



**South Australian Law Reform Institute**

**‘Lawful Discrimination’: The effect of exceptions under the  
*Equal Opportunity Act 1984 (SA)* on Lesbian, Gay, Bisexual,  
Trans, Intersex and Queer (LGBTIQ) South Australians**

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

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## Acknowledgements

This Issues Paper was written by Holly Ritson. Sarah Moulds, Louise Scarman and Dr David Plater provided proofing and editorial assistance.

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

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

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

## Abbreviations

|               |   |
|---------------|---|
| ART           | Assisted Reproductive Treatment                   |
| Audit Report  | SALRI Audit Paper (September 2015)                |
| EOC           | Equal Opportunity Commission South Australia      |
| <i>EO Act</i> | <i>Equal Opportunity Act 1984</i> (SA)            |
| LGBTIQ        | Lesbian, Gay, Bisexual, Trans, Intersex and Queer |
| SALRI         | South Australian Law Reform Institute             |
| SOGII         | Sexual Orientation, Gender Identity and Intersex  |
| The Tribunal  | Equal Opportunity Tribunal South Australia        |

## Executive Summary

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1. This Issues Paper follows SALRI's Audit Report, *Discrimination on the Grounds of Sexual Orientation, Gender, Gender Identity and Intersex Status in South Australian Legislation*, published in September 2015.<sup>1</sup> As foreshadowed in the Audit Report, SALRI intends to conduct further research in relation to a number of the more complex issues raised by the audit process as part of its work under its current reference to review legislative and regulatory discrimination against lesbian, gay, bisexual, trans and intersex South Australians.<sup>2</sup>
2. The scope of the existing exceptions to unlawful discrimination on the grounds of sexual orientation, gender identity and intersex status under the *Equal Opportunity Act 1984* (SA) ('*EO Act*') was identified by the audit process and noted in the Audit Report as a particularly complex issue, where the competing rights and interests require careful consideration and balancing.<sup>3</sup> These exceptions to the *EO Act* cover a wide range of situations and amount to providing for 'lawful discrimination' by certain people or groups in certain circumstances. The scope and operation of at least some of these exemptions is contentious.
3. This Issues Paper sets out the existing exceptions to the *EO Act* and describes the rationale for these exceptions. The Paper suggests that exceptions exist to either protect the rights of persons being discriminated against or to balance the rights of others or for practical reasons. All the provisions of the *EO Act* that provide for lawful discrimination against LGBTIQ people (and potentially other groups) are set out at Appendix 2.
4. The Issues Paper assumes that the scope of the anti-discrimination provisions of the *EO Act* will be extended in accordance with SALRI's recommendation in the Audit Paper that the problematic terms 'sexuality' and 'chosen gender' are replaced with the preferable terms of 'sexual orientation' and 'gender identity' and a new ground of intersex status is introduced.
5. The Issues Paper then discusses in greater detail the particular exceptions in the *EO Act* that prompted concern in the submissions to SALRI during the consultation process. It is significant that similar concerns have been expressed elsewhere.<sup>4</sup> The exceptions in the *EO Act* that give rise to the most concern are exceptions for religious organisations, especially in

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<sup>1</sup> South Australian Law Reform Institute, *Discrimination on the grounds of sexual orientation, gender, gender identity and intersex status in South Australian legislation*, Audit Paper (2015) ('Audit Report'). A copy of the Audit Report is available at [https://law.adelaide.edu.au/research/law-reform-institute/documents/audit\\_report\\_lgbtiq\\_sept\\_2015.pdf](https://law.adelaide.edu.au/research/law-reform-institute/documents/audit_report_lgbtiq_sept_2015.pdf).

<sup>2</sup> Ibid 16-17.

<sup>3</sup> Ibid 108-9.

<sup>4</sup> See, for example, Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Exceptions and Exemptions to the Equal Opportunity Act 1995: Final Report* (2009); Australian Human Rights Commission, 'Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights, National Consultation Report' (Consultation Report, Australian Human Rights Commission, 2015) ('Resilient Individuals Report') (A copy of the Resilient Individuals Report is available at <[www.humanrights.gov.au/sites/default/files/document/publication/SOGII%20Rights%20Report%202015\\_Web\\_Version.pdf](http://www.humanrights.gov.au/sites/default/files/document/publication/SOGII%20Rights%20Report%202015_Web_Version.pdf)>).

the area of employment; exceptions relating to participation in competitive sports; exceptions in the provision of health care relating to blood donation and assisted reproductive therapy; health care provision by religious institutions; the terminology in the exception for clubs and associations and the measures in the *EO Act* intended to achieve greater equality.

6. To inform the potential reform proposals, the Issues Paper then details how each of the other Australian jurisdictions (State, Territory and Commonwealth) provides exceptions in relation to the areas of concern. The Tasmanian model has been cited as the best practice in relation to religious exceptions,<sup>5</sup> though the South Australian provisions in relation to publishing a school's employment policy are unique. In the areas of competitive sports, it is clear that South Australia lags behind other jurisdictions. In other areas, there are no clear or obvious improvements elsewhere in Australia as to the current exceptions in the *EO Act*.
7. The final section of the Issues Paper sets out four options for reform. Based on the issues raised in this Paper, SALRI invites interested parties and readers to consider each of the options as the best way to amend or maintain the *EO Act* to better reflect contemporary South Australian values and expectations. This includes the need to protect and promote the rights of LGBTIQ, as well as the rights and interests of all South Australians. The suggested options are

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

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

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

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

8. Submissions on the issues raised and options suggested by this Issues Paper are invited from all interested members of the public and other groups. Details on how to respond to the issues, including prompting questions, are provided at Appendix 1.

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<sup>5</sup> Alastair Lawrie, Submission No 33, South Australian Law Reform Institute, *LGBTIQ Reference* (6 July 2015) 4. ('Submission No 33').

## Introduction

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9. In September 2015, the South Australian Law Reform Institute ('SALRI') released an Audit Paper examining discrimination on the grounds of sexual orientation, gender, gender identity and intersex status in South Australian legislation.<sup>6</sup> This report was the first part of SALRI's response to the Attorney-General's reference (arising from the speech of the Governor, His Excellency the Honourable Hieu Van Le AO, at the opening of State Parliament on 10 February 2015)<sup>7</sup> to inquire and report into South Australian laws that discriminate against Lesbian, Gay, Bisexual, Trans, Intersex and Queer (LGBTIQ) South Australians.
10. In the Audit Report, SALRI indicated its intention to conduct further research on a number of areas, including:

[t]he scope of the existing exemptions to unlawful discrimination on the grounds of sexual orientation, gender identity and intersex status under the *Equal Opportunity Act 1984* (SA) with a view to determining whether the scope of each exemption remains necessary and appropriate having regard to its normative and practical impact on the promotion of equality.<sup>8</sup>

This Issues Paper sets out the further research conducted by SALRI on the topic of exceptions to the *EO Act* with a view to inform further consultation and consideration on the issue before SALRI makes its final recommendations in relation to this complex issue.

### Some Notes on Terminology

11. While the South Australian *EO Act* refers to '**exemptions**', SALRI finds that the provisions in the *EO Act* provide **exceptions** to the usual rules. In some jurisdictions the difference between exemptions, which are applied for, and exceptions, which are standing exclusions for certain acts from the rules, is strict and important.<sup>9</sup> In South Australia, the difference is mostly semantic. This paper uses **exception** (and its derivatives) to convey the meaning and effect of the South Australian legislative provisions and only uses **exemption** where clearly referring to statute.<sup>10</sup>

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<sup>6</sup> Audit Report, above n 1.

<sup>7</sup> His Excellency the Honourable Hieu Van Le AO, 'Speech to the Fifty-Third Parliament of South Australia' (Speech delivered at the Opening of the Second Session of the Fifty-Third Parliament of South Australia, 10 February 2015) <<http://www.premier.sa.gov.au/images/govern/GovernorSpeech100215.pdf>>, 20-21.

<sup>8</sup> Audit Report, above n 1, 13 [2.7].

<sup>9</sup> *Anti-Discrimination Act 1998* (Tas). See Hobart Community Legal Service, *Exceptions and Exemptions under the Tasmanian Act* (2013) Hobart Community Legal Service <<http://www.hobartlegal.org.au/tasmanian-law-handbook/rights/discrimination/tasmanian-anti-discrimination-framework/exceptions-and>>.

<sup>10</sup> Responses to this Issue Paper may suggest that references to 'exemptions' in the *EO Act*, including the titles of sections 34, 79A, 85Z and 85ZL, be amended to reflect this distinction. See Appendix 1 for details on how to provide a response to this Paper.



12. This Issues Paper adopts the same approach to terminology as used in the Audit Paper. Underlying this approach is SALRI's strong support for the use of inclusive terminology and the right of people to identify their sexual orientation, gender identity or intersex status as they choose, and recognition of the complexity and power of language. SALRI is aware of the important distinction between the terms 'gender identity' and 'intersex status'.
13. Some of the terminology used in this Issues Paper is set out below. These uses were developed as part of the consultation process undertaken by SALRI earlier in 2015.<sup>11</sup>

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

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

**Gender identity:** The term 'gender identity' refers to a person's deeply held internal and individual sense of gender.

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

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

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

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

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

14. The acronym SOGII (Sexual Orientation, Gender Identity and Intersex) is used when referring to Commonwealth anti-discrimination provisions and associated research.

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<sup>11</sup> Audit Report 25-26.

## Current South Australian Situation

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15. The importance of anti-discrimination and equal opportunity laws to ensure all people enjoy equality before the law is obvious. As was declared in 2009 when the *EO Act* was last subject to significant amendment:

Equal opportunity law exists to allow all South Australians to take part equally in public life. Everyone should have equal opportunity in the fields of work, education, qualifications, access to goods and services, lodging, landholding, and membership of associations. No-one should be excluded from taking part in society because of the prejudices of others. No-one should be harassed or victimised in the exercise of these rights.<sup>12</sup>

16. Similar views have been recently reaffirmed.<sup>13</sup>

17. In South Australia, the *Equal Opportunity Act 1984* (SA) provides protection from discrimination on various grounds. These include a person's sex, breastfeeding status (including bottle feeding), chosen gender, sexuality, marital or domestic partnership status, pregnancy, race, age, disability (including the aid of assistance animal), association with a child, caring responsibilities, religious appearance or dress and spouse or partner's identity. Such discrimination is prohibited in a variety of areas including employment, membership of clubs, education, accommodation, competitive sports and access to services. Of particular relevance to this Issues Paper are the protections from discrimination on the grounds of **sex, chosen gender and sexuality**.

18. When considering the protections against discrimination on the grounds of gender identity, intersex status and sexual orientation—and the exceptions to discrimination on these grounds—SALRI is conscious that many of the issues and arguments explored may also apply equally cogently to other attributes protected under the *EO Act*. For example, arguments that it is unacceptable for a religious school to dismiss an English teacher because he is gay may also apply to critique the ability of religious schools to dismiss an English teacher or exclude a student because she is unmarried and pregnant, or for a religious hospital to dismiss

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<sup>12</sup> South Australia, *Parliamentary Debates*, House of Assembly, 30 April 2009, 2563 (Hon Michael Atkinson, Attorney-General).

<sup>13</sup> South Australia, *Parliamentary Debates*, House of Assembly, 10 September 2015, 2503 (Hon Jay Weatherill, Premier). 'Governments should support the greatest possible engagement in society for all members of our community; that is, they should govern for all people. The fact remains that some individuals and families are not able to participate fully in our community because they are who they are, whether that be gay, lesbian, bisexual, transgender, intersex or queer.' See also South Australia, *Parliamentary Debates*, House of Assembly, 10 September 2015, 2462 (David Pisoni): 'I would like to reflect on generally what happens in politics. Regardless of what political party you are a member of, whether it comes to education, whether it comes to health, whether it comes to other sectors in the community, I think it is fair to say that people from both sides want the best outcome. The politics is about how you get there, but I think when it comes to the progressive members of the parliament, and their view of, and support for equality, there is no politics about how to get there it is, 'Let's just do it. Let's do it. Let's make sure we support equality.' See further South Australia, *Parliamentary Debates*, House of Assembly, 10 September 2015, 2460-2461 (Stephen Marshall, Opposition Leader); South Australia, *Parliamentary Debates*, House of Assembly, 10 September 2015, 2461-2462 (Katrine Hildyard).

an intersex doctor. While it may be useful to keep these broader issues in mind when submitting a response to SALRI, under SALRI's current reference this Issues Paper focuses on how the exceptions may affect LGBTIQ people specifically.

### **Recommended Changes to Protection Provisions**

19. SALRI has already suggested amending the *EO Act* to help ensure that LGBTIQ people are adequately protected from discrimination. The Audit Report recommended that the South Australian Government

[a]mend ss 5 and 29 and Part 3 of the *Equal Opportunity Act 1984* (SA) to replace the term 'sexuality' with 'sexual orientation'; replace the term 'chosen gender' with 'gender identity' and insert a new provision 5(6) 'intersex status' with new terms to be defined in accordance with s 4 of the *Sex Discrimination Act 1984* (Cth).<sup>14</sup>

20. SALRI notes that this recommendation is incorporated in the Omnibus Bill, the Statutes Amendment (Gender Identity and Equity) Bill 2015, tabled in the House of Assembly by the Premier by way of a Ministerial statement on 1 December 2015. This Issues Paper proceeds on the basis that this Bill (including the recommendation as to amending the *EO Act*) will be accepted by the South Australian Parliament.<sup>15</sup> This Issues Paper will not address the issues related to the current scope of anti-discrimination protection provisions in the *EO Act*. This assumption is further based on the fact that South Australia is required to update the *EO Act* to conform with the Commonwealth legislative provisions by July 2016.<sup>16</sup>

### **Lawful Discrimination under the *Equal Opportunity Act 1984* (SA)**

21. Part 3 of the *EO Act* prohibits discrimination on the ground of sex, chosen gender, or sexuality. Under Part 3 of the *EO Act*, there are a number of exceptions to the application of these anti-discrimination laws, that is, the *EO Act* provides that certain discrimination on the grounds of a person's sex, chosen gender or sexuality is 'lawful'.<sup>17</sup> The *EO Act* provides that discrimination on the grounds of a person's sex, chosen gender or sexuality is 'lawful':

- In employment, where
  - a person is employed or contracted by an employer or principal for purposes not connected with the business carried on by the employer or principal;<sup>18</sup>

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<sup>14</sup> Audit Report, above n 1, 13 [2.3].

<sup>15</sup> South Australia, *Parliamentary Debates*, House of Assembly, 1 December 2015, 3805 (Hon Jay Weatherill, Premier). See also South Australia, *Parliamentary Debates*, House of Assembly, 10 September 2015, 2460-2461 (Stephen Marshall, Opposition Leader).

<sup>16</sup> Audit Report, above n 1, 10, 107.

<sup>17</sup> The exception provisions of the *EO Act* are set out in full at Appendix 2.

<sup>18</sup> *EO Act* s 34(1).

- there is a genuine occupational requirement that a person be of a particular sex, chosen gender or sexuality;<sup>19</sup>
- if certain criteria about publicising the policy are met, a religious education institution discriminates in relation to employment or engagement for the purposes of that religious education institution.<sup>20</sup>
- By associations, where
  - In relation to the use or enjoyment of a service or benefit provided by an association, men and women cannot use the service or benefit in the same way or at the same time, if reasonable measures are taken;<sup>21</sup>
  - An association is established for persons of a particular sex, chosen gender or sexuality (other than heterosexuality);<sup>22</sup>
  - The association is administered in accordance with the precepts of a religion and the discrimination is founded on those precepts.<sup>23</sup>
- In education, single-sex education institutions are permitted to discriminate on the ground of sex in relation to admission and provision of boarding facilities.<sup>24</sup>
- In dealing with land, persons may discriminate in disposing of interests in land by way of testamentary disposition or gift.<sup>25</sup>
- In providing a service, if the nature of a service varies according to whether it is exercised to men or to women, there is no contravention of anti-discrimination law where the service is given in accordance with normal practice.<sup>26</sup>
- In accommodation, where
  - the person (or their near relative) who provides the accommodation resides in the accommodation;<sup>27</sup> or
  - the provider is a not for profit organisation.<sup>28</sup>

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<sup>19</sup> Ibid s 34(2).

<sup>20</sup> Ibid s 34(3).

<sup>21</sup> Ibid s 35(2).

<sup>22</sup> Ibid s 35(2a).

<sup>23</sup> Ibid s 35(2b).

<sup>24</sup> Ibid s 37(3).

<sup>25</sup> Ibid s 38(2).

<sup>26</sup> Ibid s 39(2).

<sup>27</sup> Ibid s 40(3).

<sup>28</sup> Ibid s 40(4).

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

- By charities in relation to conferring charitable benefits on persons of one sex, chosen gender or a particular sexuality;<sup>29</sup>
- If it is a measure intended to achieve equality;<sup>30</sup>
- In relation to participation in a competitive sporting activity if
  - The strength, stamina or physique of the competitor is relevant;
  - The exclusion is genuinely intended to facilitate or increase the participation of people who are otherwise unlikely to participate and there are alternative opportunities to participate for those excluded; or
  - The exclusion is necessary to permit the participants to advance to higher level competitions and there are alternative opportunities to participate for those excluded;<sup>31</sup>
- In issuing insurance, if it is reasonable having regard to data from a source on which it is reasonable to rely.<sup>32</sup>
- By 'religious bodies'
  - in relation to the ordination or appointment and related training of members of a religious order,<sup>33</sup> or
  - if it is a practice of a religious body that conforms with the precepts of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion,<sup>34</sup> including in the administration of the religious body.<sup>35</sup>

23. Part 5B of the *EO Act* further prohibits discrimination on the ground of marital or domestic partnership status. This ground is relevant to the interests of LGBTIQ people as the exceptions to the anti-discrimination provisions on these grounds are mostly concerned with the ability of religious bodies to discriminate against same sex couples.<sup>36</sup>

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<sup>29</sup> Ibid s 45.

<sup>30</sup> Ibid s 47.

<sup>31</sup> Ibid s 48.

<sup>32</sup> Ibid s 49.

<sup>33</sup> Ibid s 50(1)(a-b).

<sup>34</sup> Ibid s 50(1)(c).

<sup>35</sup> Ibid s 50(1)(ba).

<sup>36</sup> Ibid sub-ss 85Z(2), 85ZB(3), 85ZM.

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

### **Rationale behind existing exceptions**

25. Before considering whether any change to these exceptions in the *EO Act* is necessary, it is important to understand why the exceptions exist. Generally speaking, the exceptions in the *EO Act* are in place to further protect the rights of persons facing discrimination, to balance the rights and interests of others in the community or groups who wish to discriminate for valid reasons or for more practical reasons. Overall, the rationale for exceptions to exist, and to continue existing, is that they should be regarded as necessary and reasonable in light of contemporary social and community values and expectations.
26. Some exceptions exist to further the rights and interests of the persons who are being protected from discrimination. For example, permitting an association formed for LGBTIQ people to only accept LGBTIQ persons as members allows that association to create a safe space for its work. Similarly, allowing women’s homelessness or domestic violence services to only hire and provide services to women advances the overall aim of such a service to support and protect women’s rights.
27. In most cases, however, exceptions to anti-discrimination legislation exist to balance the rights of those who are discriminated against with the rights and interests of those who may wish to discriminate for justifiable reasons. The rights to freedom of religion and freedom of association are the most often cited reasons for the need for exceptions to anti-discrimination law.<sup>37</sup> While these rights are not formally legally protected in South Australia,<sup>38</sup> the social value and importance accorded to these rights, and the practices associated with them, validate and justify exceptions to anti-discrimination law.
28. In relation to the exceptions for religious institutions, the South Australian Government explained why it had decided to leave these exceptions unchanged when it last made significant changes in this area of the law in 2009:

The Government gave much thought to whether such an exemption should be allowed to continue. Our law says that discrimination on the ground of sexuality is wrong. Moreover, religious schools receive public funding. An argument can be made that those who accept public funding should comply with the standards set by the public through

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<sup>37</sup> See nn 41–43 below.

<sup>38</sup> The extent to which such rights or values are protected by the common law or the operation of the Commonwealth Constitution is complex and beyond the scope of this Paper.

legislation. At the same time, the Government acknowledges that independent schools make a great contribution to the education and pastoral care of South Australia's children. This contribution is possible, in part, because of the commitment of the school community to its faith. The Government accepts that some South Australians are taught by their religion, and sincerely believe, that homosexuals should not teach in schools. In general, the State ought not to interfere in the practice of religion and ought not to compel any person to act against his or her conscience. Consequently, the Bill proposes to limit this exception to the only thing for which it is known to be used. It would not be available to all institutions run on religious principles, but would be limited to schools. It would not apply to the treatment of students but only the hiring of staff. Further, the Bill proposes that these schools should publicly disclose this policy. That way, both parents and prospective staff will know where the school stands. The Bill would require the school make the policy available on request and to publish the policy on the school's website if it has one.<sup>39</sup>

29. This type of 'rights balancing' exercise, including providing for conditions and limitations on the ability to discriminate, underlies exceptions to the application of anti-discrimination laws.
30. Other exceptions that fall into the category of protecting the interests of others are the exceptions for insurance companies as they arguably exist to enable insurance companies to assess premiums and manage risk in a cost effective manner, the exceptions for sporting competitions as they seek to ensure that sporting competitions are fair for all participants and the exceptions in the provision of accommodation.
31. 'Practical exceptions' are also provided in the *EO Act* to allow for discrimination in situations where it would be nearly impossible to comply with the anti-discrimination provisions. It may be that there is a genuine occupational requirement that an employee be of a particular sex or sexuality, or where the nature of a service varies according to whether it is exercised to men or to women.<sup>40</sup>

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<sup>39</sup> South Australia, Parliamentary Debates, Legislative Council, 26 November 2008, 865 (Hon Gail Gago). See also South Australia, *Parliamentary Debates*, House of Assembly, 30 April 2009, 2565-2566 (Hon Michael Atkinson, Attorney-General): 'The Government gave much thought to whether such an exemption should be allowed to continue. Our law says that discrimination on the ground of sexuality is wrong. Moreover, religious schools receive public funding. An argument can be made that those who accept public funding should comply with the standards set by the public through legislation. At the same time, the Government acknowledges that independent schools make a great contribution to the education and pastoral care of South Australia's children. This contribution is possible, in part, because of the commitment of the school community to its faith. The Government accepts that some South Australians are taught by their religion, and sincerely believe, that homosexuals should not teach in schools. In general, the State ought not to interfere in the practice of religion and ought not to compel any person to act against his or her conscience. Consequently, the government proposes to limit this exception to the case for which it is primarily used. It should not be available to all institutions run on religious principles, but should be limited to schools. It should not apply to the treatment of students but only the hiring of staff. Further, it is proposed that these schools should publicly disclose this policy on request and also give it to persons who are being offered work. That way, both parents and prospective staff will know where the school stands. We are doing this out of respect for religious freedom. I wish to emphasize that the Government does not believe that homosexual people pose any greater threat to children than do heterosexual people. The threat to children comes from pederasts.'

<sup>40</sup> *EO Act* s 39(2).

## **Issues with existing exceptions to discrimination under the *Equal Opportunity Act 1984* (SA)**

32. As outlined above, there are a number of instances of ‘lawful discrimination’ provided for by the *EO Act*. Many of these provisions are perceived as reasonable and necessary and tend to raise no concern. For example, provisions about providing single-sex welfare accommodation at domestic violence shelters for women leaving abusive relationships are largely uncontroversial. Similarly, the provision allowing insurance companies to charge different premiums based on a person’s gender informed by data and statistics is widely accepted.
33. These examples of ‘lawful discrimination’ indicate the instances where the community, as represented by Parliament, believes that it is acceptable to discriminate against others based on their sex, sexual orientation, gender identity or intersex status.
34. A number of exceptions in the *EO Act* were the subject of concern in many of the submissions and comments received by SALRI in mid-2015. Some submissions did not see these instances of ‘lawful discrimination’ as appropriate. These provisions include:
  - Exceptions for religious organisations;
  - Exceptions for sporting clubs;
  - Exceptions relating to health care and related services;
  - Exceptions for clubs and associations; and
  - Measures intended to achieve greater equality.

## **Particular Exceptions Giving Rise to Concern**

### **Religious Organisations**



35. The application of anti-discrimination laws to religious institutions (especially schools run by religious institutions) is inevitably contentious.<sup>41</sup> There is both extensive academic<sup>42</sup> and media<sup>43</sup> debate. There is no simple answer. As one study concluded:

The question of the extent to which religious schools should be permitted exceptions from the general anti-discrimination law is a complex one. It requires consideration of whether, and for what reasons, religious schools are valuable in Australia and the extent to which the principle of non-discrimination should be valued.<sup>44</sup>

36. As noted in the Audit Report,<sup>45</sup> concerns as to the exceptions granted to religious bodies under *EO Act* were expressed in numerous submissions.<sup>46</sup> Similar concerns have been

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<sup>41</sup> The website for the Victorian Scrutiny of Acts and Regulations Committee (see Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Exceptions and Exemptions to the Equal Opportunity Act 1995: Final Report* (2009)) indicates that a total of 1252 submissions were received by the Committee. Of these, 418 were pro forma or letter submissions and a further 60 submissions were forwarded from the Department of Justice which had commenced an earlier review of the exceptions under the *Equal Opportunity Act 1995* (Vic) in February 2008. Of these submissions, 450 brief submissions on the religious exceptions under the *Equal Opportunity Act 1995* (Vic) were received from individuals, ministers and church officials and some congregations, in addition to 20 submissions from religious organisations including substantial submissions from the Catholic Church, the Anglican Church, the Uniting Church, and the Presbyterian Church as well as Australian Christian Lobby, Australian Evangelical Alliance, Christian Parent Controlled Schools Ltd, Salt Shakers and Christian Schools Australia as well as submissions from Festival of Light and Family Voice Australia. An analysis of these submissions indicates that the greatest cause for concern was in the context of discrimination in religious schools. See John Tobin, 'Should Discrimination in Victoria's Religious Schools Be Protected? Using the Victorian Charter of Human Rights and Responsibilities Act to Achieve the Right Balance' (2010) 36(2) *Monash University Law Review* 16, n 7.

<sup>42</sup> See, for example, Reid Mortensen, 'A Reconstruction of Religious Freedom and Equality: Gay, Lesbian and De Facto Rights and the Religious School in Queensland' (2003) 3 *Queensland University of Technology Law & Justice Journal* 320; Carolyn Evans and Beth Gaze, 'Religious Freedom and Non-discrimination Laws' (2007) 16 *Human Rights Defender* 5; Carolyn Evans and Leilani Ujvari, 'Non-Discrimination Laws and Religious Schools in Australia' (2009) 30(1) *Adelaide Law Review* 31; Tobin, above n 41, 16; Greg Walsh, 'The Right to Equality and the Employment Decisions of Religious Schools' (2014) 16 *University of Notre Dame Australia Law Review* 107-144.

<sup>43</sup> See, for example, Melissa Fyfe, 'Church and State Clash Over Equality laws', *The Sydney Morning Herald* (Sydney), 19 July 2009; Jonathan Swan, 'Anti-Gay Rights to Stay', *The Sydney Morning Herald* (online), 16 January 2013, <<http://www.smh.com.au/federal-politics/political-news/antigay-rights-to-stay-20130115-2crma.html>>; Brian Greig, 'Exemptions for Religious Groups keep fears alive', *The Sydney Morning Herald* (online), 22 January 2013, <<http://www.smh.com.au/federal-politics/exemptions-for-religious-groups-keep-fears-alive-20130121-2d2f8.html>>; Josephine Tovey, 'Schools Defend right to Expel Gays', *The Sydney Morning Herald* (Sydney), 7 July 2013; Katherine Towers, 'New Anti-Discrimination laws "Erode religious Freedom"', *The Australian* (online), 9 May 2014, <<http://www.theaustralian.com.au/business/legal-affairs/new-antidiscrimination-laws-erode-religious-freedom/story-e6frg97x-1226910856242>>; John Ferguson, 'Labor vows to get Tough on Religious Discrimination at School', *The Australian* (Sydney), 21 October 2014; Henrietta Cooke, 'Religious groups hit out at Labor's move to rewrite state's equal opportunity laws', *The Age* (online), 8 December 2014, <<http://www.theage.com.au/victoria/victoria-state-election-2014/religious-groups-hit-out-at-labors-move-to-rewrite-states-equal-opportunity-laws-20141208-122rz6.html#ixzz3tJSbuqH1>>; Rosemary Bolger, 'Tasmania's Religious Schools to be given Right to reject Students who don't share Faith', *ABC News* (online), 19 March 2015, <<http://www.abc.net.au/news/2015-03-19/religious-schools-to-be-given-the-right-to-reject-non-religious/6333256>>; Bianca Hall, 'Government urged to remove LGBTI Discrimination in Schools', *The Age* (online), 2 September 2015, <<http://www.theage.com.au/victoria/government-urged-to-remove-lgbti-discrimination-in-schools-20150902-gjd5c0.html>>.

<sup>44</sup> Carolyn Evans and Beth Gaze, 'Discrimination by Religious Schools: Views from the Coal Face' (2010) 34 *Melbourne University Law Review* 392, 424.

<sup>45</sup> Audit Report, above n 1, 100.

<sup>46</sup> See Bec Koch, Submission No 13, South Australian Law Reform Institute, *LGBTIQ Reference* (2015) ('Submission No 13'); Mary Heath, Submission No 27, South Australian Law Reform Institute, *LGBTIQ Reference* (2015) ('Submission No 27'); Roz Daniell, Submission No 32, South Australian Law Reform Institute, *LGBTIQ Reference* (2015) ('Submission No

expressed elsewhere by commentators,<sup>47</sup> and in previous reviews of anti-discrimination Acts, both in South Australia<sup>48</sup> and elsewhere,<sup>49</sup> and in inquiries into the human rights of LGBTIQ Australians.<sup>50</sup> Though reliable empirical evidence does not exist for various reasons,<sup>51</sup> there have been various instances of teachers not being hired or being dismissed from their employment and students excluded from schools due to their sexual orientation.<sup>52</sup>

37. A number of provisions in the *EO Act* grant exceptions to religious bodies.<sup>53</sup> There is a clear tension and an elusive balance in reconciling the right of religious institutions to adhere to the precepts of their religion on the one hand and the right of LGBTIQ people to non-discrimination on the other; this is especially the case in relation to religious educational institutions. It is the view of at least some (as reflected in the submissions to the Audit Report)<sup>54</sup> that the current exceptions appear to operate in a way that discriminates excessively against LGBTIQ people beyond what is reasonable and necessary to protect the legitimate interests of religious bodies.

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32"); Submission No 33; Margaret Davies, Submission No 38, South Australian Law Reform Institute, *LGBTIQ Reference* 6 July 2015) ("Submission No 38"); Equal Opportunity Commission SA, Submission No 40, South Australian Law Reform Institute, *LGBTIQ Reference* (15 July 2015) ("Submission No 40"); Human Rights Law Centre, Submission No 44, South Australian Law Reform Institute, *LGBTIQ Reference* (25 August 2015) ("Submission No 44").

<sup>47</sup> See, for example, Mortensen, above n 42; Tobin, above n 41.

<sup>48</sup> See, for example, South Australian Attorney-General's Department, 'Proposal for a new law against Religious Discrimination and Vilification: Discussion Paper' (Discussion Paper, Attorney-General's Department, 2002) 10-11; Government of South Australia, 'Review of Equal Opportunity Legislation Framework Paper' (Framework Paper, Attorney-General's Department, 2004) 24.

<sup>49</sup> See, for example, Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Exceptions and Exemptions to the Equal Opportunity Act 1995: Final Report* (2009) 64-65; Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (2008) 99-101 [7.32]-[7.39]; Attorney-General's Department, 'Consolidation of Commonwealth Anti-Discrimination Laws' (Discussion Paper, Attorney-General's Department, September 2011) 41.

<sup>50</sup> See, for example, Australian Human Rights Commission, above n 4; Australian Human Rights Commission, 'Addressing sexual orientation and sex and/or gender identity discrimination: Consultation Report' (Consultation Report, Australian Human Rights Commission, 2011).

<sup>51</sup> Walsh, above n 42, 113-116.

<sup>52</sup> See, for example, Ibid 116-121; Matthew Benns, Eamonn Duff and Hannah Edwards, 'Catholic School Principal Sacked for Getting Married', *The Sydney Morning Herald* (online), 16 April 2006 <<http://www.smh.com.au/news/national/sacked-for-getting-married/2006/04/15/1144521541555.html>>; Farrah Tomazin, 'Christian School Rejects Teacher', *The Age* (online), 25 March 2009 <<http://www.theage.com.au/national/christian-school-rejects-teacher-20090324-98y0.html>>; Melissa Fyfe, 'Teacher Scorned for Chosen Lifestyle', *The Age* (online), 4 October 2009 <<http://www.theage.com.au/national/teacher-scorned-for-chosen-lifestyle-20091003-ghbl.html>>; Bridie Jabour, 'Teacher Sacked over Pregnancy', *Brisbane Times* (online), 1 May 2012 <http://www.brisbanetimes.com.au/queensland/teacher-sacked-over-pregnancy-20120501-1xw79.html>; Nathan Hondros, 'Gay Man's Daughter not welcome at Mandurah Christian School', *WA News* (Perth), 30 October 2015. See further for an analysis of discrimination by religious schools on the grounds of student or staff homosexuality and pregnancy, Deb Wilkinson, Richard Denniss and Andrew Macintosh, 'The Accountability of Private Schools to Public Values' (Discussion Paper No 71, The Australia Institute, 2004) 21-36.

<sup>53</sup> *EO Act* ss 34(3), 35(2b), 50, 85Z, 85ZM.

<sup>54</sup> See, for example, Submission No 27, 1; Submission No 32; Submission No 33, 3; Submission No 38, 2.

38. A particular issue is the fact that a religious institution that receives government funding may discriminate in providing apparently secular services such as healthcare, aged care, social services or education. It has been suggested that the state can, and indeed should, insist, as a precondition for receiving Government funding or support, that the religious institution accepts the same laws, especially anti-discrimination laws, that would apply if the activity was being provided by a non-religious institution.<sup>55</sup> It is suggested that religious institutions should be free to apply their precepts and to discriminate on that basis (for example by refusing to hire an atheist or openly<sup>56</sup> gay teacher), but only if they do not wish to receive government funding.
39. This argument can be used both ways as was discussed by the South Australian Government when it was examining this complex issue in 2004.<sup>57</sup>
40. On the one hand, it may be argued that functions of taxpayer-funded religious institutions such as providing education, housing, social work activities or health have close parallels with similar services run by secular institutions and agencies and as such, these functions are not religious, nor are integral to the religious institution. It is therefore suggested that a body (whether religious or otherwise) receiving government funds for secular purposes should be required to comply with the equal opportunity and anti-discrimination standards of the community as expressed in legislation enacted by Parliament.<sup>58</sup> As the Human Rights Council of Australia has argued, '[i]t is reasonable for the state to require public funds to be expended and applied wholly in accordance with principles of non-discrimination.'<sup>59</sup>
41. On the other hand, it can be argued that to remove this exemption amounts to an unacceptable intrusion by the state into religious issues and matters. On this view, the use of public funds is immaterial. The religious institution exists primarily because persons of particular religious views and values have established and maintained it in accordance with and for the purposes of their faith. Secular parallels notwithstanding, it may be argued that the religious institution provides a service (often a vital service)<sup>60</sup> not available from their secular counterparts because the religious ethos is an important aspect of the service—for example, the education received from a religious school may provide a uniquely strong school

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<sup>55</sup> This arises with respect to government funding to healthcare providers. See Submission No 27, 1; Submission No 38, 2.

<sup>56</sup> One study showed that a sizeable number of schools within the study took a 'don't ask, don't tell' approach to a range of issues to do with sexuality. See above, Evans and Gaze, above n 44, 412-413.

<sup>57</sup> Government of South Australia, above n 48, 25.

<sup>58</sup> Ibid.

<sup>59</sup> Josephine Tovey, 'Schools Defend right to Expel Gays', *The Sydney Morning Herald* (Sydney), 7 July 2013.

<sup>60</sup> In 2008 for example, there were 1 169 737 full time students enrolled in 2729 non-government schools comprising 34.1 per cent of the total number of students and 28.5 per cent of the total number of schools. Total government funding from both States and Commonwealth for non-government schools in 2007-08 was \$7.67 billion. See Evans and Gaze, above n 44, 393.

community based on religious morality and values. It may be argued that the Government accepts the value of this service by providing funding but this does not give the Government the right to interfere in the delivery of the service in accordance with its religious ethos and values that are its *raison d'être*.<sup>61</sup>

42. SALRI accepts this issue is likely to be contentious. It has not reached any final position and invites views to inform its final recommendations.

### **Employment in Religious Schools**

43. Section 34(c) of the *EO Act* states that discrimination on the ‘ground of chosen gender or sexuality’ in relation to employment or engagement for the purposes of an educational institution will not be unlawful where

(a) the educational institution is administered in accordance with the precepts of a particular religion and the discrimination is founded on the precepts of that religion; and

(b) the educational authority administering the institution has a written policy stating its position in relation to the matter; and

(c) a copy of the policy is given to a person who is to be interviewed for or offered employment with the authority or a teacher who is to be offered engagement as a contractor by the authority; and

(d) a copy of the policy is provided on request, free of charge—

(i) to employees and contractors and prospective employees and contractors of the authority to whom it relates or may relate; and

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

(iii) to other members of the public.

44. This provision effectively permits religious schools to discriminate in the employment of staff. This provision was the subject of particular criticism in submissions to the Audit Report (consistent with the wider criticism of such laws) on the grounds that it is harmful to LGBTIQ teachers and students at religious schools and also promotes anti-LGBTIQ stigma and homophobia more widely in the community. As one person submitted:

Some of my lesbian friends employed at religious schools have lived with a constant fear of their sexuality being discovered...this has not been good for them or for their friends. And I cannot be good for the community to have people living double lives like this. Additionally, it must have an appalling impact on LGBTI students at these schools. And it will enforce homophobic values in other students at these schools.<sup>62</sup>

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<sup>61</sup> Government of South Australia, above n 48, 25.

<sup>62</sup> Submission No 32, 1. See also Evans and Gaze, above n 44, 414, citing Peter Norden, ‘Not So Straight: A national

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

It is likely that many school communities and their leadership hold modern views about sexuality at odds with the official and outdated views of the religious organization. The exemptions to the *Equal Opportunity Act* may be a hindrance to school communities, and pander to elite religious hierarchies rather than reflecting the views of regular members.<sup>63</sup>

46. There is further the issue of equality of treatment, the principle underpinning the entire anti-discrimination and equal opportunity framework. As noted by one submission,

we are all human and deserve the same rights. Religious organisations should not be able to exclude someone simply because they identify as a female or a gay male.<sup>64</sup>

47. Finally, as a practical consideration, the current drafting of the exception leads to ambiguity in understanding the extent of the exception. The Equal Opportunity Commission receives many enquiries and complaints about the operation of this exception in what are perceived to be inappropriate circumstances, for example, discrimination against staff in non-teaching roles at religious schools.<sup>65</sup> This arguably goes beyond the intention of the exception to protect religious freedom, as the gender or sexuality of maintenance staff or the school's receptionist has little, if any, effect on the education of students.

48. Concurrently, it is also argued that religious schools should not be compelled to hire someone fundamentally opposed to the values and beliefs of a school. The Association of Independent Schools South Australia ('AISSA'), for example, submitted to SALRI that religious schools should be able to discriminate in employment. AISSA presented the case that s 34(c) is 'crucial in enabling religious schools to employ staff with values and belief consistent with the ethos of the school,'<sup>66</sup> arguing that the conditions provided in the section make the exception

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study examining how Catholic Schools can best respond to the needs of same sex attracted students' (Report, Jesuit Social Services, September 2006) 41, 45-55. Norden's report found young people experienced isolation, depression and bullying because of their sexual orientation and felt unacknowledged by their schools or judged because of their sexuality. Such young people had much higher rates of self-harm and suicide than their 'straight' peers: also at 12, 28-29. See generally Lynne Hillier, Alina Turner and Anne Mitchell, 'Writing Themselves In Again: 6 Years On — The 2nd National Report on the Sexual Health and Well-Being of Same-Sex Attracted Young People in Australia' (Report, Latrobe University, 2005).

<sup>63</sup> Submission No 38, 1. It is significant that both many members of that religion (see Evans and Ujvari, above n 42, 55-56; Tobin above n 41) and even senior members of staff at a religious school may well not share the formal views of their religion (Evans and Gaze, above n 44, 401, 411-414, 417, Tobin, above n 41). For example, evidence was provided to Victorian Scrutiny of Acts and Regulations Committee from the Victorian Independent Education Union that on many occasions school employers and even priests did not adhere to the official policy of the Catholic Church because they 'view such a policy as uncaring, harmful, intolerant and in conflict with the social justice teachings of the Catholic Church' (Victorian Independent Education Union, Submission, Victoria Government Department of Justice, *Review of Exceptions and Exemptions in the Equal Opportunity Act 1995* (April 2008) [5.1.3]).

<sup>64</sup> Submission No 13.

<sup>65</sup> Submission No 40, 5.

<sup>66</sup> Association of Independent Schools of SA, Submission No 43, South Australian Law Reform Institute, *LGBTIQ*

sufficiently specific. AISSA argued that all of a religious school's employees form part of an extended community and it is important that all staff, whether or not they are in teaching role, share and practice the precepts and values of a school's particular faith.<sup>67</sup> AISSA argued that s 34(c) of the *EO Act* is essential to allow for comprehensive exercise of the right of religious freedom and practice.

While it is accepted that privately held religious views should not be imposed on individuals in the public sphere, the area of education of children is so inextricably linked with the right of parents to organise private family life in accordance with their religion or belief-system in that both State and Federal equal opportunity law has recognized that education is an area warranting special exemption.<sup>68</sup>

49. SALRI appreciates the complexity of this issue. There may well not be a simple or comprehensive solution. It may be that a subtler and more nuanced approach is preferable to the existing exceptions in the *EO Act*. The religious school sector is both diverse and complicated and there are likely to be great differences in how religious schools approach anti-discriminations laws and the use of exceptions such as in the *EO Act*.<sup>69</sup> As a 2010 study observed,

[l]egislators deciding on whether discrimination provisions need to be tightened should be wary of claims that suggest the religious school sector is homogenous or even that all the schools from a particular religious tradition are united in their positions towards the exceptions or unconditionally support the position of their religious hierarchy. The diversity within the religious school sector makes the role and use of the law, such as the religious exceptions, more complex than a simple conflict between freedom of religion and equality.<sup>70</sup>

### **General Exceptions**

50. Section 50(1)(c) of the *EO Act* has been criticised as being a 'blank cheque' for religious organisations to discriminate in any number of areas, including employment, education, health and service delivery.<sup>71</sup> The Equal Opportunity Commission expressed concern that this exception provision can be used in relation to excluding LGBTIQ students from religious education institutions.<sup>72</sup> Similar concerns have been expressed elsewhere.<sup>73</sup> The effects of this discrimination are similar to those flowing from the operation of s 34(c) of the *EO Act* described above.

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*Reference* (30 June 2015), 1 ('Submission 43').

<sup>67</sup> See also Evans and Gaze, above n 44, 415.

<sup>68</sup> Submission No 43, 1.

<sup>69</sup> Evans and Gaze, above n 44, 423-424.

<sup>70</sup> Ibid 423.

<sup>71</sup> Submission No 33, 3.

<sup>72</sup> Submission No 40, 4.

<sup>73</sup> Resilient Individuals Report, above n 4, 41-42.

51. The concern with religious exceptions comes down to an exercise in balancing the right to non-discrimination with the right to religious freedom. Provisions that are obviously directed at protecting the rights of religious bodies to freely practice their religion are generally uncontroversial. Where the exceptions extend to areas less related to the practice of religion, for example the employment of teaching and non-teaching staff in religious schools, or the provision of aged or health care, the role of the exceptions in protecting religious freedom becomes less clear. In these cases, it is arguable that the balance should tip towards greater consideration of the rights of LGBTIQ people.

There should not be a general right to discriminate against [LGBTI] people, across multiple areas of public life like education, health, aged care of community services, simply because of the religious beliefs of certain individuals or organisations.<sup>74</sup>

### **Ordaining and Training**

52. No issues were raised by submissions regarding the operation of s 50(1)(a) and (b) to the ordainment or appointment of priests, ministers of religion or members of a religious order. Indeed, these provisions appear to be accepted as practical and necessary to protect freedom of religion.<sup>75</sup> Sub-section 50(1)(ba) was similarly seen as justifiable in relation to the ‘operation of explicitly or overtly religious bodies (like churches)’ but not other institutions operated by religious bodies that do not have a predominant religious purpose such as hospitals.<sup>76</sup>

### **Sport**

53. Section 48 of the *EO Act* provides that it is lawful to discriminate on the ground of **sex** in relation to competitive sporting activity in the following situations.

(a) if the sporting activity is one in which the strength, stamina or physique of the competitor is relevant to the outcome of the competition;

(b) if the exclusion is genuinely intended to facilitate or increase the participation of persons, or a class of persons, of a particular sex in the sporting activity and—

(i) it is unlikely that those persons will participate, or that there will be an increase in participation by those persons, in the sporting activity if the exclusion is not made (having regard to all of the circumstances of the persons or class of persons); and

(ii) there are reasonable opportunities for excluded persons to participate in the sporting activity in another competition;

(c) if—

(i) the exclusion is reasonably required to enable participants in the sporting activity to advance to competitions at a level higher than that in which the exclusion is to

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<sup>74</sup> Submission No 33, 3.

<sup>75</sup> Submission No 33, 3; Submission No 38, 2.

<sup>76</sup> Submission No 33, 3.

occur (being a requirement that is due to the structure of, or restrictions in, the higher level competitions); and

(ii) there are reasonable opportunities for excluded persons to participate in the sporting activity in another competition;

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

54. It is important to note that this provision does not allow for lawful discrimination on the basis of chosen gender, that is, it is not permissible to discriminate on the ground that a person is intersex or transgender. Therefore, it is not lawful to discriminate against a person who 'identifies on a genuine basis as a member of the opposite sex by assuming characteristics of the opposite sex' in relation to sporting competitions.<sup>77</sup>

55. From submissions received by SALRI, there was a general lack of concern regarding 'defensible single-sex organisations such as sporting competitions'.<sup>78</sup> This may be seen to accord with community expectations. However, the Equal Opportunity Commission has elsewhere acknowledged that

the issues relating to participation in sport by transgender persons are complex and there remains a need to balance the right of individuals to participate in sport as their chosen gender against the right of individuals to compete in a fair competition which aligns with their strength, stamina and physique and in which other competitors do not have an unfair advantage in that sense.<sup>79</sup>

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

57. The intersection between discrimination in sporting competitions and by sports clubs or associations should also be noted, recalling that it is currently unlawful for clubs or associations to discriminate in membership on the basis of sex, chosen gender or sexuality.<sup>80</sup>

58. The most concerning existing rules about participation of intersex people in sport arguably exist at elite competitive levels such as the national or Olympic level.<sup>81</sup> Frameworks such as

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<sup>77</sup> Equal Opportunity Commission SA, Submission No 10, Australian Human Rights Commission, *Sexual Orientation, Gender Identity and Intersex Rights National Consultation*, (6 February 2015) 5. Note the recommendation of SALRI to change the term chosen gender to gender identity and add an additional provision for intersex. This amendment would not affect the operation of this section.

<sup>78</sup> Submission No 38, 1.

<sup>79</sup> Equal Opportunity Commission SA, above n 77, 6.

<sup>80</sup> *EO Act* s 35.

<sup>81</sup> Equal Opportunity Commission SA, above n 77, 6.



the International Olympic Committee's statements on sex reassignment and female hyperandrogenism restrict participation in sporting competitions on the basis of gender.<sup>82</sup> Such provisions may lead 'elite women athletes with intersex variations to be excluded from competition, even while the IAAF [International Association of Athletics Federations] evidence shows that there is no scientific basis for the exclusion of women athletes with intersex variations.'<sup>83</sup>

59. Since amendments to the *EO Act* in 2013, it is lawful to discriminate if the discrimination enables participants to progress to elite level (national and international) competitions. This allows sporting associations to conduct single-sex competitions where qualification to an elite level of the sport must occur through single-sex qualification tournaments. This means that it is not unlawful for a sporting group to discriminate on the basis of gender if it aligns with the international standards.

## Health Care

60. The Australian Human Rights Commission ('AHRC') recently found that 'LGBTI people experience both the fear of, and actual, discrimination in essential service provision. This includes primary healthcare, crisis intervention, aged care, mental health and disability service.'<sup>84</sup> This fear and anxiety can lead to 'reduced health seeking behaviours and can leave providers in a position of being unable to provide an appropriate service as a consequence of clients' reluctance to disclose information about their sexuality, gender status or intersex status.'<sup>85</sup> These findings were based on a widespread consultation conducted by the AHRC in 2014-2015 and are of significant concern, especially given the generally low levels of health and mental health amongst the LGBTIQ population.<sup>86</sup> The discrimination and consequent stigma experienced by LGBTIQ people contributes to these concerning outcomes.<sup>87</sup>
61. Submissions received by SALRI raised two concerns with provisions of the *EO Act* that negatively affect LGBTIQ people in the area of health care: the lawful prohibition of blood

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<sup>82</sup> International Olympic Committee, *Statement of the Stockholm consensus on sex reassignment in sports*, (12 November 2003) International Olympic Committee <[http://www.olympic.org/documents/reports/en/en\\_report\\_905.pdf](http://www.olympic.org/documents/reports/en/en_report_905.pdf)>; Medical and Scientific Department, *IOC Regulations on Female Hyperandrogenism*, (22 June 2012), International Olympic Committee, <[http://www.olympic.org/Documents/Commissions\\_PDFfiles/Medical\\_commission/2012-06-22-IOC-Regulations-on-Female-Hyperandrogenism-eng.pdf](http://www.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2012-06-22-IOC-Regulations-on-Female-Hyperandrogenism-eng.pdf)>.

<sup>83</sup> Resilient Individuals Report, above n 4, 21 quoting M Carpenter for Organisation Intersex International Australia, Submission No 6, Australian Human Rights Commission, *Sexual Orientation, Gender Identity and Intersex Rights National Consultation*, (1 February 2015) 13.

<sup>84</sup> Resilient Individuals Report, above n 4, 38.

<sup>85</sup> Ibid, 37 quoting ACON, Submission No 11, Australian Human Rights Commission, *Sexual Orientation, Gender Identity and Intersex Rights National Consultation*, (6 February 2015) 3.

<sup>86</sup> Government of South Australia, Department for Communities and Social Inclusion, *South Australian Strategy for the Inclusion of Lesbian, Gay, Bisexual, Transgender, Intersex and Queer People 2014-2016* (May 2014), <http://publicsector.sa.gov.au/wp-content/uploads/20140501-DCSI-LGBTIQ-Strategy.pdf>, 10 ('Inclusion Strategy').

<sup>87</sup> Ibid.

donation by gay men and discrimination in access to assisted reproductive treatment (“ART”). Submissions to the AHRC’s report further found that concerns mostly related to the discriminatory provision of healthcare by religious institutions; the *EO Act* enables South Australian religious institutions to discriminate in providing health-related services.<sup>88</sup>

### **Blood Donation**

62. As outlined in the Audit Report,<sup>89</sup> s 79A of the *EO Act* raises concerns.<sup>90</sup> Section 79A provides that discrimination on the ground of disability, which includes infection status, is lawful if it

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

63. In its submission, the Equal Opportunity Commission noted that this exception is relied upon to discriminate on the ground of sexual orientation in some situations. The most contentious of these situations is excluding men who have had homosexual contact within the previous 12 months from donating blood.<sup>91</sup> The Equal Opportunity Commission argues that this measure is directed to avoiding the spread of HIV and is reasonable, based on statistics such as the following:

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

HIV continues to predominantly affect gay and other [men who have sex with men] in Australia with 70% of all diagnoses in 2013 among this group.<sup>92</sup>

64. This provision can have significant discriminatory effects on gay men by reproducing social stigma and homophobic assumptions about a person’s infection status. One submission commented:

Current laws also discriminate against gay men giving blood. I assume this is in relation to AIDs (sic), but since AIDs can be contracted by men, women, gay, straight and all else then this is just a case of purposely excluding a group in the population and, doubly, calling them unclean.<sup>93</sup>

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<sup>88</sup> Section 50(1)(c).

<sup>89</sup> Audit Report, above n 1, 103.

<sup>90</sup> See Jess Attard, Submission No 28, South Australian Law Reform Institute, *LGBTIQ Reference* (2015) (“Submission No 28”); Submission No 40, 4.

<sup>91</sup> Submission No 28. See also Robert Simms, ‘Greens call to scrap gay blood donor ban’ (Media Release, 28 Oct 2015) (available from <http://robert-simms.greensmps.org.au/content/media-releases/greens-call-scrap-gay-blood-donor-ban>).

<sup>92</sup> The Kirby Institute and Centre for Social Research in Health, *HIV in Australia, Annual Surveillance Report 2014 Supplement* (2014) The Kirby Institute, <[https://kirby.unsw.edu.au/sites/default/files/hiv/resources/HIVASRsuppl2014\\_online.pdf](https://kirby.unsw.edu.au/sites/default/files/hiv/resources/HIVASRsuppl2014_online.pdf)>.

<sup>93</sup> Submission No 28.

65. The Australian Red Cross Blood Service maintains that ‘the Blood Service does not discriminate based on sexual orientation’, but rather bases its position on ‘safety reasons based on medical research’. The Australian Red Cross Blood Service explains:

Asking men who have sex with men to wait 12 months before donating blood is based on two factors; the statistically higher incidence of some blood borne diseases (including HIV) in this group, and the existence of infections undetectable by testing.

The reasoning behind the screening practice is sound, as patients rely on donated blood to be as safe as possible. Any risk that the blood could carry disease is a risk borne completely by the patient who receives the blood, and that could be you or someone you care about.<sup>94</sup>

66. In 2012, the Australian Red Cross Blood Service established an independent expert committee to conduct a study on the appropriateness and necessity of the 12-month deferral period for men who have homosexual contact with men. The report, titled *Review of Blood Donor Referrals Relating to Sexual Activity*, recommended that the deferral time be reduced to six months. This recommendation was, however, rejected by the Therapeutic Goods Administration.<sup>95</sup>

67. As noted by the EOC,<sup>96</sup> this rule may have negative flow on effects regarding the perception of gay men in society more generally. Legally enforcing presumptions about the infection status of gay men may affect their employment opportunities, access to health care, insurance premiums or simply increase social stigma about homosexuality more generally. This blanket ban does not consider other variables for a person’s risk factor for HIV, such as practicing safe sex or being in a monogamous relationship, but assesses all gay men’s risk equally. Further, as noted by the EOC above, the exception is based on historical evidence of an increased risk.

Why should gay men who are practising safe-sex be prevented from donating blood? Your capacity to donate blood shouldn’t be determined by your sexuality.<sup>97</sup>

### **Exception of Services from the Equal Opportunity Act 1984 (SA)**

68. Section 5(2) of the *EO Act* provides that

(2) A reference in this Act...to the provision of a service does not include, and will be taken never to have included, the carrying out of either of the following fertilisation procedures: (a) artificial insemination; or (b) the procedure of fertilising an ovum outside the body and transferring the fertilised ovum into the uterus.

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<sup>94</sup> Jennifer Williams, *Blood Service Deferrals* (2015) Australian Red Cross Blood Service <<http://www.donateblood.com.au/blood-service-deferrals>>.

<sup>95</sup> Submission 40, 5.

<sup>96</sup> Ibid.

<sup>97</sup> Simms, above n 91.

69. This section operates in conjunction with provisions of the *Assisted Reproductive Treatment Act 1988* (SA) to enable the discriminatory provisions of that Act.<sup>98</sup> The system of accessing Assisted Reproductive Treatment in South Australia currently discriminates against gay couples. In the Audit Report, SALRI recommended amendments to the ART Act to ensure that ‘people seeking to undergo ART’ procedures must not be discriminated against on the basis of their sexual orientation, marital status or religion’ and to the *EO Act* correspondingly.<sup>99</sup> This would involve repealing s 5(2) of the *EO Act*.

### **Religious Organisations**

70. The AHRC’s report found that the concerns raised by the consultation related to health care stemmed mostly from experiences of discrimination by religious bodies.<sup>100</sup>
71. As noted above, religious institutions in South Australia have considerable latitude under the *EO Act* to discriminate against LGBTIQ people where the discrimination ‘conforms with the precepts of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.’<sup>101</sup> This provision can extend to the provision of health care to LGBTIQ people.
72. In other jurisdictions, this concern is alleviated by provisions that specifically link government funding for religious care institutions to non-discrimination in the provision of such services.<sup>102</sup> The inclusion of such a condition was suggested by a number of submissions received by SALRI.<sup>103</sup>

Exemptions from anti-discrimination legislation for religious bodies must be removed from the *Equal Opportunity Act 1984*, particularly if those bodies receive State funding or any exemptions from, or reduction in, State rates and charges. This is more important than ever as government funded services contract and people have correspondingly few choices other than to use services from religious providers.<sup>104</sup>

### **Clubs and Associations**

73. Section 35 of the *EO Act* makes it unlawful for clubs and associations to discriminate in membership or provision of services or benefits on the basis of sex, chosen gender or sexuality. The *EO Act* does not define the terms club or association; the *EO Act* is ambiguous

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<sup>98</sup> Stephen Page, Submission No 34, South Australian Law Reform Institute, *LGBTIQ Reference* (6 July 2015), 5.

<sup>99</sup> Audit Report, above n 1, 85, [2.2].

<sup>100</sup> Resilient Individuals Report, above n 4, 37.

<sup>101</sup> *EO Act* s 50(c).

<sup>102</sup> *Sex Discrimination Act 1984* (Cth) s 37(2).

<sup>103</sup> Submission No 38, 2; Submission No 27, 1.

<sup>104</sup> Submission No 27, 1.

in its application. Any change to this provision should include definitions to clarify the parameters of the rule and its exceptions.

74. Sub-section 35(2) provides that discrimination by clubs or associations will be lawful in relation to the use or enjoyment of a service or benefit provided by an association

a) if it is not practicable for the service or benefit to be used or enjoyed simultaneously by both men and women, but the same, or an equivalent, service or benefit is provided for the use or enjoyment of men and women separately from each other or at different times,

(b) if it is not practicable for the service or benefit to be used or enjoyed to the same extent by both men and women, but both men and women are entitled to a fair and reasonable proportion of the use or enjoyment of the service or benefit.

75. Sub-section 35(2a) provides that discrimination by a club or association in relation to membership will not be unlawful if the club or association is established for

(a) persons of a particular sex; or

(b) persons of a chosen gender; or

(c) persons of a particular sexuality (other than heterosexuality),

and, consequently, such an association may discriminate against an applicant for membership so as to exclude from membership persons other than those for whom the association is established.

76. No significant issues arise from the application of s 35(2a), given that its intention is to protect and promote the rights and interests of LGBTIQ people. Sub-section 35(2), however, may unfairly discriminate against intersex people in that it refers to providing services and benefits to men and women, rather than encompassing the range of genders that now accepted to exist in the community. SALRI recommends that this provision should be amended in line with the similar recommendations made in the Audit Report.<sup>105</sup>

## **Measures Intended to Achieve Equality**

77. Section 47 of the *EO Act* creates a general exception to the anti-discrimination framework for acts done

for the purpose of carrying out a scheme or undertaking intended to ensure that persons of the one sex, persons of a chosen gender, or persons of a particular sexuality, have equal opportunities with, respectively, persons of the other sex, persons who are not persons of a chosen gender or persons of another sexuality, in circumstances to which this Part applies.

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<sup>105</sup> Audit Report, above n 1, 11. Recommendations for immediate action included amending legislation that specified men and women or ‘opposite sex’.

78. While this provision is widely perceived as generally commendable, some concerns are raised regarding its application to intersex and gender diverse people. The Human Rights Law Centre noted that ‘some laws fail to specifically recognise how an intersex or gender diverse person is to be treated. This potential creates a lacuna which leaves an intersex or gender diverse person vulnerable to discrimination.’<sup>106</sup> In relation to special measures under s 47, there is a concern that a scheme intended to promote the interests of one sex could exclude intersex people who identify as that gender. For example, a scheme to promote participation of women in leadership positions may exclude or discriminate against intersex people who identify as women, or transgender women who do not fit the gender binary expressed by the special measure.<sup>107</sup> Amending the *Acts Interpretation Act 1915* (SA) to address this specific concern was recommended by SALRI in the Audit Report.<sup>108</sup>

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<sup>106</sup> Submission No 44 (appendix), 12.

<sup>107</sup> Dami(en) Barnes, Submission No 6, South Australian Law Reform Institute, LGBTIQ Reference (2015), 3.

<sup>108</sup> Audit Report, above n 1, 11, [1.3].

## Australian Equal Opportunity Frameworks

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79. Similar anti-discrimination or equal opportunity legislative frameworks exist in all other Australian jurisdictions.<sup>109</sup> Each of these frameworks, generally speaking, protects LGBTIQ people from discrimination. However, each Act also provides for lawful discrimination against LGBTIQ people, in similar circumstances to those provided for in the South Australian *EO Act*. How each of the other Australian Acts exempts otherwise discriminatory acts by religious bodies, sporting competitions, health care, associations and measures designed to achieve equality will be described below, with the intention of informing the following section on possible options for reform.
80. Each jurisdiction's legislation varies slightly in its scope of protecting LGTBIQ people from discrimination. For example, the *Sex Discrimination Act 1984* (Cth) ('*SDA*'), prohibits unlawful discrimination in the areas of employment or occupation on the grounds of a person's sex, sexual orientation, gender identity or intersex status while the Victorian *Equal Opportunity Act 2010* (Vic) prohibits unlawful discrimination on the grounds of a person's gender identity, lawful sexual activity, sex, sexual orientation, and personal association with someone who has, or is assumed to have, any of these personal characteristics.
81. Differences in the scope of the categories covered by the various Acts are not considered in this section, as it is assumed that any future change to the South Australian *EO Act* will conform with the Commonwealth provisions in relation to discrimination on the grounds of sexual orientation, gender identity and intersex status by mid-2016, as previously recommended by SALRI.<sup>110</sup>

### Religious Bodies

82. All Australian jurisdictions acknowledge that in respect of religious institutions it is inappropriate to insist on absolute equality and to prescribe a complete absence of discrimination.<sup>111</sup> As discussed above, this is a reflection of the broad acknowledgement of the right of religious freedom. All jurisdictions provide at least some exceptions for religious institutions from the operation of anti-discrimination laws.<sup>112</sup> These exception provisions can be divided into three main categories: exceptions for employment in religious schools, general

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<sup>109</sup> *Sex Discrimination Act 1984* (Cth); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1996* (NT); *Anti-Discrimination Act 1991* (Qld); *Anti-Discrimination Act 1998* (Tas); *Equal Opportunity Act 2010* (Vic); *Equal Opportunity Act 1994* (WA).

<sup>110</sup> Audit Report, above n 1, 13 [2.3].

<sup>111</sup> Evans and Gaze, above n 41, 5.

<sup>112</sup> *Sex Discrimination Act 1984* (Cth) s 42; *Equal Opportunity Act 2010* (Vic) s 72 (on the basis of sex or gender identity), *Anti-Discrimination Act 1977* (NSW) s 38; *Anti-Discrimination Act 1998* (Tas) s 29 (on the basis of gender); *Anti-Discrimination Act 1991* (Qld) s 111, *Equal Opportunity Act 1984* (WA) s 35; *Discrimination Act 1991* (ACT) s 41, *Anti-Discrimination Act 1996* (NT) s 56.

exceptions for religious institutions and exceptions for acts relating to the ordaining of religious leaders. Each of these types of exceptions are also found in the *EO Act*.<sup>113</sup>

### **Employment in Religious Schools**

83. All Australian jurisdictions appear to acknowledge the arguments made by AISSA in their submission to SALRI—that education is a crucial part of religious life and that religious schools should reserve the right to employ staff in accordance with a school’s religious teachings and status.<sup>114</sup>
84. In many jurisdictions, it is lawful for education institutions that are conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion (religious schools) to discriminate in the area of employment if the discrimination is in ‘good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.’<sup>115</sup> This is a similar provision to the *EO Act*.
85. In Victoria, the exception is in slightly different terms. In that State, a religious school may discriminate ‘in the course of establishing, directing, controlling or administering the educational institution’ on grounds including religious belief or activity, sex, sexual orientation, lawful sexual activity or gender identity if the act ‘(a) conforms with the doctrines, beliefs or principles of the religion; or (b) is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.’<sup>116</sup>
86. It is significant that under the *EO Act* and most similar Acts elsewhere in Australia, a religious school is entitled to discriminate against both teaching and non-teaching staff. It is understood that these Acts are largely used in practice by religious schools in relation to teaching staff, however, under the Acts, the school’s receptionist, bus driver or cleaner could also be legitimately excluded from employment.<sup>117</sup> This gives rise to potential concern.
87. In this area, SALRI understands that the Tasmanian model is a ‘best practice’ approach to exceptions in employment by religious schools.<sup>118</sup> Section 51 of the *Anti-Discrimination Act 1998* (Tas) provides the following

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<sup>113</sup> Section 50.

<sup>114</sup> *Sex Discrimination Act 1984* (Cth) s 38; *Equal Opportunity Act 2010* (Vic) s 83; *Anti-Discrimination Act 1977* (NSW) ss 25(3)(c), 38C(3), 49ZH(3); *Anti-Discrimination Act 1998* (Tas) ss 27(1)(a), 51; *Anti-Discrimination Act 1991* (Qld) s 25(3); *Equal Opportunity Act 1984* (WA) s 73; *Discrimination Act 1991* (ACT) s 33(1); *Anti-Discrimination Act 1996* (NT) s 37A.

<sup>115</sup> *Sex Discrimination Act 1984* (Cth) s 38; *Equal Opportunity Act 1984* (WA) s 73; *Discrimination Act 1991* (ACT) s 33(1); *Anti-Discrimination Act 1996* (NT) s 37A.

<sup>116</sup> *Equal Opportunity Act 2010* (Vic) s 83(2).

<sup>117</sup> See South Australia, *Parliamentary Debates*, Legislative Council, 26 November 2008, 865 (Hon Gail Gago); Diversity Council Australia, Submission No 5 to Australian Human Rights Commission, *Sexual Orientation, Gender Identity and Intersex Rights National Consultation*, (5 February 2015) 3.

<sup>118</sup> Submission No 33, 4.



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

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

88. The Tasmanian exception is clearly more narrowly defined both in its scope and the circumstances of application. Introducing the ‘genuine occupational requirement’ test to this exception further targets the exception to only apply in those situations where the religion of an employee is directly relevant to the work. This reflects a submission made by the Diversity Council Australia to the AHRC, in which the Council distinguished between the reasonableness of employing religious persons as religious teachers and insisting on the religious belief of a school bus driver.<sup>119</sup>

89. The *Anti-Discrimination Act 1998* (Tas) also provides an exception for discrimination on the basis of gender in employment by religious institutions ‘if it is required by the doctrines of the religion of the institution’.<sup>120</sup>

90. The Queensland provision also considers religious exceptions as a genuine occupational requirement. Section 25 of the *Anti-Discrimination Act 1991* (Qld) states:

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

...

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

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

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

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

(a) the person openly acts in a way that the person knows or ought reasonably to

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<sup>119</sup> Diversity Council Australia, above n 117, 3.

<sup>120</sup> *Anti-Discrimination Act 1998* (Tas) s 27(1)(a).

know is contrary to the employer's religious beliefs—

during a selection process; or

in the course of the person's work; or

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

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

...

(5) For subsection (3), whether the discrimination is not unreasonable depends on all the circumstances of the case, including, for example, the following—

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

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

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

(7) To remove any doubt, it is declared that subsection (3) does not affect a provision of an agreement with respect to work to which subsection (3) applies, under which the employer agrees not to discriminate in a particular way.<sup>121</sup>

91. The Queensland model is significant in that the threshold for what constitutes lawful discrimination by religious bodies is much higher—the discrimination must be reasonable, there must be knowledge on the part of the person discriminated against, and the requirement must be a genuine occupational requirement. By incorporating the genuine occupational requirement test, the Queensland provision holds religious schools to at least a higher standard of justification in order to lawfully discriminate in employment.
92. The NSW legislation creates separate exceptions to discrimination by religious bodies in employment on the grounds of sex,<sup>122</sup> being transgender,<sup>123</sup> and homosexuality.<sup>124</sup> Each of these exceptions states that it is not unlawful for a private educational authority to discriminate in employment. A private educational authority is defined by the Act and includes religious schools.<sup>125</sup>

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<sup>121</sup> *Anti-Discrimination Act 1991* (Qld).

<sup>122</sup> *Anti-Discrimination Act 1977* (NSW) s 25(3)(c).

<sup>123</sup> *Ibid* s 38C(3).

<sup>124</sup> *Ibid* s 49ZH(3).

<sup>125</sup> *Ibid* s 4: 'private educational authority' means a person or body administering a school, college, university or other

93. No other jurisdictions mirror the South Australian provisions regarding publication of a religious schools' employment policy.
94. Though there are assertions that all a school's employees form part of an extended community and they should all share and practice the same religious values,<sup>126</sup> this argument would appear to carry less weight the further removed from a teaching role the employee occupies.

### **Students at Religious Schools**

95. Exceptions for religious schools in the area of education, that is, lawful discrimination against LGBTIQ students are also of concern.<sup>127</sup> Whereas the *EO Act* does not provide a specific exception for discrimination by religious schools (South Australian schools rely on the general exception), some other Australian jurisdictions specifically permit discrimination by religious schools in admitting students.<sup>128</sup>
96. Generally, this discrimination is only permitted in accordance with the religious principles of the school. In Queensland, Tasmania and the Northern Territory, this discrimination is only permitted on the grounds of religious belief.

### **General Exceptions**

97. As with South Australia, most other jurisdictions make general exceptions for acts or practices by religious bodies that either conform to the doctrines tenets of beliefs of the religion or are necessary to avoid injury to the religious susceptibilities of adherents of that religion.<sup>129</sup> There are, however, some variations in the extent of the exception between the different jurisdictions.
98. The Victorian exception goes further than other jurisdictions in that it also provides an exception for discrimination by religious individuals, that is,

discrimination by a person against another person on the basis of that person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental

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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.

<sup>126</sup> Evans and Gaze, above n 44, 404-405, 415.

<sup>127</sup> Submission No 40. See Hondros, above n 52.

<sup>128</sup> *Sex Discrimination Act 1984* (Cth) s 38(c); *Equal Opportunity Act 2010* (Vic) s 83; *Anti-Discrimination Act 1977* (NSW) s 31A(3) (on the ground of sex), s 38K (on transgender grounds) s 49ZO (on the ground of homosexuality); *Anti-Discrimination Act 1998* (Tas) s 51A; *Anti-Discrimination Act 1991* (Qld) s 41(a); *Equal Opportunity Act 1984* (WA) s 73(3); *Discrimination Act 1991* (ACT) s 33(2); *Anti-Discrimination Act 1996* (NT) s 30(2).

<sup>129</sup> *Sex Discrimination Act 1984* (Cth) s 37(1)(d); *Equal Opportunity Act 2010* (Vic) s 82(2); *Anti-Discrimination Act 1977* (NSW) s 56(d); *Anti-Discrimination Act 1998* (Tas) s 52(d); *Anti-Discrimination Act 1991* (Qld) s 109(1)(d); *Equal Opportunity Act 1984* (WA) s 72(d); *Discrimination Act 1991* (ACT) s 32(d). The NT Act does not include a general exception of this type.

status or gender identity if the discrimination is reasonably necessary for the first person to comply with the doctrines, beliefs or principles of their religion.<sup>130</sup>

99. As noted below, the Commonwealth exception does not permit discrimination in the provision of aged care services by religious bodies that receive Commonwealth funding.<sup>131</sup> The exception still, however, applies in relation to employment by Commonwealth funded religious aged care facilities.
100. The ACT, Queensland and Tasmanian exceptions only apply where the discriminatory act both conforms to the doctrines tenets of beliefs of the religion **and** is necessary to avoid injury to the religious susceptibilities of adherents of that religion.
101. The general exception under the Queensland Act is also limited in that it does not apply in the work or work-related or education areas.<sup>132</sup>
102. The Tasmanian exception is further limited in its application in that it only permits discrimination on the grounds of religious belief or affiliation or religious activity.<sup>133</sup> The *Anti-Discrimination Act 1998* (Tas) only permits general discrimination by religious bodies on the basis of gender 'if it is required by the doctrines of the religion of the institution.'<sup>134</sup>
103. Under the *Anti-Discrimination Act 1996* (NT), the only general exception for religious bodies is for 'an act by a body established for religious purposes if the act is done as part of any religious observance or practice.'<sup>135</sup>

### **Ordaining and Membership**

104. As discussed above, the Institute has not received any submissions raising concerns relating to exceptions for religious bodies in relation to the selection, ordaining, appointment, training or education of priests, ministers of religion or other members of a religious order. These exceptions are found without significant variation in all jurisdictions.<sup>136</sup> In most Acts, this exception is a general exception to all or part of the Act.

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<sup>130</sup> *Equal Opportunity Act 2010* (Vic) s 84.

<sup>131</sup> *Sex Discrimination Act 1984* (Cth) s 37(2).

<sup>132</sup> *Anti-Discrimination Act 1991* (Qld) s 109(2). The exception also does not apply if s 90 (accommodation for religious purposes) applies, as the two provisions would be duplicative.

<sup>133</sup> *Anti-Discrimination Act 1998* (Tas) s 52.

<sup>134</sup> *Ibid* s 27(1)(a).

<sup>135</sup> *Anti-Discrimination Act 1996* (NT) s 51(d).

<sup>136</sup> *Sex Discrimination Act 1984* (Cth) s 37(1)(a-c); *Equal Opportunity Act 2010* (Vic) s 82(1); *Anti-Discrimination Act 1977* (NSW) s 56(d); *Anti-Discrimination Act 1998* (Tas) s 52(a-c); *Anti-Discrimination Act 1991* (Qld) s 109(1)(a-c); *Equal Opportunity Act 1984* (WA) s 72(a-c); *Discrimination Act 1991* (ACT) s 32(a-c); *Anti-Discrimination Act 1996* (NT) s 51(a-c).

105. The Tasmanian exception is again unique, in that it only permits discrimination in this area on the grounds of religious belief or affiliation or religious activity, rather than sex, sexuality or gender identity.<sup>137</sup>

## Sport

106. In each Australian jurisdiction it is lawful to discriminate on the basis of a person's sex in relation to participation in competitive sports.<sup>138</sup> Similarly to South Australia, all jurisdictions except NSW and Tasmania restrict this exception to where the 'strength, stamina or physique' of the competitor is relevant. Like the *EO Act*, the *Equal Opportunity Act 2010* (Vic) also provides exceptions where the discrimination is to permit progression to elite levels of the competition or to encourage participation.<sup>139</sup>

107. In a number of jurisdictions, this exception is limited to sporting competitions where the players are over 12 years of age.<sup>140</sup> Many jurisdictions further limit the application of the exception by excluding coaching, administration, umpiring or refereeing and other prescribed activities from the exception.<sup>141</sup>

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

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

(a) the relevant sporting activity is a competitive sporting activity for members of the sex with which the person identifies; and

(b) the person would have a significant performance advantage as a result of his or her

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<sup>137</sup> *Anti-Discrimination Act 1998* (Tas) s 52.

<sup>138</sup> *Sex Discrimination Act 1984* (Cth) s 42; *Equal Opportunity Act 2010* (Vic) s 72 (on the basis of sex or gender identity); *Anti-Discrimination Act 1977* (NSW), s 38; *Anti-Discrimination Act 1998* (Tas) s 29 (on the basis of gender); *Anti-Discrimination Act 1991* (Qld) s 111; *Equal Opportunity Act 1984* (WA)s 35; *Discrimination Act 1991* (ACT) s 41; *Anti-Discrimination Act 1996* (NT) s 56.

<sup>139</sup> *Equal Opportunity Act 2010* (Vic) sub-ss 72(1A), (1B).

<sup>140</sup> *Sex Discrimination Act 1984* (Cth) s 42(2)(e); *Equal Opportunity Act 2010* (Vic) s 72(3); *Anti-Discrimination Act 1998* (Tas) s 29; *Anti-Discrimination Act 1991* (Qld) s 111(2); *Equal Opportunity Act 1984* (WA)s 35(2)(e); *Anti-Discrimination Act 1996* (NT) s 56(2).

<sup>141</sup> *Sex Discrimination Act 1984* (Cth) s 42; *Anti-Discrimination Act 1977* (NSW), s 38 *Anti-Discrimination Act 1991* (Qld)) s 111; *Equal Opportunity Act 1984* (WA)s 35; *Discrimination Act 1991* (ACT) s 41; *Anti-Discrimination Act 1996* (NT) s 56.

medical history.

110. There is currently very little research in relation to the participation of trans people in sporting competitions.<sup>142</sup> It is therefore difficult to discern the effect of these provisions. As the Australian Human Rights Commission is currently undertaking research in this area,<sup>143</sup> it is possible that competitive sports exceptions in some jurisdictions will undergo reconsideration in the near future, especially in relation to the exclusion of gender diverse participants.

## Health Care

111. Discrimination against men who have homosexual contact with men donating blood occurs across Australia. This discrimination is permitted by general exceptions in the interests of public health and safety in some jurisdictions.<sup>144</sup> In a number of jurisdictions, the exception operates similarly to that found in the *EO Act*, that is, it is an exception on the ground of disability, which is defined as including a disease or illness and includes a future or ‘presumed’<sup>145</sup> disability.<sup>146</sup> These provisions all include the condition that the discrimination must be ‘reasonably necessary’ or words to that effect.
112. Only in Queensland, under s 45A of the *Anti-Discrimination Act 1991* (Qld), is there an exception in relation to the provision of ART. The Queensland provision is more explicit than the South Australian scheme. Section 45A(1) provides

Section 46 [prohibition of discrimination in the provision of goods and services] does not apply to the provision of assisted reproductive technology services if the discrimination is on the basis of relationship status or sexuality.

113. As noted above, similar exceptions for religious institutions in relation to the provision of health care apply across Australian jurisdictions. Indeed, the AHRC report’s findings in relation to LGBTIQ people’s health care experiences described above were the result of a nationwide consultation. In this context, the Tasmanian model in relation to exceptions for religious bodies was cited as the best practice model,<sup>147</sup> as there is no exception for religious bodies to discriminate on the grounds of sex, sexuality or gender identity in the provision of healthcare.

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<sup>142</sup> Caroline Symons et al ‘Come Out to Play: The Sports Experiences of Lesbian, Gay, Bisexual and Transgender (LGBT) people in Victoria’ (Research Paper, Victoria University, May 2010) 6; See also Mandy Treagus, Rob Cover and Christine Beasley, ‘Integrity in Sport Literature Review’ (Literature Review, University of Adelaide, August 2011).

<sup>143</sup> Australian Human Rights Commission, ‘Survey on transgender, gender diverse and intersex rights in sport’ (Media Release, 20 August 2015) (available at <https://www.humanrights.gov.au/news/media-releases/survey-transgender-gender-diverse-and-intersex-rights-sport>).

<sup>144</sup> *Anti-Discrimination Act 1991* (Qld) ss 107-108; *Anti-Discrimination Act 1996* (NT) s 55.

<sup>145</sup> *Anti-Discrimination Act 1977* (NSW) s49A.

<sup>146</sup> *Disability Discrimination Act 1992* (Cth) s 48; *Equal Opportunity Act 2010* (Vic) s 86; *Anti-Discrimination Act 1977* (NSW) s 49P; *Anti-Discrimination Act 1998* (Tas) s 47; *Discrimination Act 1991* (ACT) s 56.

<sup>147</sup> Submission No 33, 4.

114. The Commonwealth has addressed some concerns in relation to discrimination in the provision of healthcare to older people by specifically linking non-discrimination in the provision of aged care to Commonwealth funding.<sup>148</sup>

## Clubs and Associations

115. Other Australian jurisdictions, except the Commonwealth, also contain exceptions in relation to the membership of and provision of services by clubs and associations.<sup>149</sup> All the provisions regarding the provision of services to men and women separately use the term ‘men and women’ or ‘males and females’. There is no example of a more inclusive formulation of this exception.

## Measures intended to achieve equality

116. Each jurisdiction excludes measures intended to achieve equality from anti-discrimination provisions.<sup>150</sup> Generally, these measures are similar to the *EO Act* exception.

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

118. In Queensland, s 105(1) of the *Anti-Discrimination Act 1991* (Qld) provides that ‘a person may do an act to promote equal opportunity for a group of people with an attribute if the purpose of the act is not inconsistent with this Act’. The purposes of the *Anti-Discrimination Act 1991* (Qld) are defined as anti-discrimination and the promotion of equal opportunity.<sup>151</sup>

119. The Victorian Equal Opportunity Tribunal may also grant exemptions from anti-discrimination provisions upon application where such an exemption is necessary and reasonable given consideration to the human rights principles set out in the *Charter of Human Rights and Responsibilities 2006* (Vic).<sup>152</sup>

120. None of the anti-discrimination provisions found in other jurisdictions address the concern raised above at [78].

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<sup>148</sup> *Sex Discrimination Act 1984* (Cth) s 37(2).

<sup>149</sup> *Equal Opportunity Act 2010* (Vic) ss 66, 68-69; *Anti-Discrimination Act 1977* (NSW) s 34A; *Anti-Discrimination Act 1998* (Tas) s 27; *Anti-Discrimination Act 1991* (Qld) ss 97-98; *Equal Opportunity Act 1984* (WA) s 22; *Discrimination Act 1991* (ACT) s 40; *Anti-Discrimination Act 1996* (NT) s 47.

<sup>150</sup> *Sex Discrimination Act 1984* (Cth) s 7D; *Equal Opportunity Act 2010* (Vic) s 88; *Anti-Discrimination Act 1977* (NSW) s 126A; *Anti-Discrimination Act 1998* (Tas) ss 26; *Anti-Discrimination Act 1991* (Qld) s 105; *Equal Opportunity Act 1984* (WA) s 31, 35ZD; *Discrimination Act 1991* (ACT) s 27; *Anti-Discrimination Act 1996* (NT) s 57.

<sup>151</sup> *Anti-Discrimination Act 1991* (Qld) s 6.

<sup>152</sup> *Equal Opportunity Act 2010* (Vic) ss 89-90.

## Options for Reform

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121. This Issues Paper has examined the existing exceptions to the *EO Act* in South Australia and raised a number of issues and concerns in relation to the scope and operation of these exceptions. SALRI now invites submissions from interested parties, experts and the public on the issues raised in this Paper and to give opinions on whether the case for reform has been made out and, if so, what amendments to the *EO Act* are appropriate. To assist and guide the consultation process, this section sets out four options to be discussed by participants:

- **Option A:** no reform required
- **Option B:** reform to certain exceptions only
- **Option C:** general limitations clause
- **Option D:** exceptions by application only

## Why Reform?

122. By way of framing the following options for reform of the *EO Act*, this section outlines some of the imperatives for reform of South Australian law. As a starting point, it is worth considering the role of the law in our community—to what extent should South Australian legislation reflect the contemporary values of the community? Which part(s) of the community hold those values? Which of those values require the most promotion and protection? Does the current *EO Act* protect these values sufficiently? These are questions to keep in mind when forming responses to this paper.

123. SALRI also makes certain considerations in examining potential law reform options. When conducting reviews of legislation and making recommendations to government, SALRI focuses on

- The modernisation of the law;
- The elimination of defects in the law;
- The consolidation of any laws;
- The repeal of laws that are obsolete or unnecessary; and
- Uniformity between laws of other States and the Commonwealth.

124. The issues raised by this Paper in relation to exceptions in the *EO Act* indicate the need to reform aspects of the South Australian legislation in order to modernise the relevant law and, where appropriate, to increase consistency and best practice with other States and the Commonwealth.

125. This Issues Paper also notes the wider context of the South Australian Government's commitment to welcoming, including and celebrating LGBTIQ South Australians and ensuring that LGBTIQ South Australians can fully participate in all aspects of social and



economic life, without experiencing prejudice or discrimination.<sup>153</sup> An important part of the Inclusion Strategy is said to be the protection and promotion of the human rights of LGBTIQ people, which includes the fundamental right of non-discrimination. Law reform to ensure that LGBTIQ people do not face unnecessary or inappropriate discrimination on the basis of their sexual orientation, gender identity or intersex status can be seen as a vital part of the effective implementation of the Government's Inclusion Strategy.

### **Option A: No Reform**

126. As explained in this Paper, South Australia has well established anti-discrimination laws that provide protection against unlawful discrimination including on the grounds of sex, sexuality and chosen gender. The Institute has previously recommended that these protections be modernised to refer to gender identity, intersex status and sexual orientation. These laws also contain specific and general exceptions to the provisions that make discrimination unlawful. The Institute's research and consultations to date suggest that these exceptions require review and reform to ensure that they align with best practice. However not all interested parties share this view. For example, SALRI received submissions either arguing that no change to the present law is necessary or that the current *EO Act* was not having a negative effect on LGBTIQ people.

127. As such, one option following the consultation on this issue may be to leave the present exceptions in the *EO Act* as they are. If, after consideration of the issues raised by this Issues Paper and the submissions received, the case for reform has not been satisfactorily made out, SALRI may, in these circumstances, recommend maintaining the status quo.

### **Option B: Modify certain exceptions**

128. As outlined in detail in this Paper, South Australian anti-discrimination laws contain protective provisions that make discrimination on certain grounds unlawful, and exceptions to these general rules where discrimination will be lawful. This Paper has looked closely at whether the existing laws have got the balance right between the need to protect people against discrimination and other important rights or interests, such as the need to respect religious practices and freedom of religious belief. The Institute's research and consultations to date suggest that these exceptions require review and reform to ensure that they align with best practice. Option B outlines some of the reform options developed by the Institute to improve the relevant South Australian laws.

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<sup>153</sup> Government of South Australia, *LGBTIQ State of Play: Equality for Lesbian, Gay, Transgender, Intersex and Queer (LGBTIQ) People* (2015) Government of South Australia, <<http://yoursay.sa.gov.au/documents/lgbtiq-state-of-play.pdf>>; Inclusion Strategy, above n 86.

129. A first level of reform is to devise reform options to limit the existing exceptions. These amendments would address some of the concerns raised by LGBTIQ people as to the scope of current lawful discrimination.

### **Religious Organisations**

130. As discussed in this Paper, one existing exception in the *Equal Opportunity Act* is that applying to employment by religious schools. Currently this exception permits religious schools to discriminate on the grounds of sexuality and chosen gender when employing staff, provided the discrimination is founded on the precepts of a particular religion and the school has a publicly available written policy setting out its position. One reform option is to narrow the existing exception to require a closer connection between the particular role the person is being employed to do and the tenets, beliefs, teachings, principles or practices of the particular religion.

131. In short, this approach would introduce a ‘genuine occupational requirement’, as well as a ‘reasonableness in the circumstances’ test. This option is set out below.

132. *Employment by religious schools*: With reference to the Queensland and Tasmanian models, amend s 34(3) as follows. Existing sections (3)(b), (c) and (d) and (4) to be renamed (d), (e) and (f) and (5) respectively.

#### *Section 34(3)(b)*

*(i) the person, in relation to their sexual orientation, gender identity or intersex status, acts contrary to the precepts of that religion and it is a genuine occupational requirement of the employer that the person, in the course of, or in connection with, the person’s work, act in a way consistent with the employer’s religious belief or*

*(ii) the discrimination is in order to enable, or better enable, the educational institution to be conducted in accordance with those tenets, beliefs, teachings, principles or practices; and*

*(3)(c) the discrimination is not unreasonable in the circumstances;*

...

*(4) For subsection (3)(c), whether the discrimination is not unreasonable depends on all the circumstances of the case, including, for example, the following—*

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

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

133. It should be noted that SALRI has already identified ‘chosen gender’ as a phrase which requires amendment.

134. A related reform option would be to slightly amend the current provision that permits general exceptions to be made with respect to religious organisations, to require both a clear connection with the precepts of the religion and evidence that the exception is necessary in the circumstances.
135. *General Exceptions*: amend s 50(1)(c) to read: *any other practice of a body established for religious purposes that conforms with the precepts of that religion **and** is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.*
136. *The Tasmanian Model*: the best practice model would be to further amend the exceptions in s 34(3) and s 50 to only apply to discrimination on the grounds of ‘*religious belief or affiliation or religious activity.*’

## **Sport**

137. In terms of sporting exemption, a possible amendment consistent with interstate practice would be to limit the exemption to the areas of coaching, umpiring, administration and the age of the participant. Such an amendment could include some or all of the following features:
138. Insert subsection 48(2):

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

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

## **Health Care**

139. As outlined in the Paper, the current law contains exceptions for unlawful discrimination on the grounds of sexuality and chosen gender with respect to the provision of health care. There may be legitimate reasons for retaining these exceptions, however, there may also be circumstances in which these exceptions require review to determine whether they continue to be based on genuine medical or other reliable evidence.. As a result, it may be necessary to consider reform options including those detailed below.
140. *Blood Donation*: Insert exclusion section 79A(2): *This section does not apply to discriminatory acts against men who have sex with men on the basis of a presumed HIV infection status* **OR** a note in the legislation ‘it is not reasonable to presume that a man who has had sex with a man in the last 12 months has an infectious disease’.

141. Further amendments relating to health care explored in this Paper include the need to ensure non-discriminator access to ART, and the option of amending the existing religious bodies exception, so that the exception would not apply to the provision of services (such as health services) that attract public funding. These reforms are set out below.

142. *Assisted Reproductive Treatment*: Repeal section 5(2) of the *EO Act*.

143. *Health Care*: Insert ‘funding condition’ clause s 50(2):

*Sub-section s 50(1)(c) does not apply to the provision of services by any body established for religious services if the body receives State funding or any exemptions from, or reduction in, State rates and charges.*

### **Clubs and Associations**

144. This Paper also explored options for clarifying and modernising the operation of the exceptions relating to clubs and association. The reform options for consideration are:

145. Remove the term ‘club’ from the *EO Act*. Define the term ‘association’ with reference to the *Associations Incorporation Act 1985* (SA).

146. Remove the phrase ‘for men and women’ from section 35(3); replace with ‘for one sex’.

### **Measures intended to achieve equality**

147. As explored in this Paper, there are a number of ways to improve the clarity of the current anti-discrimination laws and to ensure they meet the competing needs of protecting against unlawful discrimination and permitting different treatment if such treatment is necessary to achieve a legitimate public aim. An example of such a reform is that relating to the provision in the *EO Act* relating to measures intended to achieve equality. This provision could be amended as follows to clarify its substantive equality objective.

148. Insert s 47(2):

*where a measure is intended to achieve equality between sexes, or exists for the benefit of one sex, the measure must not discriminate against people based on their gender identity or intersex status unless reasonable and necessary in all the circumstances.*

### **Option C: General Limitations Clause**

149. An alternative option to those reforms outlined above would be to remove all or some of the specific exceptions to unlawful discrimination on the grounds of sexuality or chosen gender in the *EO Act* and replace these with a general limitation clause. Such a clause would operate to exempt a particular individual or organisation from the operation of the Act, but only when certain criteria are met.

150. This option was mooted by the Commonwealth Government in 2011,<sup>154</sup> based on the *Canadian Human Rights Act*.<sup>155</sup> In the Canadian Act, otherwise discriminatory acts are not unlawful if there is some *bona fide* requirement or justification. Rather than having multiple exception provisions dealing with particular areas, the *EO Act* could have a single provision that provides exceptions to certain parts or sections of the *EO Act* where the conduct is justifiable.

151. The Commonwealth Attorney-General's Department suggested to the Commonwealth the following model for such a clause

It is not unlawful to discriminate against another person if that conduct is justifiable.  
Conduct is justifiable if all of the following elements are satisfied:

- the first person engaged in the conduct, in good faith, for the purpose of achieving a particular aim
- that aim is a legitimate aim
- the first person considered, and a reasonable person in the circumstances of the first person would have considered, that engaging in the conduct would achieve that aim, and
- the conduct is a proportionate means of achieving that aim.

In determining whether each of these elements is satisfied, the following matters must all be taken into account:

- the objects of the Bill
- the nature and extent of the discriminatory effect of the conduct
- whether the first person could instead have engaged in other conduct that would have had no, or a lesser, discriminatory effect, and
- the cost and feasibility of engaging in other conduct.<sup>156</sup>

152. This model could operate similarly to the existing complaint system.<sup>157</sup> For example, under a general limitation clause, a gay person who was refused employment by a religious school on the grounds of his or her sexual orientation could approach the Equal Opportunity Tribunal

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<sup>154</sup> Attorney-General's Department, 'Consolidation of Commonwealth Anti-Discrimination Laws' (Discussion Paper, Attorney-General's Department, September 2011), 37. In 2011, the Commonwealth Government conducted significant consultation regarding the consolidation of Commonwealth Anti-discrimination laws, resulting in an exposure draft Human Rights and Anti-Discrimination Bill 2012 (Cth). This Bill was never passed into law.

<sup>155</sup> *Canadian Human Rights Act*, RSC, 1985, c H-6, s 15 ('the Canadian Act').

<sup>156</sup> Human Rights and Anti-Discrimination Bill 2012 (Cth), 40 (exposure draft).

<sup>157</sup> *EO Act* part 8, Division 1.

to assess whether the school's discriminatory act was justifiable. The Tribunal could then make a determination on the facts of the case.

153. As described in the Commonwealth Government discussion paper, this approach has the advantages of being case-specific, flexible and ensuring that there are fewer gaps in anti-discrimination rules and exceptions.<sup>158</sup> It would also create a simpler and more straightforward system in some respects.

154. This model would, however, have the potential disadvantage of leading to complexity and uncertainty in the equal opportunity system, as groups would be unsure as to whether their actions would be the subject of a Tribunal determination. This model would also involve significant resource implications for the Equal Opportunity Tribunal and financial implications for the State.

155. Recommendations for this model would also need to consider which exceptions could be satisfactorily replaced with a general limitations clause and which, if any, should remain as stand-alone exceptions.

#### **Option D: Exceptions by Application Only**

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

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

158. SALRI suggests that an option for reform would be to repeal all the existing statutory exceptions and move to an 'exception by application' system. This would involve relying upon the existing s 92 powers of the Equal Opportunity Tribunal to grant exemptions.

159. A number of submissions received by SALRI advocated for the removal of the present discriminatory exceptions in the *EO Act* in the interests of equality and advancing the rights of LGBTIQ people.<sup>159</sup>

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<sup>158</sup>See, for example, Attorney-General's Department, 'Consolidation of Commonwealth Anti-Discrimination Laws' (Discussion Paper, Attorney-General's Department, September 2011), 37; Explanatory Notes, Human Rights and Anti-Discrimination Bill 2012 (Cth) 33.

<sup>159</sup> See for example Submission No 13; Submission No 32; Submission No 38, 1.

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

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## APPENDIX 1

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### Questions

The Institute encourages interested parties to share their views on the issues raised in this Paper by way of a written submission. These views will be taken into account in the preparation of the Institute's Final Report. The following questions may assist in the preparation of a written submission. To make it easier to make a submission, the questions are available for downloading on the Institute's webpage at <https://law.adelaide.edu.au/research/law-reform-institute/>.

#### Question 1

Having regard to the changes to key terms already proposed by SALRI (introducing protections against unlawful discrimination on the grounds of gender identity, sexual orientation and intersex status), does the current South Australian *Equal Opportunity Act 1984* (SA) offer appropriate protection against discrimination for LGBTIQ South Australians?

#### Question 2

How important is it to continue to include a wide range of exceptions to unlawful discrimination under the South Australian *Equal Opportunity Act 1984* (SA)? Are some exceptions more important than others?

#### Question 3

Which of the options for reform (A, B, C or D) would be most appropriate for South Australia? Why? (You may argue that a combination of the options is preferable. Please explain any modified options for reform).

#### Question 4

Aside from those discussed in this Issues Paper, are there any other exceptions to anti-discrimination law that you think should be reformed? This may include adding further exceptions.

#### Question 5

If Option C: general limitations clause was adopted, are there any exceptions that should not be repealed and replaced by the clause? Why?

#### Question 6

If Option D: exemptions by application was adopted, are there any exceptions that should not be repealed? Why?

#### Question 7

If the *Equal Opportunity Act 1984* (SA) was reformed in one of ways proposed in this Issues Paper, what would be the practical implications of such change? For example, what impact would any changes have on the Equal Opportunity Commission or on the clubs, schools or other bodies currently relying upon exceptions to unlawful discrimination under the Act.

## APPENDIX 2

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### Exception provisions in *Equal Opportunity Act 1984 (SA)*

#### **5—Interpretation**

...

(2) A reference in this Act or in the repealed *Sex Discrimination Act 1975* to the provision of a service does not include, and will be taken never to have included, the carrying out of either of the following fertilisation procedures:

- (a) artificial insemination; or
- (b) the procedure of fertilising an ovum outside the body and transferring the fertilised ovum into the uterus.

#### **34—Exemptions**

(1) This Division does not apply in relation to—

- (a) an employer employing a person for purposes not connected with a business carried on by the employer; or
- (b) a principal engaging a natural person as an independent contractor for purposes not connected with a business carried on by the principal.

(2) This Division does not apply to discrimination on the ground of sex, chosen gender or sexuality in relation to employment or engagement for which it is a genuine occupational requirement that a person be a person of a particular sex, a person of a chosen gender or a person of a particular sexuality.

(3) This Division does not apply to discrimination on the ground of chosen gender or sexuality in relation to employment or engagement for the purposes of an educational institution if—

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

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

(iii) to other members of the public.

(4) This Division does not apply to discrimination on the ground of chosen gender in relation to employment or engagement if the discrimination is for the purposes of enforcing standards of appearance and dress reasonably required for the employment or engagement.

### ***35—Discrimination by associations***

...

(2) This section does not apply to discrimination on the ground of sex in relation to the use or enjoyment of a service or benefit provided by an association—

(a) if it is not practicable for the service or benefit to be used or enjoyed simultaneously by both men and women, but the same, or an equivalent, service or benefit is provided for the use or enjoyment of men and women separately from each other or at different times; or

(b) if it is not practicable for the service or benefit to be used or enjoyed to the same extent by both men and women, but both men and women are entitled to a fair and reasonable proportion of the use or enjoyment of the service or benefit.

(2a) This section does not render unlawful an association established for—

(a) persons of a particular sex; or

(b) persons of a chosen gender; or

(c) persons of a particular sexuality (other than heterosexuality),

and, consequently, such an association may discriminate against an applicant for membership so as to exclude from membership persons other than those for whom the association is established.

(2b) This section does not apply to discrimination on the ground of chosen gender or sexuality if the association is administered in accordance with the precepts of a particular religion and the discrimination is founded on the precepts of that religion.

### ***37—Discrimination by educational authorities***

(3) This section does not apply to discrimination on the ground of sex in respect of—

(a) admission to a school, college, university or institution established wholly or mainly for students of the one sex; or

(b) the admission of a person to a school, college or institution (not being a tertiary level school, college or institution) if the level of education or training sought by the person is provided only for students of the one sex; or

(c) the provision at a school, college, university or institution of boarding facilities for students of the one sex.

**38—Discrimination by person disposing of an interest in land**

...

(2) This section does not apply to the disposal of an interest in land by way of, or pursuant to, a testamentary disposition or gift.

**39—Discrimination in provision of goods and services**

...

(2) If the nature of a skill varies according to whether it is exercised in relation to men or to women, a person does not contravene this section by exercising the skill in relation to men only, or women only, in accordance with the person's normal practice.

**40—Discrimination in relation to accommodation**

...

(3) This section does not apply to discrimination in relation to the provision of accommodation if the person who provides, or proposes to provide, the accommodation, or a near relative of that person, resides, and intends to continue to reside, in the same household as the person requiring the accommodation.

(4) This section does not apply to discrimination on the ground of sex in relation to the provision of accommodation by an organisation that does not seek to secure a pecuniary profit for its members, if the accommodation is provided only for persons of the one sex.

**45—Charities**

This Part does not—

(a) affect a provision in a charitable instrument for conferring benefits wholly or mainly on—

(i) persons of the one sex; or

(ia) persons of a chosen gender; or

(ii) persons of a particular sexuality; or

(b) render unlawful an act done to give effect to such a provision.

**47—Measures intended to achieve equality**

This Part does not render unlawful an act done for the purpose of carrying out a scheme or undertaking intended to ensure that persons of the one sex, persons of a chosen gender, or persons of a particular sexuality, have equal opportunities with, respectively, persons of the other sex, persons who are not persons of a chosen gender or persons of another sexuality, in circumstances to which this Part applies.



**48—Sport**

This Part does not render unlawful the exclusion of persons from participation in a competitive sporting activity on the ground of sex in the following circumstances:

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

**49—Insurance etc**

This Part does not render unlawful discrimination on the ground of sex in the terms on which an annuity, life assurance, accident insurance or other form of insurance is offered or may be obtained, if the discrimination—

- (a) is based on actuarial or statistical data from a source on which it is reasonable to rely; and
- (b) is reasonable having regard to that data.

**50—Religious bodies**

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

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

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

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

### **79A—Exemption in relation to infectious diseases**

This Part does not render unlawful a discriminatory act if the act—

(a) is directed towards ensuring that an infectious disease is not spread; and

(b) is reasonable in all the circumstances.

### **85Z—Exemptions**

(1) This Division does not apply in relation to—

(a) an employer employing a person for purposes not connected with a business carried on by the employer; or

(b) a principal engaging a natural person as an independent contractor for purposes not connected with a business carried on by the principal.

(2) This Division does not apply to discrimination against same sex domestic partners on the ground of marital or domestic partnership status in relation to employment or engagement for the purposes of an educational institution administered in accordance with the precepts of a particular religion if Part 3 Division 2 does not apply in relation to discrimination on the ground of sexuality in relation to the employment or engagement (see section 34(3)).

### **85ZB – Discrimination by Associations**

...

(2) This section does not render unlawful an association established—

(a) for persons of a particular marital or domestic partnership status; or

(b) for spouses or domestic partners of a particular class; or

(c) for persons with caring responsibilities or particular caring responsibilities,

and, consequently, such an association may discriminate against an applicant for membership so as to exclude from membership persons other than those for whom the association is established.

(3) This section does not apply to discrimination against same sex domestic partners on the ground of marital or domestic partnership status if the association is administered in accordance with the precepts of a particular religion and the discrimination is founded on the precepts of that religion.

**85ZL—Exemption relating to identity of spouse or domestic partner**

This Part does not apply to discrimination on the ground of the identity of a spouse or domestic partner if the discrimination is, having regard to all the circumstances of the particular case, reasonably necessary to preserve confidentiality, avoid conflicts of interest or nepotism or reasonably apprehended conflicts of interest or nepotism or protect the health or safety of persons.

**85ZM—Religious bodies**

This Part does not render unlawful discrimination on the ground of marital or domestic partnership status in relation to—

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

**92—The Tribunal may grant exemptions**

(1) The Tribunal may, on application under this section, grant exemptions from a provision of this Act in relation to—

- (a) a person, or class of persons; or
- (b) an activity, or class of activity; or
- (c) circumstances of a specified nature.

(2) An exemption under this section—

- (a) may be granted unconditionally or on conditions; and
- (b) may be revoked by the Tribunal on breach of a condition; and
- (c) subject to revocation, remains in force for a period, not exceeding three years, determined by the Tribunal, but may be renewed from time to time for a further period, not exceeding three years, determined by the Tribunal.

(3) An application for the grant, renewal or revocation of an exemption may be made to the Tribunal by the Commissioner or any other person.

(4) The following persons are entitled to appear and be heard by the Tribunal on an application under this section:

- (a) the applicant;
- (b) if the Commissioner is not the applicant—the Commissioner;

- (c) a person in whose favour the exemption in question is sought, or has been granted.
- (5) A person referred to in subsection (4) may call or give evidence in support of, or against, the application.
- (6) In determining an application under this section, the Tribunal may—
  - (a) have regard (where relevant) to the desirability of certain discriminatory actions being permitted for the purpose of redressing the effect of past discrimination; and
  - (b) have regard to other factors that the Tribunal considers relevant.
- (7) Notice of the grant, renewal or revocation of an exemption under this section must be published in the Gazette.
- (8) Notice of the grant or renewal of an exemption under this section must state—
  - (a) the period for which the exemption has been granted or renewed; and
  - (b) the conditions (if any) to which the exemption is subject.