSW Parliamentary Debates (LA)*, [19 September 2013](#), p23,814

³ A Greenwich, *NSW Parliamentary Debates (LA)*, [19 September 2013](#), p23,815

to previous proposals in NSW and the provisions in other jurisdictions. Finally, the paper notes some recent comments on the exceptions and the Bill, and it refers to studies on discrimination in religious schools.

2. OVERVIEW OF NSW ACT

The *Anti-Discrimination Act 1977* (NSW) makes it unlawful to discriminate against a person on a number of prohibited grounds, in a number of areas, subject to certain exceptions. There is a mechanism for making complaints, and the Act contains a number of available remedies.

2.1 Unlawful discrimination

What is discrimination? Both direct and indirect discrimination are unlawful. Direct discrimination occurs if, on one of the prohibited grounds, a person (the perpetrator) treats another person less favourably than in the same or similar circumstances, the perpetrator treats or would treat a person who does not have the relevant attribute. Indirect discrimination occurs if a person requires another person to comply with a requirement or condition:

- with which a substantially higher proportion of persons who do not have the relevant attribute comply or are able to comply;
- being a requirement which is not reasonable having regard to the circumstances of the case; and
- with which the aggrieved person does not or is not able to comply.

Prohibited grounds: The following are prohibited grounds of discrimination:

- Race (Part 2 of the Act)
- Sex (Part 3)
- Transgender (Part 3A)
- Marital or domestic status (Part 4)
- Disability (Part 4A)
- Carer's responsibilities (Part 4B)
- Homosexuality (Part 4C)
- Compulsory retirement on ground of age (Part 4E)
- Age (Part 4G)

The Act also prohibits sexual harassment (Part 2A).

Areas of operation: Discrimination is unlawful in the following areas:

- Employment
- Provision of education
- Provision of goods and services
- Accommodation
- Registered clubs

2.2 Exceptions

The Act contains several exceptions that apply to particular grounds of discrimination, in certain areas of operation. These include exceptions for private educational authorities in the provision of education (see Section 3 below). There are also a number of general exceptions, which apply across the whole Act (see Part 6 of the Act). These include an exception for acts done under statutory authority; and exceptions relating to religious and voluntary bodies (the exception for religious bodies is outlined in Section 4 below).

2.3 Complaints and remedies

A person may lodge a written complaint to the NSW Anti-Discrimination Board in respect of a breach of the NSW laws (see Part 9 of the Act). It will investigate the complaint and may attempt to resolve it through conciliation. If this is not successful, the Board may refer the matter to the Administrative Decisions Tribunal. The Tribunal determines whether discrimination has occurred and makes a binding decision. It can award damages (up to \$100,000) and can make orders such as preventing the discriminator from continuing the conduct.

3. EXCEPTIONS FOR PRIVATE EDUCATIONAL AUTHORITIES

3.1 The provisions and exceptions

The Act contains exceptions for private educational authorities in two areas, employment, and provision of education. This paper focuses on the exceptions that apply to the provision of education, which are the focus of the 2013 Bill.

In each Part of the Act dealing with a particular ground of discrimination, there are provisions making it unlawful to discriminate in the provision of education. All of these provisions are in the same form and all use the term “educational authority”, which means “a person or body administering a school, college, university or other institution at which education or training is provided” (s 4). By way of example, section 31A states (in part):

- (1) It is unlawful for an educational authority to discriminate against a person on the ground of sex:
 - (a) by refusing or failing to accept the person’s application for admission as a student, or
 - (b) in the terms on which it is prepared to admit the person as a student.

- (2) It is unlawful for an educational authority to discriminate against a student on the ground of sex:
 - (a) by denying the student access, or limiting the student’s access, to any benefit provided by the educational authority, or
 - (b) by expelling the student or subjecting the student to any other detriment.

All of the provisions in the Act making it unlawful for educational authorities to discriminate in the provision of education (except the provisions relating to the ground of race) contain an exception, which states that the provisions do not apply to or in respect of a “private educational authority”: e.g. s 31A(3)(a). In other words, private educational authorities are permitted to discriminate against applicants for admission, and students, on all grounds covered by the Act except race. The 2013 Bill would remove all of these exceptions.

3.2 What is a “private educational authority”?

The term “private educational authority” is defined (in s 4) to mean:

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

The term private “educational authority” therefore includes all non-government primary and secondary schools. A full list of these registered schools can be found on the NSW Board of Studies’ [website](#). The term also includes private vocational colleges and universities which have not been established under an Act of incorporation of a university: e.g. the Australian Catholic University.

3.3 Background to these exceptions

These exceptions for private educational authorities were not part of the Act as originally enacted in 1977. In its original form, the Act prohibited three grounds of discrimination: race, sex, and marital status. It was unlawful for an educational authority to discriminate against students on the grounds of race but there were no such provisions in relation to the two other grounds. It was unlawful for employers (including an educational authority) to discriminate on all three grounds in relation to employment of staff.

There was only one specific exception in relation to discrimination in the provision of education. Section 17, which made it unlawful to discriminate on the grounds of race in education, stated in subsection (3) that “nothing in this section applies to or in respect of a prescribed educational authority in relation to such circumstances, if any, as may be prescribed”. There were no specific exceptions in relation to discrimination in employment.

The general exception for religious bodies was part of the Act, as was a general exception in section 58, which stated that nothing in the Act affects:

(a) any rule or practice of an education or religious establishment which restricts admission to membership of that establishment; or

(b) the provision of benefits, facilities or services to pupils, students, members or staff of such establishments.

In 1981, the Parliament enacted some major amendments to the Act including adding physical impairment as a new ground of unlawful discrimination; and increasing the coverage of the Act in relation to educational authorities (including by repealing the general exception in section 58) but inserting specific exceptions for private educational authorities in respect of the grounds of sex, marital status and the new ground of physical impairment.⁴ These exceptions were inserted into the provisions concerning discrimination in the provision of education, as well as those concerning discrimination in employment. In his second reading speech on the 1981 Bill, Premier Wran stated:

...When the Government introduced anti-discrimination legislation in 1976, the question of its impact on the educational system, both public and private, provoked considerable controversy.

This [Bill] exposes the government educational system to the full force of the effect of the Anti-Discrimination Act. Discrimination in the employment of teachers and staff on the grounds of race, sex, marital status and physical impairment will be banned [Note that this was already the case under the Act in relation to the first three of these grounds]...Discrimination in the admission and treatment of students on the same grounds will be rendered unlawful. There are some qualifications to this general statement. The position of single sex schools will not be affected...It will not be unlawful for a government educational authority to decline admission of a person to a school on the ground of his physical impairment if the person, by reason of his impairment, requires special services or facilities which cannot reasonably be made available...

These initiatives do not apply to the private school sector. However, it has always been unlawful for private schools to discriminate on the ground of race and this will continue...⁵

As new grounds of unlawful discrimination have been added to the Act since 1981, specific exceptions have been inserted into the Act for private educational authorities in relation to those grounds. Like the previous exceptions, most of these exceptions apply in relation to both the provision of education and the employment of staff. Interestingly, in 1993 when age was added as a ground of discrimination, an exception was created for private educational authorities in the provision of education but not in the employment of staff.⁶ Note also that when the prohibitions on sexual harassment were inserted into the Act in 1997 no exception was made for private educational authorities.⁷

⁴ *Anti-Discrimination Amendment Act 1981 (NSW)*

⁵ N Wran, *NSW Parliamentary Debates*, 25 November 1980, p 3,414.

⁶ See *Anti-Discrimination (Age Discrimination) Amendment Act 1993 (NSW)*

⁷ See *Anti-Discrimination Amendment Act 1997*

4. GENERAL EXCEPTION FOR RELIGIOUS BODIES

As noted earlier, the Act contains a number of general exceptions including an exception for religious bodies. Section 56 states:

Nothing in this Act 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 appointment of any other person in any capacity by a body established to propagate religion, or
- (d) any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

The 2013 Bill does not propose any changes to section 56(d). Accordingly, it will still be possible for private educational authorities that are religious bodies to seek to rely on this provision to discriminate against students. However, it will be more difficult for religious bodies to come within the terms of this exception in relation to some grounds of discrimination (e.g. race and disability) than in relation to other grounds (e.g. sexuality). By way of example, in 2010 a religious foster care organisation successfully relied upon this exception to defend a complaint that it had discriminated against a same-sex couple.⁸

5. NSW LAW REFORM COMMISSION REPORT

5.1 The report

In 1999, the NSW Law Reform Commission published a review of the Anti-Discrimination Act.⁹ The Commission made over 150 recommendations to reform the Act. These included recommendations on:

- the exceptions for private educational authorities in the area of employment;
- the exceptions for private educational authorities in the provision of education;
- the general exception for religious bodies.

The only legislative response from the Government to the report was in the form

⁸ See [OW v Members of the Board of the Wesley Mission Council](#) [2010] NSWADT 293. This decision followed this judgment by the NSW Court of Appeal [OV & OW v Members of the Board of the Wesley Mission Council](#) [2010] NSWCA 155

⁹ NSW Law Reform Commission, [Review of the Anti-Discrimination Act 1977 \(NSW\)](#), Report 92, November 1999

of the *Anti-Discrimination Amendment (Miscellaneous Provisions) Act 2004*, which primarily related to complaint handling procedures.

5.2 Exceptions in area of employment

The Commission recommended that the exceptions for private educational authorities in the area of employment should only apply to religious educational authorities; and only on the grounds of sex, pregnancy, domestic status, sexuality and transgender status.¹⁰ The exception should provide that the educational institution must be conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed; and the employer must act on a bona fide belief that the discrimination was required in order to comply with the tenets of the particular religion or creed.

5.3 Exceptions in the area of education

The Commission made the following recommendations in relation to the exceptions for private educational authorities in the provision of education:

- repealing the exceptions for private educational authorities in relation to all grounds;
- repealing the exception for prescribed educational authorities from the prohibition on race discrimination;
- providing a limited exception for educational institutions which operate in accordance with religious tenets for the grounds of sex, domestic status, sexuality, transgender and religion.¹¹

The Commission's reasons were stated as follows (in part):

4.181 The rationale for the current exception is that the State should not interfere with education in the private sphere. As stated above, the inclusion of this exception was mooted by the private school lobby and mainstream churches. As with restricting private educational authorities in employment, there seems little justification in giving private educational authorities as they are currently defined such a broad exception in relation to the services they provide. Educational bodies, whether public or private, provide a service which, except for certain carefully justified circumstances, should be free from unlawfully discriminatory criteria. The exceptions provided in other jurisdictions suggest that the only area in which an exception may be justified is in relation to religious schools, where discrimination may be needed to cater to particular religious doctrines.

4.182 The purpose of excluding prescribed private educational authorities from the prohibition against race discrimination was to cover situations like "certain schools...designed to provide language classes for migrants both in the English

¹⁰ NSW Law Reform Commission, note 9, Recommendation 16, p159-160. The reasons for this recommendation are discussed at p155-159.

¹¹ NSW Law Reform Commission, note 9, Recommendations 20-22. Note that the Commission recommended that religion should be added as an unlawful ground of discrimination.

language and cultures of their home country”. Such situations will be covered by the proposed special measures provision and do not warrant an exception by prescription.

4.183 The Commission is not satisfied that, in the important area of education, discrimination should be permitted except to the extent necessary to resolve a conflict with other fundamental human rights or freedoms. The only basis on which the Commission is satisfied that such a conflict exists is in relation to religious freedom. Furthermore, the Commission can see no justification for providing such an exception, even for religious educational institutions, in relation to the grounds of race, age or disability or in relation to sexual or other forms of harassment.¹²

The draft bill, which was appended to the report, contained this exception:

It is not unlawful under this Act for a private educational authority that operates an educational institution or program in accordance with the doctrines, tenets or beliefs of a particular religion to exclude persons on the irrelevant characteristics of sex, domestic status, sexuality, transgender status or religion if the exclusion is reasonably necessary to comply with the doctrines, tenets or beliefs of that religion.¹³

5.4 General exception for religious bodies

The Commission recommended amending the general exception for religious bodies in section 56, including repealing subsection 56(d).¹⁴ In relation to subsection (d), the Commission concluded that “consistent with the positive protection to be provided in relation to religious beliefs and practices in the areas of employment and education, this paragraph is no longer necessary”.¹⁵

6. PAST PRIVATE MEMBERS BILL

6.1 The 2005 Bill

In 2005, Lee Rhiannon of the Greens introduced into the Legislative Council the [*Anti-Discrimination Amendment \(Equality in Education and Employment\) Bill*](#).¹⁶ This Bill proceeded to the second reading debate, but subsequently lapsed on prorogation on 19 May 2006. It was broader in scope than the current 2013 Bill. It proposed repealing the exceptions for private educational authorities both in respect to the provision of education *and in the area of employment*. In addition, it proposed limiting the general exception for religious bodies in section 56. The Bill would have inserted a new subsection (2) in section 56 stating:

¹² NSW Law Reform Commission, note 9, p181-182

¹³ NSW Law Reform Commission, note 9, p821 (clause 44 of Draft Bill)

¹⁴ NSW Law Reform Commission, note 9, p349 (Rec 46)

¹⁵ NSW Law Reform Commission, note 9, p348

¹⁶ This followed the earlier *Anti-Discrimination Amendment (Removal of Exemptions) Bill 2003*, which did not proceed beyond the Notice of Motion stage.

- (2) This section does not operate so as to permit unlawful discrimination:
- (a) in the provision of services (such as social, charitable or welfare services or similar services) to the public, or
 - (b) in the provision of primary, secondary or tertiary education.

6.2 Second reading debate

In her second reading speech, Ms Rhiannon presented the following case (in part) for repealing the exceptions for private educational authorities:

The Anti-Discrimination Act 1977 is one of the finest achievements of this Parliament, but it is not perfect. It contains some loopholes that allow legal discrimination to continue. The bill seeks to remove those loopholes. At present a student at a private school in New South Wales can legally be expelled for coming out as gay or lesbian. Imagine that—a young person, grappling to come to terms with his or her sexuality, perhaps struggling to deal with the emotions and confusion involved, is expelled for no other reason than his or her sexuality. At present a private school can legally fire a teacher because his or her marriage ends in divorce. In 2005 you would hardly believe that it could be the case, but it is. In 1977 this Parliament decided that it was unacceptable generally to discriminate on the grounds of marital status. However, in 2005 private schools can still do so. The Greens believe that that is a disgrace.

Further, at present, public schools in New South Wales accept every student who enrolls. That is their great strength. Yet private schools are legally entitled to turn away a prospective student if that young person has a disability. Public schools are not allowed to discriminate against those with a disability, and rightly so, but private schools remain free to do so. The irony, of course, is that many private schools are better placed to afford the costs involved than the hard-pressed public school system. The Greens believe that these legal discrimination loopholes are morally repugnant. The principle upon which the Anti-Discrimination Act is founded—embodying the values of inclusion, equality and fairness—cannot be qualified or limited. Discrimination is either right or it is wrong. We say that it is wrong. It is a nonsense to have one rule for some and another rule for others.¹⁷

Ms Rhiannon stated that the measures contained in the bill would “not impinge upon freedom of religion, and it does not limit the free exercise of religion”. Ms Rhiannon argued that the right to freedom of religion:

....does not mean that schools or charities, or businesses operated by religious organisations should not have to conform to normal, social standards. It is the proper role of Parliament to set those social standards, to set rules for fairness, to promote equality, and to protect the disadvantaged. That is what Parliament did in 1977 when it passed the Anti-Discrimination Act.¹⁸

¹⁷ L Rhiannon, *NSW Parliamentary Debates (LC)*, [13 October 2005](#), p18,556-18557

¹⁸ L Rhiannon, note 17, p18,557

Only the Democrats supported the Bill, which was opposed by the Liberal/Nationals Coalition, the Christian Democrats, and the one Labor member who spoke on it. Opposition to the Bill focused on the proposal to repeal the exceptions for private educational authorities *in the employment of staff*. The main argument against this proposal was that people should be allowed to set up a private educational institution that reflects religious values and parents should have the choice of sending children to such an institution.

Very few speeches against the Bill specifically addressed the proposal to repeal the exceptions for private educational authorities in *the provision of education*. Their main argument was that there was little evidence that such discrimination occurred in practice. Two Members who opposed the Bill actually supported repealing exceptions in relation to certain grounds. John Ryan said that, subject to consultation, the exception that applied to the ground of disability should be repealed.¹⁹ Don Harwin suggested that there was merit in the proposal to repeal the exception that applied to the ground of sexuality.²⁰

7. COMMONWEALTH LAWS

7.1 Overview of Commonwealth Acts

There are four separate Commonwealth anti-discrimination Acts:

- *Racial Discrimination Act 1975*
- *Sex Discrimination Act 1984*
- *Disability Discrimination Act 1992*
- *Age Discrimination Act 2004*.

All of the Acts make it unlawful to discriminate against a person on certain grounds, and in several areas including education. The *Racial Discrimination Act* does not specifically refer to education but it is considered to apply in this area by virtue of the general provision in section 9. The other Acts specifically make it unlawful for an “educational authority” to discriminate in the provision of education.²¹ Educational authority is defined to mean “a body or person administering an educational institution”, which, in turn, means “a school, college, university or other institution at which education or training is provided”.

Each of the Acts contains several exceptions (see Section 7.3 below).

Complaints about unlawful discrimination can be made to the Australian Human Rights Commission. It has a similar process for dealing with complaints to the NSW Anti-Discrimination Board. If the complaint cannot be resolved, the

¹⁹ J Ryan, *NSW Parliamentary Debates (LC)*, [1 March 2006](#), p20,800ff

²⁰ D Harwin, *NSW Parliamentary Debates (LC)*, [6 April 2006](#), p22,200ff

²¹ *Sex Discrimination Act 1984*, s21; *Disability Discrimination Act 1992*, s22; *Age Discrimination Act 2004*, s26

complainant can take action in the Federal Circuit Court or the Federal Court. The courts can make a wide range of orders including awarding damages.

In November 2012, the Commonwealth Government released an Exposure Bill, which proposed to consolidate into a single Act the existing four Commonwealth Acts; as well as making some changes (e.g. protecting additional attributes including sexual orientation).²² In March 2013, the Gillard Government indicated that it needed to do more work on the proposed reforms. In the interim, amendments were introduced to the *Sex Discrimination Act* so that it now also covers sexual orientation, gender identity and intersex status.²³

7.2 Interaction with State Acts

The Commonwealth Acts operate alongside the State Acts. If conduct is unlawful under both a Commonwealth Act and a State Act, the complainant can choose which jurisdiction to lodge their complaint in. In the event of any inconsistency between the Commonwealth Acts and a State Act, the Commonwealth laws prevail to the extent of the inconsistency, by virtue of section 109 of the Constitution. This provision in the Constitution needs to be read with “savings provisions” in each of the Commonwealth Acts. For example, section 10(3) of the *Sex Discrimination Act* states that:

This Act is not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Act.

There are different views on the application of section 109 to anti-discrimination laws. In a submission to a recent Senate inquiry, the NSW Government suggested that if conduct is prohibited by a provision in a State Act but is permitted under a Commonwealth Act, there may be an issue of section 109 inconsistency, and the provision in the State Act could be invalid to the extent of the inconsistency.²⁴ An alternative view, put forward by the Commonwealth Attorney-General’s Department is that the inconsistency between the Acts would not prevent the Acts from operating concurrently; the position would simply be that a person could sustain a complaint about the conduct under the State Act but could not do so under the Commonwealth Act.²⁵

7.3 Relevant Commonwealth exceptions

The *Sex Discrimination Act* and the *Age Discrimination Act* contain a general exception for religious bodies, which is very similar to section 56 of the NSW

²² *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012*

²³ *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013*.

²⁴ NSW Government, [Inquiry into the Sex Discrimination Amendment \(Sexual Orientation, Gender Identity and Intersex Status\) Bill 2013: NSW Government Submission](#), May 2013

²⁵ Senate Standing Committee on Legal and Constitutional Affairs, [Sex Discrimination Amendment \(Sexual Orientation, Gender Identity and Intersex Status\) Bill 2013 \[Provisions\]](#), June 2013, p28

Act. Section 37(1) of the *Sex Discrimination Act* states:

- (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.

Recent amendments to the Act state that section 37(1)(d) does not apply to an act or practice of a religious body if (a) the act or practice is connected with the provision of Commonwealth-funded aged care; and (b) the act or practice is not connected with employment of persons to provide that aged care.²⁶

The only Commonwealth Act that contains a specific exception for an educational authority is the *Sex Discrimination Act*, which has an exception for religious educational institutions. Section 38(1) of that Act contains an exception in the area of employment. Section 38(3) contains a similar exception, which applies in the provision of education or training to students. It states:

- (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.

The interaction between the general exception for religious bodies in section 37 and these specific exceptions in section 38 (which only apply to certain grounds and are in slightly different terms) is not clear from the Act. However, a leading text on anti-discrimination law refers to cases indicating that "one exemption should not be read down as a matter of construction to bring it in line with an apparently narrower exemption".²⁷ This would mean that the general exemption in section 37 would not be limited by the specific exceptions in section 38.

²⁶ *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013*.

²⁷ C Ronalds and E Raper, *Discrimination Law and Practice*, Federation Press, 4th edition, 2012, p149

7.4 Reports discussing these exceptions

A 1994 report by the Australian Law Reform Commission on women's equality before the law recommended repealing the exceptions for religious educational institutions in section 38. It explained:

Religious freedom and the right to enjoy culture and religion must be balanced with the right to equality and with the principle of non-discrimination. The statutory exemption prefers one right over another and precludes any consideration of where the balance between the rights should be. Women employed in religious educational institutions should have the same right to be free from discrimination as other women. The Commission supports the recommendation of the [Sex Discrimination Commissioner] in her review of the permanent exemptions. The Commission considers that the recommendation made in [the House of Representative Standing Committee report] *Half Way to Equal* would be of limited benefit and endorses it as a second, though less satisfactory, option. If the exemption is to be retained it should apply only to discrimination on the ground of marital status. There can be no religious basis for discrimination on the grounds of sex and pregnancy.²⁸

The Law Reform Commission's recommendation was that:

The exemption contained in SDA s 38 for educational institutions established for religious purposes should be removed. At the very least the exemption should be removed in relation to discrimination on the ground of sex and pregnancy. The exemption for discrimination on the ground of marital status, if it is to be retained, should be amended to require a test of reasonableness.²⁹

A 2008 Senate Committee report on the effectiveness of the *Sex Discrimination Act* examined the exceptions in the Act, including those for religious bodies and religious educational institutions.³⁰ It recommended that consideration be given to replacing the permanent exceptions with a general limitations clause: i.e. a provision which would permit discrimination within reasonable limits.³¹ Alternatively, the Committee considered that:

...the drafting of the exemption relating to religious educational organisations in section 38 should be reviewed. The purpose of the exemption in section 38 is to protect religious freedom. However, Christian Schools Australia noted that the exemption in section 38 is not used by its members to discriminate on the basis of sex and pregnancy but only on the basis of marital status. The Independent Education Union also suggested that, in addition to being in 'good faith', discrimination under section 38 should be 'reasonable'.³²

²⁸ Australian Law Reform Commission, [Equality before the Law: Justice for Women](#), ALRC Report 69, Part 1, 1994, para 3.81

²⁹ Australian Law Reform Commission, note 28, Recommendation No. 3.11

³⁰ Senate Standing Committee on Legal and Constitutional Affairs, [Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality](#), 12 December 2008, Ch7 and Ch11

³¹ Senate Standing Committee on Legal and Constitutional Affairs, note 30, p157 and 163

³² Senate Standing Committee on Legal and Constitutional Affairs, note 30, p158

The report recommended that consideration be given to reviewing the operation of section 38 to: (i) remove the exemption in relation to discrimination on the grounds of sex and pregnancy; and (ii) require a test of reasonableness.³³

In February 2013, the Senate Legal and Constitutional Affairs Committee published a report on the *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012*, which, as noted above, proposed consolidating the Commonwealth Acts into one Act.³⁴ The Bill contained similar exemptions for religious bodies and religious educational institutions (cl 33). The Committee considered that religious bodies and religious educational institutions should maintain the right to employ staff in accordance with their founding ethos and values, subject to a requirement to make publicly available a document outlining their intention to rely on the exception.³⁵ On other hand, the Committee considered that these bodies and institutions should not be permitted to discriminate in the provision of services. The Committee stated:

7.70...while the committee is of the view that religious organisations should retain their statutory exceptions in relation to employment, it can see no reason why individuals should automatically lose their right to non-discrimination in the provision of services because a particular service is being provided by a religious organisation. The committee is of the view that no organisation should enjoy a blanket exception from anti-discrimination law when they are involved in service delivery to the general community. It is vitally important that the rights of minority groups are upheld when they are receiving help from service providers, particularly in cases where the service provision is Commonwealth-funded.

7.71 The committee notes that, in other jurisdictions in Australia and internationally, much tighter exceptions apply in relation to service delivery by religious organisations than proposed in the current wording of the Draft Bill. The committee heard evidence that, under the Tasmanian Anti-Discrimination Act, there are no statutory exceptions for religious organisations from anti-discrimination requirements in relation to the delivery of services to the public. The Tasmanian Anti-Discrimination Commissioner told the committee that these provisions have operated in Tasmania for over a decade without serious concerns being raised about the erosion of freedom of religion.

7.72 Accordingly, the committee is recommending that the Draft Bill be amended in order to remove exceptions that allow religious organisations to discriminate against individuals in the provision of services, where that discrimination would otherwise be unlawful. The committee strongly supports the Tasmanian model for religious exceptions to anti-discrimination law in this regard, and considers that this model should be implemented nationally through the consolidated Commonwealth Act. With regards to the specific amendments that would be required to implement this recommendation, the committee leaves it to the

³³ Senate Standing Committee on Legal and Constitutional Affairs, note 30, p158

³⁴ Senate Standing Committee on Legal and Constitutional Affairs, [Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012](#), 21 February 2013

³⁵ Senate Standing Committee on Legal and Constitutional Affairs, note 34, p94

Department to develop appropriate drafting for clause 33 in order to meet this policy goal, undertaking further consultation if necessary.³⁶

Coalition Senators issued a dissenting report opposing the Bill, but it did not comment specifically on the exceptions in clause 33.³⁷ The Greens argued that the Committee's recommendations should go further:

A number of human rights groups and legal experts submitted 'that there should be no permanent exceptions for religious organisations in respect of any protected attributes'. There was evidence that the existing religious exceptions regime effectively 'perpetuates a false and unjustified hierarchy of rights, entrenches systemic discrimination and generally restrains society's pursuit of equality'.

There was also clear evidence from organisations working with religious bodies that the blanket exception is simply not needed, and instead religious organisations can 'rely on the general exception of justifiable conduct in clause of the Draft Bill'. Indeed, it was submitted that the general exception of justifiable conduct clause, 'used in the right way, would allow a more thorough examination of human rights in conflict and consideration of how they might be balanced'. The Australian Greens are concerned by this evidence, which clearly indicates that the blanket and permanent exception in clause 33 that applies to religious organisations is arbitrary, overly broad and unnecessary, particularly in light of the new general exception of justifiable conduct clause. We therefore recommend that the permanent religious exception contained in clause 33 of the Draft Bill be removed, in favour of reliance on the general exception for justifiable conduct.³⁸

In its June 2013 report on the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013*, the Senate Legal and Constitutional Affairs Committee expressed the same views, and supported a proposal by the Government to amend the Bill so that the exception for religious bodies in section 37 would not apply in respect of the sexual orientation, gender identity and intersex status in connection with the provision of Commonwealth-funded aged care services.³⁹ In a minority report, Coalition Senators expressed their opposition to this proposal. They stated (in part):

Coalition senators do not believe the committee majority has adequately addressed the operational concerns of some religious bodies operating faith-centred services. Further, it is hard to understand why such operational considerations would be taken into account and exempted under legislation in

³⁶ Senate Standing Committee on Legal and Constitutional Affairs, note 34, p94-95. As to the exceptions in the Tasmanian Act, see Section 8 below.

³⁷ Senate Standing Committee on Legal and Constitutional Affairs, note 34, p101

³⁸ Senate Standing Committee on Legal and Constitutional Affairs, note 34, p114-115

³⁹ Senate Standing Committee on Legal and Constitutional Affairs, [Sex Discrimination Amendment \(Sexual Orientation, Gender Identity and Intersex Status\) Bill 2013 \[Provisions\]](#), 14 June 2013, p30

respect of the operation of educational or health facilities, but not in relation to aged care facilities, where nearly identical concerns arise.⁴⁰

The Greens expressed the same views as in the previous report.⁴¹

8. OTHER STATES AND TERRITORIES

8.1 Summary of laws and exceptions

All other States and Territories have anti-discrimination laws. These laws cover similar grounds to the NSW Act but note that all other jurisdictions except South Australia also make it unlawful to discriminate on the grounds of a person's religious beliefs. The laws in all other jurisdictions apply in similar areas of public life including employment and education. The Table below outlines the exceptions for private educational authorities in the area of education (but not in the area of employment), and the general exceptions for religious bodies.

As can be seen, no other State or Territory has a specific exception for a "private educational authority". Three jurisdictions (Western Australia, Victoria and the ACT) have specific exceptions for religious educational authorities *in the area of education*. In Western Australia, this exception does not apply to the grounds of race, disability or age; and in Victoria, this exception does not apply to race, disability or pregnancy. In the ACT, the exception applies to all grounds. In all three jurisdictions, these exceptions are framed in similar terms to the general exception for religious bodies.

In all other States and Territories, there is a general exception for religious bodies. In one State (Queensland), this exception does not apply in the area of education (see further below); in some States (Victoria, South Australia and Tasmania) the exception is limited to certain grounds; while in others (Western Australia and the Territories), the exception applies to all grounds. In some States, the general exceptions for religious bodies are framed in very similar terms to the exception in section 56 of the NSW Act.

⁴⁰ Senate Standing Committee on Legal and Constitutional Affairs, note 39, p36

⁴¹ Senate Standing Committee on Legal and Constitutional Affairs, note 39, p37

Summary of relevant exceptions in other States and Territories⁴²

| | Legislation | Exception for religious educational authorities in area of education | Exception for religious bodies |
|------------|-------------------------------------|---|---|
| QLD | <i>Anti-Discrimination Act 1991</i> | No | Yes (s 109) – but does not apply to provision of education or employment of staff (s 109(2)) |
| VIC | <i>Equal Opportunity Act 2010</i> | Yes (s 83) – in the same terms as general exception for religious bodies in section 82(2) | Yes (s 82) – but does not apply to grounds of pregnancy, race and disability. The Act does not apply to anything done by a religious body that (a) conforms to the doctrines, beliefs or principles of the religion; or (b) is reasonably necessary to avoid injury to the religious sensitivities of adherents of that religion (s 82(2)) |
| SA | <i>Equal Opportunity Act 1984</i> | No | Yes (s 50) – but only applies to grounds of sex, chosen gender, and sexuality. The Act does not render discrimination on these grounds unlawful in relation to any practice of a religious body that (a) conforms with the precepts of that religion; or (b) is necessary to avoid injury to the religious susceptibilities of the adherents of that religion (s 50(c)) |
| WA | <i>Equal Opportunity Act 1984</i> | Yes (s 73) – but does not apply to grounds of race, disability or age. Religious educational institutions may discriminate in good faith in order to avoid injury to religious susceptibilities of adherents of that religion (s 73(3)) | Yes (s 72). Nothing in the Act affects any act or practice of a religious body that (a) conforms to the doctrines, tenets or beliefs of that religion or (b) is necessary to avoid injury to the religious susceptibilities of adherents of that religion (s 72(d)) |
| TAS | <i>Anti-Discrimination Act 1998</i> | No | Yes (27(1)(a)) – but only applies to ground of gender. A person may discriminate against another person on this ground in a religious institution, if it is required by the doctrines of the religion of the institution |
| ACT | <i>Discrimination Act 1991</i> | Yes (s 33) – Religious educational institution may discriminate in good faith in order to avoid injury to religious susceptibilities of adherents of that religion (s 33(2)) | Yes (s 32). The Act does not apply to any act or practice of a religious body (a) if the act or practice conforms to the doctrines, tenets or beliefs of that religion; <u>and</u> (b) it is necessary to avoid injury to the religious susceptibilities of adherents of that religion (s 32(d)) |
| NT | <i>Anti-Discrimination Act 1992</i> | No | Yes (s 51). The Act does not apply in relation to an act by a religious body if the act is done as part of any religious observance or practice (s 51(d)) |

⁴² Note that the Table does not refer to exceptions which allow for the operation of educational institutions that are restricted to a particular sex or religion, or persons who have a specific impairment.

8.2 Background to Queensland provisions

As can be seen from the above Table, Queensland's anti-discrimination laws offer the least protection to religious educational institutions in the provision of education: there is no specific exception for religious educational institutions in the area of education, and the general exception for religious bodies does not apply in the area of education (or employment). This position came about as a result of amendments that were enacted in 2002.⁴³

The *Discrimination Law Amendment Bill 2002*, introduced by the Labor Government, proposed several reforms, including "removing anomalous exemptions for religious bodies and non-state school authorities which permit discrimination against groups that the [Act] was designed to protect".⁴⁴ The Bill proposed repealing the exception (in section 29) for religious health institutions and religious educational institutions in the area of employment but clarifying the exception (in section 25) for genuine occupational requirements. The Bill also proposed repealing the specific exception (in section 42) for non-State schools in the area of education. This was explained as follows:

[This exemption] currently allows non-State school authorities to discriminate in the education area on any ground other than race or impairment. The exemption is considered unjustifiable in that it would allow non-State schools to refuse to admit or teach a student because he or she was, for example, homosexual, pregnant or in a de facto relationship. The Act already provides a specific exemption for educational authorities under section 41 which allows educational authorities to operate institutions wholly or mainly for children of a particular sex or religion or who have a general or specific impairment. Any further exemption is considered unjustifiable.⁴⁵

In addition, the Bill proposed limiting the application of the general exception for religious bodies (in section 109) by excluding the areas of employment and education. It was explained that "this is to ensure that the purpose of repealing sections 29 and 42 is not circumvented by recourse to section 109(d)".⁴⁶

These proposals generated much controversy; in particular, the proposal to remove the exception (in section 29) for religious health and educational institutions in the area of employment.⁴⁷ This prompted the Government to introduce amendments to the Bill at the Committee stage to "clarify that educational institutions under the direction or control of bodies established for religious purposes and bodies established for religious purposes will be able to discriminate in a manner that is not unreasonable in certain areas of work".⁴⁸

⁴³ *Discrimination Law Amendment Act 2002*

⁴⁴ [Discrimination Law Amendment Bill 2002– Explanatory Notes](#), p5

⁴⁵ [Discrimination Law Amendment Bill – Explanatory Notes](#), p15

⁴⁶ [Discrimination Law Amendment Bill – Explanatory Notes](#), p15

⁴⁷ See *Queensland Parliamentary Debates*, [28 November 2002](#), p5,011ff

⁴⁸ [Discrimination Law Amendment Bill – In Committee - Explanatory Notes](#), p1-2

Notwithstanding these amendments to the Bill, the Liberal/National Opposition opposed the repeal of the exception in section 29.⁴⁹ It is not entirely clear whether it also opposed repealing the exception in section 42, which allowed non-state schools to discriminate in the area of education. In the debate on the Bill, no Coalition Member specifically argued against the repeal of this exception in section 42.⁵⁰ Ultimately, the Bill (as revised by the Government's amendments in relation to section 25) were passed into law.

9. COMPARATIVE ANALYSIS OF THE 2013 BILL

9.1 Comparison with past proposals in NSW

In summary, the following comparisons can be made between the 2013 Bill and past proposals for reform in NSW

- **NSW Law Reform Commission report (1999):** The 2013 Bill adopts the Law Reform Commission's recommendations to repeal the exceptions for private educational authorities in the area of education. However, it does not adopt the Commission's recommendations to insert a specific exception for religious educational authorities that would only apply to the grounds of sex, domestic status, sexuality, and transgender; and to repeal section 56(d). The 2013 Bill might, in practical terms, achieve the same result. This is because it may be difficult for religious educational institutions to rely on section 56(d) in relation to grounds such as race, age and disability. The Bill does not adopt the Commission's similar recommendations in relation to the exceptions for private educational authorities in the area of employment.
- **Private Members Bill – Lee Rhiannon (2005):** Like the 2013 Bill, the Ms Rhiannon's 2005 Private Member's Bill proposed repealing the exceptions for private educational authorities in the area of education. However, the 2005 Bill also proposed amending the general exception in section 56(d) so that it would not apply in the area of education. In addition, the 2005 Bill proposed removing the exceptions for private educational authorities in the area of employment.

9.2 Comparison with laws in other jurisdictions

In summary the following comparisons can be made between the 2013 Bill and the laws at the Commonwealth level and in other States and Territories:

- **Commonwealth laws:** The 2013 Bill would make the NSW Act more consistent with the Commonwealth *Sex Discrimination Act* and *Age Discrimination Act*. The NSW Act would, at least in form, remain

⁴⁹ See L Springborg, *Queensland Parliamentary Debates*, [29 November 2002](#), p5152

⁵⁰ See *Queensland Parliamentary Debates*, [28 November 2002](#), p5,011ff and *Queensland Parliamentary Debates*, [29 November 2002](#), p5,132ff

inconsistent with the *Racial Discrimination Act* and the *Disability Discrimination Act*, which do not contain a general exception for religious bodies. However, as noted above, it may be difficult for a religious educational institution to rely on the exception for religious bodies in the NSW Act in relation to these grounds (i.e. race and disability).

- **Laws in other States/Territories:** The Bill would bring the law in NSW more into line with other Australian jurisdictions. However, the NSW Act would continue to have broader exceptions for religious educational institutions than in four other States. In Queensland the exception for religious bodies does not apply to education and in three other States the exception is expressly limited to certain grounds: in Tasmania, it only applies to the ground of gender; in South Australia, it only applies to the grounds of sex, chosen gender, and sexuality; and in Victoria, it does not apply to the grounds of pregnancy, race and disability. As noted above, however, it may be difficult in NSW for religious educational institutions to rely on the general exception for religious bodies in section 56(d) in relation to certain grounds such as race, age and disability.

10. RECENT COMMENTS ON EXCEPTIONS AND 2013 BILL

10.1 Comments by former and current NSW Attorney-General

An article in the *Sydney Morning Herald* in February 2011 discussed the exception in the NSW *Anti-Discrimination Act* that “allows private schools to expel gay students simply for being gay”.⁵¹ The article noted that then Attorney-General, John Hatzistergos, supported this exception. The article stated that through a spokesman, Mr Hatzistergos described the law as necessary:

to maintain a sometimes delicate balance between protecting individuals from unlawful discrimination while allowing people to practise their own beliefs.

The article then reported the views of then Shadow Attorney-General (now Attorney-General), Greg Smith, as follows:

I personally think it is something that should be reviewed, looked at with a view to perhaps changing it. Times have changed.⁵²

In an August 2011 speech, the Attorney General, Greg Smith, did not specifically address this issue but made some general comments about discrimination laws and religion and private educational institutions:

122. To a great extent, Australian laws which prohibit discrimination represent shared values and beliefs in the Australian community. The principle of giving

⁵¹ D Marr, [‘Appalling’ law lets schools expel gay students](#), *SMH*, 12 February 2011

⁵² D Marr, note 51

people a “fair go” irrespective of race, religion, political belief, gender or sexual orientation is a widely held moral value.

123. That being said, these laws ought take into account the fundamental freedoms which go to the heart of our democratic system of responsible and representative government: of speech, association, assembly, religion, and movement.

124. Further, and although the Constitutional guarantee of freedom of religion in section 116 of the Constitution operates only to restrict Commonwealth legislation from breaching that right, the legal context and jurisprudence of Australia and each of its states is such that freedom of religion is fundamental to our system of democracy and laws.

125. As such, although drafted as ‘exemptions’ to the Anti-Discrimination Act, I consider that such provisions are in fact a legislative recognition of the fundamentality of freedom of religion. The legislature recognises that it is not permitted to encroach upon the freedom of religion.

126. In other words, to refer to the rights of religious groups vis-à-vis discrimination legislation as an exemption is accurate as far as the drafting of the legislation is concerned. However, as a matter of substantive legal principle, rather than the creation of special rights or interests, the ‘carve out’ protects pre-existing rights which go to the heart of our democracy as I have argued extensively today.

127. The same principle applies to private educational institutions. Such institutions, motivated by a particular belief or philosophy, oftentimes religious belief, should not be excluded from the rights enjoyed by religious institutions, merely because they do not carry the label of religious or because they do not have a belief in the supernatural.

128. On this basis I believe that NSW’s anti-discrimination laws strike the best balance in terms of protecting against discrimination on the one hand, and protecting the rights of freedom of religion and association on the other.

129. Nevertheless, there may be grounds for some reform...⁵³

10.2 Stakeholder comments on the 2013 Bill

An article in the *Sun Herald* in July 2013 reported several stakeholder views on the 2013 Bill (which was then in draft form).⁵⁴ The article reported the views of Catholic and Anglican educational authorities as follows:

Ian Baker, acting executive director of the NSW Catholic Education Commission, said the fact that so few, if any, cases of students being expelled were widely known was testament to the fact schools tended to treat such students with sensitivity.

⁵³ G Smith, [Religious vilification, anti-discrimination law and religious freedom](#), Speech to the International Religious Liberty Association’s 13th meeting of experts, 14 August 2011,

⁵⁴ J Tovey, [‘Schools defend right to expel gays’](#), *SH*, 7 July 2013

“It speaks for itself,” he said. “It’s exercised with great caution and consideration. The objective is not to punish, but to protect the rights of those families who send their child to a school based on a religious faith.

“We couldn’t agree to the exemptions being removed unless we could be assured that there’s an alternative way of guaranteeing freedom of religion, which is an internationally recognised human right.”

Laurie Scandrett, chief executive of the Sydney Anglican Schools Corporation, agreed: “Most private schools have a religious ethos, they stand for something, and if these exemptions were removed that would break down the ability of these schools to maintain whatever their particular ethos is.”

On the other hand, the article noted that the Australian Council of Jewish Schools was not opposed to the proposals to repeal the exceptions:

“While Jewish schools jealously guard against any incursion into our ability to teach the Jewish religion in a manner consistent with its tenets, and consider those tenets and that ability fundamental to our existence,” said Len Hain, executive director of the Australian Council of Jewish Schools, “we do not see any practical limitation, or the imposition of any practical burden on that ability from the amendments deleting the specific exclusions to the Anti-Discrimination Act.”

The article also reported the views of the Gay and Lesbian Rights Lobby:

...Justin Koonin, from the Gay and Lesbian Rights Lobby, said he questioned why schools wanted the laws if they did not use them. “It’s not just that the student can be expelled, they can be discriminated against within the school environment, and the school doesn’t have to do anything about it.”

11. STUDIES ON DISCRIMINATION BY RELIGIOUS SCHOOLS

11.1 Public attitudes to discrimination by religious schools

As noted by Alex Greenwich in his second reading speech on the 2013 Bill, in 2004, the Australia Institute commissioned Newspoll to survey a randomly selected sample of 650 adults in NSW and Victoria, asking their views on whether private schools should be able to expel students (1) because they are gay, and (2) if they become pregnant.⁵⁵ The Australia Institute reported the survey results in relation to the first question as follows:

The Newspoll survey shows that nine out of ten (89 per cent) respondents disagree that private schools should be able to expel gay students...76 per cent strongly disagree with the view that private schools should be able to expel gay students. This view is held by both parents with children in private schools (76 per cent strongly disagree) and at state schools (75 per cent strongly disagree). It is a view held consistently by residents of capital cities and country areas,

⁵⁵ D Wilkinson, A Macintosh and R Dennis, [Public Attitudes to Discrimination in Private Schools](#), The Australia Institute, 1 May 2004

although country Victorians are a little more conservative. It is important to note that 89 per cent of those who send their children to private schools disagree that those schools should be able to expel gay students. Interestingly, young adults (18-24) and older people (50+) are more conservative on this issue than those aged 25-34 and 35-49.⁵⁶

The survey results in relation to the second question were stated as:

A large majority, 77 per cent, of respondents disagree with the view that private schools should be able to expel girls who are pregnant, with 62 per cent strongly disagreeing. Those who attended private schools or send their children to private schools are just as likely to oppose expulsions. It is perhaps surprising, however, that 17 per cent believe that private schools should be able to expel pregnant girls, twice the number that favour expelling gay students.

Sydney residents appear more tolerant of pregnant girls than those in Melbourne and country areas although, with the exception of country Victoria, the difference is not large. High-income households are more tolerant than low-income ones, even though pregnant girls are more likely to come from poorer households. Once again, young adults and older adults are more conservative on this question than those in their 30s and 40s.⁵⁷

The Australia Institute has not published a more recent poll on this issue.

11.2 Views of religious school principals on discrimination

A 2010 article reported the results of an Australian study that aimed to:

...provide some insight into the way in which those who have responsibility for leadership in religious schools or organisations associated with religious schools use and understand the current regime for exceptions to anti-discrimination law, and also whether they think that the current regime needs to be changed.⁵⁸

The study was based on interviews with 18 principals and other senior school leaders from religious schools based in NSW, Victoria and Tasmania; as well as nine representatives from organisations that had a relationship with religious schools (some of which had a role in setting policies and standards for the schools and others being more of a source of information and guidance).⁵⁹ The article noted the limitations of the study as follows:

The actual number of participants was relatively small, and our results should be seen as indicative rather than definitive of the range of views within this sector. For this reason, while the number of respondents who took particular viewpoints is set out in the article, such numbers should not be seen as necessarily

⁵⁶ D Wilkinson et al, note 55, p12

⁵⁷ D Wilkinson et al, note 55, p13

⁵⁸ C Evans and B Gaze, 'Discrimination by Religious Schools: Views from the Coal Face' (2010) 34 *Melbourne University Law Review* 392 at 400

⁵⁹ C Evans and B Gaze, note 58, p400

reflecting the proportion of religious school leaders who would take this view if a larger or more representative sample could have been obtained.⁶⁰

As part of the interviews, the participants were asked to discuss what would happen in the hypothetical situations that an unmarried teacher or student became pregnant, and that a student or teacher came out as gay. On the question of students becoming pregnant, the article reported (in part):

Thirteen of the 27 schools and organisations interviewed said that they would try to take a supportive approach to a pregnant student, although most had not had occasion to follow through on this intention. Only four mentioned that this situation had occurred in schools with which they had been associated. One organisation said, 'we had a situation last year on that very issue of a pregnant student and we talked to them about it and established that we were happy to continue [that student's enrolment]'. Three interviewees drew a distinction between a student or teacher who admitted that she had made a mistake (in all cases it was assumed that the sexual intercourse was consensual) and one who was defiant or triumphant about having become pregnant outside marriage; if the pregnant student or teacher was perceived as continuing to deliberately undermine the values of the school, it was considered best that she left. Where the student was prepared to continue to abide by the values of the school, however, 9 of 18 schools said that they would try to keep the student in school or support her outside of the school to complete her education...⁶¹

In relation to the question of gay and lesbian students, the article reported:

There was a reasonable degree of variation in answers to the question...A number of interviewees avoided the question, saying that secondary school students were 'too young to know' if they were gay or lesbian. Five of 18 schools acknowledged that they had gay and lesbian students at the school. One principal said that this did 'not make any difference to me' and said that protecting such children from bullying was the key issue; another talked about the importance of bringing together parties if a gay student believed that he was being discriminated against in order to resolve the issue. A third said that they had 'no issues' with the fact that some of the school's students were gay. However, most of those interviewed were not enthusiastic about acknowledging sexual diversity in the school in any public way. The emphasis tended to be on ensuring that students did not publicly contradict the values of the school and, so long as students were low-key about their sexual orientation, there was no problem about them continuing at the school.⁶²

12. CONCLUSION

The 2013 Bill proposes to remove the blanket exceptions in the Act for private educational authorities in the area of education. However, it would not alter the general exception for religious bodies in section 56(d), and religious educational

⁶⁰ C Evans and B Gaze, note 58, p395

⁶¹ C Evans and B Gaze, note 58, p409-410

⁶² C Evans and B Gaze, note 58, p411

institutions would be able to rely on this exception for conduct that meets the criteria in the section. The availability of this exception does not appear to have been taken into account by those who have criticised on the Bill on the basis that it would impinge upon freedom of religion. The Bill would bring the law in NSW more into line with other Australian jurisdictions. However, the law in NSW would continue to have broader exceptions for religious educational institutions than in a number of other States; in particular, Queensland.