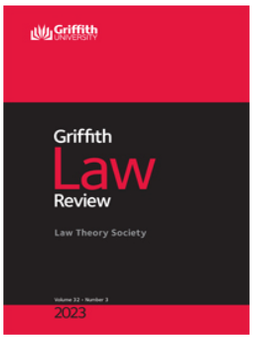

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Religious schools: a transparent right to discriminate?

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ABSTRACT

Discrimination laws have long contained exceptions for otherwise unlawful discriminatory conduct. An increasing site of tension has been the exceptions granted to religious schools. These schools maintain that they should be able to adopt an approach to education which reflects the faith-based ethos of the school community. However, there are concerns that some faith-based approaches can cause harm to, and exclude, LGBTIQ+ staff and students. An approach that has been under active consideration in Australia is to allow some discrimination by religious schools so long as they give public notice of their policy of doing so. This 'notice provision' exists in several state and territory discrimination laws, and has been considered in recent law reform inquiries across the country.

In this paper, we challenge the underlying idea that prior notice justifies discriminatory conduct. We argue that such an approach sits uncomfortably with the conceptual and theoretical underpinnings of discrimination law, and that transparency is an insufficient reason to permit discrimination. Notice provisions appear to evade, rather than answer, the question of how to balance competing human rights to religious freedom and equality. As such, we argue that discrimination by religious schools cannot be justified on the basis of notice.

KEYWORDS

Discrimination law; LGBTIQ+ rights; religious freedom; religious schools; transparency; equality

1. Introduction

All discrimination law regimes contain justifications and exceptions to discrimination law to allow conduct which would otherwise be discriminatory. One key site of tension is how the right to religious freedom can and should justify discriminatory conduct.[1] Many jurisdictions have confronted the challenge of accommodating religious belief whilst simultaneously maintaining a commitment to non-discrimination and equality on grounds such as sex, disability and LGBTIQ+ status.[2] In responding to this challenge, statutory schemes prohibiting discrimination generally contain exceptions which allow otherwise unlawful conduct by religious organisations on the basis of religious belief.[3]

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[1]Evans and Gaze (2010).
[2]See, eg, McCrudden (2020).
[3]See, eg, *Sex Discrimination Act 1984* (Cth) ss 37, 38.

This article has been corrected with minor changes. These changes do not impact the academic content of the article.

In this paper, we focus on the rights granted to religious educational institutions, or what we colloquially refer to as 'religious schools'.[4] Religious schools have been a particular site of controversy in discrimination law.[5] On the one hand, religious schools maintain that they should be able to adopt an approach to education which reflects the faith-based ethos of the school community.[6] On the other, there are concerns that some faith-based approaches can cause significant harm to staff and students – particularly, but not only, on the basis of gender, disability and LGBTIQ+ status.[7]

An approach that has been under active consideration in Australia is to allow some discrimination by religious schools so long as they give public notice of their policy of doing so. This 'notice provision' exists as an exception within South Australian ('SA'), Australian Capital Territory ('ACT') and Tasmanian discrimination laws. The incorporation of a new notice provision was considered as part of recent law reform processes in Western Australia ('WA') and Queensland, and was incorporated into the infamous federal Religious Discrimination Bill. This year alone, the ACT has added a new notice provision relating to employment and goods and services discrimination by religious bodies to its discrimination law,[8] and notice provisions were considered in the Australian Law Reform Commission's inquiry into religious schools and discrimination laws.

In this paper, we challenge the underlying idea that prior notice justifies discriminatory conduct. We argue that such an approach sits uncomfortably with the broader conceptual and theoretical underpinnings of discrimination law, and that transparency is an insufficient reason to permit discrimination. Our argument is split in four parts. We begin in Part 2 by exploring the historical passage of notice provisions in Australia, and consider if there is any underlying basis or justification for the exception given in explanatory materials or Hansard records. We then turn, in Part 3, to the increasing presence of notice provisions in recent law reform proposals in Australian discrimination law, including the federal Religious Discrimination Bill. In both existing notice provisions and proposed notice provisions, we will establish that little conceptual or theoretical justification is given for their basis, aside from the vague concept of 'transparency'.

In Part 4, we consider this justification of 'transparency' and argue that notice provisions rely on it as an end rather than a means, rendering it an insufficient justification to allow for discriminatory treatment. This is exacerbated by two errant assumptions made by those advocating for such transparency: that the market can provide a solution to discrimination without state intervention, and that there is no further harm suffered by individuals and groups when public notice is given of their exclusion. In the final part, we consider whether there are other arguments in the literature on how discrimination could be justified through notice, finding that the predominant view is a 'balancing' of a right to religious freedom and a right to equality.

Ultimately, however, we argue that this human rights rationale masks the reality: that notice provisions evade, rather than answer, the question of how to balance competing human rights. As such, we argue that discrimination by religious schools cannot be justified on the basis of notice.

[4]While religious universities, colleges and other educational institutions are included within the remit of these exceptions, almost all policy and legal controversy has centred on religious schools.
[5]Donnelly (2023); Elphick (2023).
[6]Evans and Ujvari (2009), pp. 31–2; Law Reform Commission of Western Australia (2022), pp. 178–9.
[7]Evans and Ujavi (2009), p. 35.
[8]*Discrimination Amendment Act 2023* (ACT) s 9, which substitutes *Discrimination Act 1991* (ACT) s 32 in April 2024.

2. The history of notice provisions in Australian discrimination law

Across all Australian jurisdictions, there are exceptions to discrimination laws where conduct is based on religious belief. The challenge that each jurisdiction faces is how to appropriately balance competing rights and interests. International law recognises both a right to freedom to belief, thought and conscience, including religious belief, as well as a right to non-discrimination and equality.[9] The extent to which conduct is justified on this basis varies greatly across jurisdictions, both internationally and throughout Australia.

Three rationales have commonly been used for the existence of exceptions in discrimination law. The first is based on the underlying tensions between the ideals of equality and freedom and the distinction between the public and the private sphere.[10] This tension relates to the idea that people should be free to determine with whom they interact, particularly within a private and social context; it is for this reason that exceptions generally allow discrimination in hiring a caregiver in a private home.[11] The second is to prevent anomalous results that might otherwise arise from a general prohibition. Genuine occupational requirement exceptions are one example; these allow, for instance, theatre groups to choose women to fill particular acting roles, when they would otherwise be barred from distinguishing on the basis of sex.[12] Finally, the third arises because of pragmatic compromises that occur as part of the political process to balance the rights of different parties and ensure the smooth passage of discrimination law.[13] Smith suggests that the wide exceptions in New South Wales exempting small employers from employment discrimination prohibitions are the result of such a pragmatic compromise.[14]

In this part, we trace the emergence of the notice provision in Australia, starting with its inception in South Australia. We will demonstrate that when notice provisions first emerged in SA, it was based on the third rationale for the existence of exceptions in discrimination law: a pragmatic compromise to ensure the passage of legislation. However, later debates about notice provisions in other jurisdictions appear to assume that the adopted SA approach has a theoretical or conceptual justification which, from our study of the legislative record, does not appear to exist. We will demonstrate that throughout the law reform history of notice provisions in Australia, little underlying conceptual basis is provided for notice provisions – except for brief references in recent, 2023 reforms to 'transparency'.

2.1. The lack of rationale provided by existing notice provisions

Three Australian jurisdictions provide that some forms of discrimination by religious schools are justified where the discrimination is supported by a written policy which outlines the religious beliefs of the school.[15] However, each of these notice provisions

[9] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1996, 999 UNTS 171 (entered into force 23 March 1976) arts 18, 26.
[10] Thornton (1991), pp. 453–4.
[11] See, eg, *Equal Opportunity Act 2010* (Vic) s 24(1)(a).
[12] Smith (2008), p. 8; see, eg, *Sex Discrimination Act 1984* (Cth) s 30(2)(b).
[13] Blackham (2018), p. 1088.
[14] Smith (2008), p. 8; *Anti-Discrimination Act 1977* (NSW) ss 25(3)(b), 38C(3)(b), 40(3)(b), 49D(3)(b), 49V(3)(b), 49ZH(3)(b).
[15] *Equal Opportunity Act 1984* (SA) s 34(3); *Anti-Discrimination Act 1998* (Tas) s 51A; *Discrimination Act 1991* (ACT) ss 46(3), (4).

operates differently, applying to different protected attributes (such as sexual orientation, or gender identity) and to different spheres of operation (such as employment, or education).

In SA, employment discrimination based on sexual orientation, gender identity or intersex status is justified where the religious school is administered in accordance with the precepts of a religion and the discrimination is founded on that basis.[16] Importantly, the school must also have a written policy, and a copy of the written policy must be given to the person who is seeking employment with the school.[17] In contrast, the notice provisions in the Tasmanian and ACT discrimination legislation only allow discrimination on the basis of religion, not on the basis of LGBTIQ+ status. In Tasmania, the notice provision relates only to the admission of students, rather than the employment of staff, and requires the religious school to publicise an admission policy based on religion.[18] In the ACT, the notice provision relates to both the admission of students as well as the hiring of staff; religious schools there can discriminate on the basis of religious belief if they have a written, publicly available policy that advises as such.[19]

The first jurisdiction to implement a 'notice provision' for religious schools was SA, in 2009.[20] The 2009 amendments removed the previous exception for religious educational and other institutions to discriminate on the basis of 'sexuality or cohabitation with another person of the same sex' where the discrimination arose in the course of administration of that institution and was founded on the precepts of that religion.[21] The previous exception, which applied until 2009, did not contain any 'notice' requirement. The justification for removing that previous exception was that it was too broad, capturing other institutions as well as educational institutions, and could be utilised to allow other actions such as expelling gay students or limiting their access to other educational opportunities.[22] However, in the second reading speech, the Attorney-General nevertheless recognised the need for balance between non-discrimination rights and a right to religious freedom, particularly with respect to employment at religious schools.[23]

As a result, the compromise made in SA in 2009 was to still allow religious schools to discriminate in employment on the basis of 'chosen gender or sexuality', later amended to 'sexual orientation, gender identity or intersex status',[24] but require the discrimination to be both connected to the precepts of religion and outlined in a publicly available policy for prospective staff and parents.[25] The Attorney-General noted that the requirement to have a publicly available policy stipulating the school's practices regarding the employment of LGBTIQ+ staff would allow 'both parents and prospective staff … [to] know where the school stands.'[26] Other than this small articulation of a justification for the notice provision, no other rationale was given by the Attorney-General for its inclusion

[16] *Equal Opportunity Act 1984* (SA) s 34(3).
[17] *Equal Opportunity Act 1984* (SA) s 34(3).
[18] *Anti-Discrimination Act 1998* (Tas) s 51A.
[19] *Discrimination Act 1991* (ACT) ss 46(3), (4).
[20] *Equal Opportunity (Miscellaneous) Amendment Act 2009* (SA).
[21] *Equal Opportunity (Miscellaneous) Amendment Act 2009* (SA).
[22] South Australia, *Parliamentary Debates*, House of Assembly, 14 July 2009, pp. 3474–5.
[23] South Australia, *Parliamentary Debates*, House of Assembly, 14 July 2009, pp. 3474–5.
[24] *Statutes Amendment (Gender Identity and Equity) Act 2016* (SA).
[25] South Australia, *Parliamentary Debates*, House of Assembly, 14 July 2009, pp. 3474–5.
[26] South Australia, *Parliamentary Debates*, House of Assembly, 14 July 2009, pp. 3474–5.

– despite the fact the 2009 amendments represented the first-ever notice provision under any Australian discrimination legislation.

The notice provisions in Tasmanian and ACT discrimination legislation are slightly different to that contained in the SA legislation. The Tasmanian and ACT schemes allow discrimination only on the basis of religious belief, rather than on the basis of sexual orientation, gender identity or intersex status.[27] In Tasmania, a religious school is able to discriminate on the ground of religious belief in deciding to admit a student, where the school has a policy which demonstrates that the admission criteria relate to students' religious beliefs (or their parents' religious beliefs), and not any other protected attribute.[28] It is not clear from the provision whether the policy must be publicly available. The Tasmanian notice provision was introduced in 2015,[29] and replaced the previous approach to religious school exceptions, which was ad hoc and required individual schools to apply for an exemption to use religious belief as a criterion for admission.[30] The justification given for the notice requirement in the second reading speech for the amending Act was that it was designed to 'remove administrative burden and red tape associated' with the previous exemption approach.[31] In introducing the amendment to the Tasmanian Parliament, there was little conceptual debate surrounding the requirement for a policy outlining admission practices.

In the ACT, the notice provision for religious schools relates to both the admission of students and the hiring of staff. Under the ACT approach, a religious school must have a written, published and readily accessible policy on its admission and hiring practices for prospective and current students and staff where it wishes to discriminate on the basis of religious belief in admitting students or hiring staff or contractors.[32] This exception was inserted as section 46 of the *Discrimination Act 1991* (ACT) in 2018.[33] Second reading speeches on the amending Act by the Chief Minister and the Attorney-General emphasised the importance of transparency and consistency in the application of the exception.[34] In the ensuing debate, the opposition leader, Andrew Coe, raised some questions as to the practical operation of the policy and questioned how much detail would be required for the policy to be sufficiently clear for prospective staff and students.[35] However, like in the Tasmanian example, the ACT government provided no conceptual or theoretical basis for the requirement for a written, published policy. As such, historical notice provisions for religious schools have provided almost no guidance as to their underlying justification.

[27] *Anti-Discrimination Act 1998* (Tas) s 51A; *Discrimination Act 1991* (ACT) ss 46(3), (4).
[28] *Anti-Discrimination Act 1998* (Tas) s 51A.
[29] *Anti-Discrimination Amendment Act 2015* (Tas).
[30] Tasmania, *Parliamentary Debates*, House of Assembly, 28 April 2015, p. 26 (Premier Rockliff).
[31] Tasmania, *Parliamentary Debates*, House of Assembly, 28 April 2015, p. 26 (Premier Rockliff). The previous exemption approach required religious schools to, one-by-one, seek individual exemptions to be able to discriminate on the basis of religious belief in the admission of students – rather than applying a generalised legislative test, as under the new approach.
[32] *Discrimination Act 1991* (ACT) ss 46(3), (4).
[33] *Discrimination Amendment Act 2018* (ACT).
[34] Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 1 November 2018, pp. 4612–4 (Chief Minister Barr), 4614–6 (Attorney-General Rattenbury).
[35] Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 27 November 2018, p. 4881 (Opposition Leader Coe).

2.2. A new notice provision and the rationale of 'transparency'

Earlier this year, however, a new religious notice provision was added to the ACT discrimination legislation.[36] This does not affect section 46 or religious schools, but rather pertains to all other religious bodies. Previously, section 32 contained a standard provision excepting 'any other act or practice' of a religious body if it both 'conforms to the doctrines, tenets or beliefs of that religion and is necessary to avoid injury to the religious susceptibilities of adherents of that religion.'[37] Similar general religious body exceptions exist throughout Australia.[38] The new ACT provision requires religious bodies to meet further hurdles, in addition to the general test, in order to discriminate in employment and in the provision of goods, services and facilities. Such discrimination can now only be based on the ground of religious conviction, and the religious body must have a published policy, in relation to employment and/or the provision of goods, services or facilities, that is readily accessible to the public.[39]

As such, religious notice provisions in the ACT will – as of April 2024, when the new amendments take effect –[40] capture all employment discrimination by religious bodies, the provision of goods, services and facilities by all religious bodies, and the admission of students at religious educational institutions. Unlike the 2018 ACT amendments, and the Tasmanian and SA notice provisions, the 2023 amendments provide a clearer conceptual basis for the requirement for a written, published policy. While no reference is made to this requirement in the speech introducing the Bill to parliament,[41] or the legislative scrutiny report,[42] the explanatory statement to the amending Bill provides helpful guidance. In practical terms, it provides that the requirement to 'publish' means that 'the policy might be made available in hard copy form or published on the website of the body.'[43] But more importantly for our purposes, several references are made to the conceptual basis of the new section 32. The explanatory statement provides that the intention of the provision is to practically balance the right to equality and the right to religious freedom, such that there are 'greater protections against discrimination where actions of religious bodies intersect with the general public while still allowing religious bodies greater latitude in activities which relate to the administration of religious groups.'[44] The amendments therefore allow the public to 'be able to make an informed choice about whether to engage with the religious body as a service provider or employer' where they are providing external functions to the broader community.[45] This, the statement notes, reinforces the religious freedom of individuals whose own religious beliefs differ from those of religious bodies.[46]

[36] *Discrimination Amendment Act 2023* (ACT) s 9.
[37] *Discrimination Act 1991* (ACT) s 32(1)(d).
[38] Elphick (2017), pp. 158–161; Moulds (2020).
[39] *Discrimination Amendment Act 2023* (ACT) s 9, which will be incorporated into the *Discrimination Act 1991* (ACT) ss 32 (1)(d), (e) in April 2024.
[40] *Discrimination Amendment Act 2023* (ACT) s 2.
[41] Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 30 November 2022, p. 4020 (Assistant Minister Cheyne).
[42] Legislative Assembly for the Australian Capital Territory (2023), pp. 8–10.
[43] Explanatory Statement and Human Rights Compatibility Statement to the Discrimination Amendment Bill 2022 (ACT), p. 24.
[44] Explanatory Statement and Human Rights Compatibility Statement to the Discrimination Amendment Bill 2022 (ACT), p. 24.
[45] Explanatory Statement and Human Rights Compatibility Statement to the Discrimination Amendment Bill 2022 (ACT), pp. 24–25.
[46] Explanatory Statement and Human Rights Compatibility Statement to the Discrimination Amendment Bill 2022 (ACT), p. 24.

The human rights compatibility statement for the amending Bill is even clearer:[47]

> Requiring religious bodies to publish a policy that sets out the circumstances in which they discriminate on religious grounds will promote greater *transparency* and support both the community and government to make an *informed decision* about whether to contract or engage with a religious body.

ACT Chief Minister Barr similarly noted, in a parliamentary speech supporting the Bill, the need for religious bodies to be '*up-front* about … discrimination in their public policies' and that 'the requirement to publish policies allows the public and the government to understand the approach of different religious organisations and to *choose* whether or not to use their services or, indeed, to work with them.'[48] In the same speech, Chief Minister Barr also flagged the balancing of competing human rights as underpinning the religious notice provision.[49]

As such, while it is clear that existing notice provisions for religious schools in the ACT, Tasmania and SA provide little justification for their inclusion, the ACT's more recent religious *bodies* notice provision has provided some assistance. The parliamentary materials relating to these recent amendments appear to ground this justification in 'transparency', and the associated benefits it is purported to create: namely, the ability for the public to understand the 'upfront' approach taken by particular religious bodies, and for the public to then be able to make 'informed decisions' on engaging with such bodies. However, this concept of 'transparency' remains underdeveloped. Indeed, this part has outlined all available parliamentary references to transparency as a justification for religious notice – and it appears the only such justification ever provided, aside from rights balancing propositions to which we return in Part 5. In the next part, we turn to how notice provisions have arisen in recent proposed law reform in Australian discrimination law, and whether this sheds any further light on why discrimination should be permitted by notice.

3. The notice provision in proposed law reform

Notice provisions have arisen in several areas of proposed law reform in Australian discrimination law in recent years. This part considers whether these recent law reform processes also utilise the somewhat nebulous concept of 'transparency' in justifying notice provisions, or whether they provide any other conceptual basis for their inclusion in discrimination law.

In 2018, the Religious Freedom Review Expert Panel Report ('Ruddock Report') recommended the incorporation of notice provisions into existing exceptions in the *Sex Discrimination Act 1984* (Cth) ('SDA'),[50] which allow discrimination on the basis of sexual orientation, gender identity and relationship status in both the employment of staff and the enrolment of students at religious schools.[51] The expert panel recommended that the

[47]Explanatory Statement and Human Rights Compatibility Statement to the Discrimination Amendment Bill 2022 (ACT), p. 10 (emphasis added).
[48]Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 23 March 2023, p. 622 (Chief Minister Barr) (emphasis added).
[49]Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 23 March 2023, p. 623 (Chief Minister Barr).
[50]Commonwealth Attorney-General's Department (2018) ('*Ruddock Report*'), p. 2.
[51]*Ruddock Report* (2018), p. 2.

exception remain but that the discrimination be 'founded in the precepts of the religion', and that religious schools be required to have a publicly available policy outlining their position and how they would enforce their policy.[52] The policy was to be given to prospective and current employees and contractors, and parents and students, at such schools.[53] The panel, therefore, recommended a *narrowing* of the existing SDA religious school exceptions, through this additional hurdle of prior notice.[54]

This recommendation for a publicly available policy appears to have been motivated by the evidence given to the expert panel by LGBTIQ+ community members, who felt that they were compelled to hide important aspects of their identity at work and which caused them significant stress and mental health pressure.[55] According to the expert panel, this was exacerbated by the uncertainty and lack of transparency surrounding the use of the existing exceptions in the SDA, as employees were unsure if their employers would be accepting of their identity.[56] The Ruddock Report accepted that there was a legitimate basis for allowing religious schools to discriminate on the basis of religious belief, sexual orientation, gender identity, and marital and relationship status – though that basis was not made explicit in the report.[57] The panel's exclusion of other attributes on which religious schools may discriminate appears to be because religious schools gave no indication that they wanted to discriminate on the basis of race, disability, pregnancy or intersex status, in contrast to sexual orientation and general identity.[58]

Reinforcing transparency as the predominant justification given for notice provisions in law reform processes, the Panel emphasised that:

> [T]he key to the maintenance of existing exceptions is *clarity* and *transparency* so that prospective employees understand the precepts of the religion on which the school is based and the school's policies with respect to employment and can make choices accordingly.
>
> Noting the variety of approaches taken in different jurisdictions, the Panel confines its recommendations in this regard to the Commonwealth. However, it encourages States and Territories to improve the *transparent* use of exceptions in discrimination law.[59]

While not clear from the Ruddock Report, it seems likely that their proposal for a publicly available policy would require that the religious basis for the discrimination be outlined. It also appears likely that the expert panel was influenced by the SA legislation; the SA notice provision was referenced in the Ruddock Report when considering exceptions for religious educational institutions.[60] The Panel emphasised that one key to maintaining the ability for religious schools to discriminate in employment was to be clear and transparent in their approach so that prospective employees would be aware of the religious precepts and approach adopted by the school.[61] Prospective employees could then, accordingly, make their own choices as to whether to apply for employment in the religious school.[62]

[52] *Ruddock Report* (2018), p. 2.
[53] *Ruddock Report* (2018), p. 2.
[54] Elphick, Maguire and Hilkemeijer (2018).
[55] *Ruddock Report* (2018), p. 57.
[56] *Ruddock Report* (2018).
[57] *Ruddock Report* (2018), pp. 36–7.
[58] *Ruddock Report* (2018), pp. 36–7.
[59] *Ruddock Report* (2018), p. 63 (emphasis added).
[60] *Ruddock Report* (2018), p. 62.
[61] *Ruddock Report* (2018), p. 63.
[62] *Ruddock Report* (2018), p. 63.

This is strikingly similar to the justifications given in the 2023 ACT notice provision amendments: that transparency would lead to the purported benefits of knowledge and informed choice.

The Ruddock Report recommendation on notice provisions had significant influence at the federal level through the former federal government's proposed Religious Discrimination Bill, which comprised of various law reform processes between 2019 and 2022. Indeed, the Religious Discrimination Bill 2022 (Cth) ('RDB') – the final version of the Bill put to federal Parliament – contained such a notice provision for religious schools.[63] Section 7 of the RDB provided that where religious bodies engage in conduct in good faith where a person of the same religion could reasonably consider that conduct to be in accordance with that religion, this would not be discrimination under the Bill.[64] Religious schools were provided an additional hurdle: to have a policy which outlined the school's position in relation to particular religious beliefs or activities, explain how the position was to be enforced, and be publicly available to prospective applicants for employment.[65] This applied only to employment.

Notice provisions also existed in the RDB in the exceptions provided to religious hospitals, aged care facilities, accommodation providers, disability service providers, and camps and conference sites.[66] Additionally, another notice provision was inserted in the final version of the RDB in section 11. This emphasised that the RDB would 'override' any state and territory discrimination legislation which contained employment exceptions for religious educational institutions that were narrower than those provided in the RDB (as noted above, in section 7).[67] Such institutions would only be exempted from those state and territory discrimination laws if they had a written, publicly available policy.

In its submission to the Commonwealth Parliamentary Joint Committee on Human Rights inquiry into the RDB, the Attorney-General's Department justified the requirement to have a publicly available policy on the basis that it:

> increases *certainty* and *transparency* and ensures that prospective or existing employees as well as the general public would be able to ascertain and understand the position of a religious body in relation to the particular matter dealt with in the relevant provision of the Bill (i.e. employment, partnerships, or accommodation facilities).[68]

Other organisations justified support for the notice provision on the basis of 'transparency and certainty', and because it would ensure that unsuccessful applicants would 'avoid the embarrassment being turned down on the basis that they did not meet the requirements of the religious school.'[69] The Parliamentary Joint Committee on Human Rights noted its anticipation that any policy guidance provided by the Attorney-General would be consistent with the requirements previously outlined in the Ruddock Report.[70]

[63]Religious Discrimination Bill 2022 (Cth).
[64]Religious Discrimination Bill 2022 (Cth) cl 7; see further Australian Discrimination Law Experts Group (2020), pp. 21–23.
[65]Religious Discrimination Bill 2022 (Cth) cl 7(6).
[66]Religious Discrimination Bill 2022 (Cth) cl 9(3), 40(2)(d), 40(5)(c).
[67]Religious Discrimination Bill 2022 (Cth) cl 11.
[68]Parliamentary Joint Committee on Human Rights (2022), p. 119 (emphasis added).
[69]Parliamentary Joint Committee on Human Rights (2022), pp. 119–20.
[70]Parliamentary Joint Committee on Human Rights (2022), p. 109.

The RDB never made it into law, infamously being withdrawn in 2022 by the then-federal government.[71] This was after the RDB passed the House of Representatives with an attached amendment to remove the ability under the SDA for religious schools to discriminate against LGBTQ+ students, which some government members crossed the floor to support. However, the RDB is undoubtedly the most high-profile Australian discrimination law inquiry in recent years, and created various flow-on effects. As a result, other recent discrimination law reform inquiries have raised the suitability of similar notice provisions.

The new federal Labor government referred an inquiry into religious educational institutions and anti-discrimination law to the Australian Law Reform Commission ('ALRC') in November 2022.[72] The terms of reference ask the Commission to make amendments to the SDA, and related laws, to ensure that religious schools must not discriminate against staff or students on the basis of their sexual orientation, gender identity, marital or relationship status, or pregnancy – while still allowing religious schools to continue to build a community of faith by giving preference to persons of the same religion as the school in the selection of staff.[73] This would, in effect, require the removal of the existing SDA exceptions that permit such discrimination but which do not have any 'notice' requirement.[74] In a Consultation Paper released in early 2023, and seemingly in response to some groups advocating for a shift towards notice provisions in the SDA, the ALRC provided a preliminary view that notice provisions would fail to protect the rights of staff and students at religious schools:

> It could, instead, be argued to have the perverse impact of requiring anti-discrimination law to entrench discriminatory beliefs by requiring schools to explicitly write them down and have prospective students and parents agree to them. Such measures go beyond merely making prospective students aware of the school's policies: they compound stigma and may also impact on the rights of existing students and teachers who may have the protected characteristics (or who are associated with those with protected characteristics, such as a teacher with a gay child) by creating an atmosphere of exclusion in relation to them. In addition, policies or the expression of policies can change, and impact existing students and staff.[75]

The release of the ALRC report in this inquiry has since been delayed.[76] In the meantime, though, the suitability of notice provisions as a justification for discriminatory practices was also raised in two recent discrimination law reform inquires in Queensland and WA.[77] In its final report, the Law Reform Commission of WA cited both the SA notice provision and the Ruddock Report recommendations on notice provisions, and provided a familiar justification: that transparency would ensure prospective parents and employees 'clearly know' a religious school's position ahead of time and could therefore make 'informed choices'.[78] Other justifications raised by the Commission in passing include that a notice provision would minimise ad hoc decision-making, be a code of conduct for schools, and be a pragmatic limitation on any religious schools exception.[79]

[71] Evans (2022).
[72] The Hon Mark Dreyfus KC MP (2022).
[73] Australian Law Reform Commission (2022).
[74] *Sex Discrimination Act 1984* (Cth) s 38; see further Australian Discrimination Law Experts Group (2023), pp. 3, 6–7.
[75] Australian Law Reform Commission (2023a), pp. 47, 49.
[76] Australian Law Reform Commission (2023b).
[77] Law Reform Commission of Western Australia (2022), pp. 183–4; Queensland Human Rights Commission (2022), p. 380.
[78] Law Reform Commission of Western Australia (2022), p. 183.
[79] Law Reform Commission of Western Australia (2022), p. 184.

Ultimately, both reviews rejected notice as a sufficient basis for discrimination.[80] However, it is striking that notice provisions are continuing to be a major focus in ongoing law reform inquiries into discrimination law.

In tracing the legislative and policy history of notice provisions, we have highlighted a number of issues. The first is that, for the most part, there has been little consideration of the purpose of requiring notice of a religious school's policy of discrimination against either staff or students – especially in those jurisdictions which already have notice provisions. Second, notice provisions remain a key feature of ongoing discourse and debate on religious school exceptions in discrimination law: comprising key components of recent ACT reforms and the infamous federal Religious Discrimination Bill. Third, through recent and ongoing law reform inquiries and processes, transparency has emerged as the main justification for notice provisions. This transparency is purported to create deeper community *understanding* of how religious schools manifest their beliefs in practice and allow potential employees, parents and students to make more *informed choices* in engaging with such schools. Beyond this, transparency has been a largely underdeveloped rationale for notice provisions.

4. Does transparency justify what would otherwise be a discriminatory distinction?

Transparency – the main justification given by policymakers for notice provisions – may appear to some to be an enticing solution. On face value, transparency is a positive virtue which regularly plays an important role in law. However, there has been little discussion or analysis, in the context of notice provisions, as to why notice is helpful or how it balances the rights and interests of relevant parties in a coherent or satisfactory manner. Instead, it seems to be assumed that all forms of transparency are beneficial in discrimination laws.

In this part, we challenge this idea and argue that transparency has two important and negative ramifications: market-based solutions are ineffective at resolving discriminatory conduct, and transparency has the capacity to increase rather than decrease the dignitary harms that affected groups suffer. As such, we will establish that the only justification that has been provided by policymakers for notice provisions is insufficient.

Transparency has been seen as a powerful tool for the progression of equality. Its proponents argue that it is radical notion in a system which is often shrouded in secrecy.[81] Advocates of greater transparency in discrimination law point to three critical areas in which policies and mechanisms promoting transparency will contribute to generating a more equal society. First, transparency in discrimination law is potentially useful in better exposing the positive outcomes often reached for claimants in conciliation settings.[82] This transparency largely occurs through the publication by equality agencies of anonymised conciliation outcomes. For example, the Queensland Human Rights Commission publishes summarised lists of conciliated outcomes as case studies to 'provide a guide to the range of outcomes that may result from a complaint, the types of issues raised, and

[80]Law Reform Commission of Western Australia (2022), p. 184; Queensland Human Rights Commission (2022), pp. 380–4.
[81]Allen, Blackham and Thornton (2021), p.7.
[82]Allen and Blackham (2019).

may assist people prepare for conciliation.'[83] Conciliation is a primary mechanism used in Australian discrimination law to ensure the effective, efficient and cheap resolution of complaints.[84] The problem with the conciliation process, though, is that its secretive nature and focus on the individual complainant rarely has applicability to other claims, leading to a limited capacity to create systemic and long-standing change of practices.[85]

Secondly, from an evidentiary perspective, transparency helps unmask the reasons for certain individual treatment and the ways in which certain practices impact groups.[86] Complainants often struggle to succeed in their discrimination claims because all relevant evidence is held by the respondent.[87] Transparency is beneficial in this context in forcing the respondent to provide relevant evidence so that the potential discriminatory conduct or practice can be more clearly exposed.

Thirdly, and finally, transparency can be utilised in the form of data from government and large organisations regarding the make-up of their workforce to expose biases and potential structural limitations which exist and are preventing workplaces from becoming more equal.[88] Transparency here requires businesses and government departments to report and analyse their workforce with respect to sex, age, race, gender, disability and other attributes, as well as the policies and practices which promote and assist vulnerable groups in the workplace. One prominent example is the obligations placed on larger employers in Australia to report on gender equality indicators,[89] which has recently been expanded to include gender pay gap and sexual harassment prevention reporting.[90] Transparency requires businesses to change their practices once they have been exposed, but can also create a 'race to the top' with other organisations because they want to make themselves as attractive as possible to prospective employees, clients, and customers.[91]

All of these uses of transparency have the potential to be effective, and indeed 'radical' – but in each of these cases, transparency is being utilised as a tool or a means for equality rather than an end in and of itself. In the first example, transparency is utilised to expose beneficial outcomes. In the second, transparency is utilised to assist complainants in their claims. In the third, the pursuit of a 'race to the top' requires organisations to change their practices to ensure that traditionally excluded groups have opportunities to succeed, whether through the utilisation of regulatory theories of communication or the enforcement of positive obligations through equality organisations.

While notice provisions for religious schools have been justified by policymakers on the basis of 'transparency', this transparency is not utilised to generate equal outcomes (as it is in the above three examples). Rather, transparency is used in this context to justify discriminatory conduct. To compare the example of the 'name and shame' gender pay gap reporting mechanisms noted above: while both these reporting mechanisms and notice provisions may shine a light on those organisations which are discriminating against certain groups, gender pay gap reporting mechanisms do not allow organisations

[83]Queensland Human Rights Commission (2023).
[84]Allen and Blackham (2019), p. 389.
[85]Allen and Blackham (2019), p. 412.
[86]Hopkins (2021), p. 44.
[87]Hunyor (2003), p. 537.
[88]Blackham (2021), p. 100.
[89]*Workplace Gender Equality Act 2012* (Cth) s 13.
[90]*Workplace Gender Equality Amendment (Closing the Gender Pay Gap) Act 2023* (Cth).
[91]Blackham (2021).

with greater gender pay gaps to rely on their transparency as a defence. These reporting mechanisms are compulsory legal obligations on a vast swathe of organisations for the purpose of exposing inequality and changing behaviour. By contrast, notice provisions exist for the purpose of *directly permitting* that very discrimination to occur, by providing a legal exception to discrimination prohibitions. Only those religious schools that are seeking to discriminate would choose to make use of these notice provisions, making it highly unlikely that this transparency will lead to any 'race to the top' in the mould of gender pay gap reporting. In this sense, any transparency provided by notice provisions is being utilised as an end in and of itself rather than as a means to create a more equal society. As such, the benefits to transparency noted by the above scholars do not appear to apply to notice provisions.

This takes us to the, quite limited, literature on notice provisions and transparency. The strongest scholarly support for transparency and notice in religious exceptions to discrimination law comes from Barker,[92] who adds important depth to the under-developed justifications provided by policymakers in the preceding parts of this paper. Barker argues that the greater transparency provided by notice provisions has three main benefits. First, transparency allows for the use of such exceptions to be properly scrutinised; without the requirement for notice, Barker argues that the general community are unaware of the existence and use of these exceptions.[93] If religious schools are required to have a policy outlining their position on religious matters and their impacts on decisions regarding staff and students, then these can be properly understood and interrogated.[94] Secondly, she argues that requiring notice of discrimination allows the public to recognise those organisations that do *not* discriminate in, for example, their hiring of staff.[95] Barker argues that this will both allow for the diversity in views and policies of religious organisations to become apparent and ensure that potential employees, parents, and other school community members can 'walk with their feet' and not support schools which rely on religious exceptions in discrimination law.[96] Finally, by requiring religious educational institutions to be transparent in their use of religious exceptions, Barker argues this places more of the onus on the duty-bearer in facilitating the exception rather than on the potential employee in inquiring into any potential use of the exception.[97]

These arguments make sense; there are some benefits to the transparency provided by notice provisions. However, they are outweighed by two errant assumptions underpinning the transparency justification for notice provisions. The first is that this approach assumes that market-based solutions are effective at resolving discriminatory conduct. This assumption underpins Barker's 'walk with their feet' justification, and the 'informed choices' justification given by policymakers. This transparency is in theory meant to help parents and potential employees, in particular, determine whether they wish to associate with a particular school. However, the idea that the market will stop discriminatory practices has long ago been proven as 'at best, wishful thinking.'[98] Within a society which

[92]Barker (2019).
[93]Barker (2019), p. 193.
[94]Barker (2019), p. 193.
[95]Barker (2019), p. 195.
[96]Barker (2019), p. 195.
[97]Barker (2019), p. 195.
[98]Sunstein (1991), p. 22.

contains private prejudices and stereotyping, history does not suggest that people will 'walk with their feet'.[99]

In his seminal work on the ineffectiveness of market-based solutions to tackle problems of discrimination, Sunstein uncovers evidence in the United States which found that providing public signage that people are not welcome to access certain goods and services on the basis of their skin colour or gender did *not* engender market-based solutions to discrimination.[100] There was little evidence in the circumstances of segregation that customers refused to engage with discriminatory businesses. It is for this reason, Sunstein contends, that the state must play an active role in engendering non-discrimination and equality.[101] Indeed, one of the main justifications for discrimination laws is that a solely market-based approach, without state intervention, cannot 'fix' discrimination;[102] indeed, discrimination is often caused by the market,[103] and discrimination laws are designed to restrict the market. It is, therefore, not clear why requiring schools to articulate their admissions policies will, through this market-based approach, necessarily lead to more inclusive religious schools. The ineffectiveness of notice is particularly pertinent with respect to the enrolment of students, given that children are unlikely to be making decisions about their own enrolment; rather, this decision would likely be made by their parent or guardian.

The second errant assumption in using transparency to justify discrimination is that notice provisions are harm-free. The benefits of transparency raised by Barker and others, which are already somewhat limited, only support transparency as a justification for notice provisions if they outweigh any negative effects. Rather, the reality is that – when used in the way envisaged by notice provisions – transparency has the capacity to *increase* rather than decrease the expressive and dignitary harms that disadvantaged groups suffer.

Notice provisions indicating that one is precluded from employment or education at a religious school owing to their being gay, or trans, clearly has the capacity to exacerbate stigma and stereotypes against the LGBTIQ+ community. This is borne out in Hellman's seminal theoretical work on discrimination law. For Hellman, discrimination law's overarching purpose is to protect persons from expressive harms by prohibiting demeaning conduct.[104] Demeaning conduct for Hellman has two different aspects. First, the policy, practice or conduct must express or indicate that a person is less worthy of equal respect and dignity based on an attribute that they hold (the expressive dimension).[105] Secondly, the person or entity carrying out the policy, practice or conduct must be in a position of power in order to subordinate another (the power dimension).[106] With respect to the first element, Hellman recognises that actions which demean people will vary based on culture and context.[107] She draws on Justice Marshall's articulation on this point when,

[99]Sunstein (1991), p. 22.
[100]Sunstein (1991), p. 25.
[101]Sunstein (1991), p. 37.
[102]See further Loury (1998).
[103]See further Eisenberg (2011).
[104]Hellman (2008), p. 35.
[105]Hellman (2008), pp. 35–7.
[106]Hellman (2008), pp. 35–7.
[107]Hellman (2008), pp. 35–7.

relevant for our purposes, she considers public notices prohibiting entry to certain places based on sex:

> A sign that says 'men only' looks very different on a courtroom door than on a bathroom door … the problem with the courthouse prohibition is that it distinguishes between men and women in a way that *demeans* women whereas the bathroom prohibition does not.[108]

Applying Hellman's approach, we must consider the social meaning of the notice to determine whether an action, conduct or policy is demeaning and, in particular, if the behaviour or action is consistent with a broader social indicium of inferiority due to certain attributes.[109] Religious schools providing notice of their exclusion of, for example, staff who are in same-sex marriages would seem to clearly be demeaning. When understood in the context of the broader community role that religious schools play in society, this conforms to a social indicium of inferiority such that LGBTIQ+ people are less worthy of respect.

Under the second element of the expressive wrong, the 'power dimension', Hellman argues that we can determine if an actor has power over the person discriminated against by considering the kinds of actions that the person or organisation can do to the other person – such as firing them, refusing to hire them, or jailing them.[110] Notice provisions applying to religious schools seem largely focused on access to the religious school: whether in refusing to hire staff, or refusing to admit students.

The problem with notice provisions with respect to religious school exceptions, therefore, is that rather than mitigating the harms of discrimination, they can instead exacerbate the expressive harms that such discrimination causes. Segregation and explicit refusal, through public signage and notices, of access based on protected attributes are classic examples of such expressive harms. That discrimination law is intended to protect persons from these very expressive harms is accepted in several different accounts of discrimination law's purpose, most notably in its role in reducing stigma and stereotyping.[111] The transparency that is meant to justify notice provisions, thus, could exacerbate the damage that discrimination laws are attempting to ameliorate – whether for staff and students who are LGBTIQ+, as has been our focus, or indeed for staff and students of differing faith backgrounds or beliefs.

As was raised in both recent WA and Queensland law reform inquiries into discrimination law, explicitly providing that individuals with certain attributes cannot obtain employment does not lessen stigma or alleviate harm experienced by affected individuals and groups,[112] and instead may serve only to entrench discriminatory views.[113] Public notice that a religious school will not employ or admit a person based on their gender identity or sexual orientation indicates that a person is less worthy of respect, dignity, and access to employment or education due to an attribute that discrimination law has long deemed worthy of protection.[114]

[108]Hellman (2008), p. 7.
[109]Hellman (2008), pp. 35–6.
[110]Hellman (2008), p. 38.
[111]Moreau (2020), p. 42; Fredman (2022), pp. 34–5; Solanke (2017), p. 3.
[112]Law Reform Commission of Western Australia (2022), p. 184.
[113]Queensland Human Rights Commission (2022), pp. 382–3.
[114]See generally Chapman (1996).

Discrimination law has significant normative potential to articulate discrimination as a wrong, change communities' expectations around acceptable behaviour, and create the capacity for a more equal society.[115] However, the presence of exceptions which are not consistent with an underlying, beneficial purpose undermine this. In challenging transparency as an insufficient rationale for notice provisions, we have dismissed the predominant and in many cases only justification provided in law, policy and literature for religious schools to be able to discriminate by providing notice. We turn in our final part to whether a broader international human rights approach of balancing a right to religious freedom with a right to equality can instead take its place.

5. The balancing of a right to religious freedom and a right to equality

There is little doubt that the underlying rationale for religious body exceptions to LGBTIQ+ discrimination protections, as a general proposition, is a balancing of a right to religious freedom and a right to equality.[116] While this 'balance' is not a dominant feature of discourse on notice provisions for religious schools, this framing was briefly mentioned in both the 2009 SA amendments and 2023 ACT amendments discussed in this paper.[117] Having dismissed 'transparency' as an insufficient reason to permit discrimination by notice, in this final part we turn to consider whether international human rights law could provide an alternative rationale. Ultimately, though, we argue that while this human rights balance provides the underlying reason for religious body exceptions, it does not justify notice provisions. Indeed, this human rights framing tends to mask the reality: that notice provisions provide a chimera of neutrality and evade, rather than answer, the question of how to balance competing human rights.

The underlying scholarly rationale for granting religious schools, and other religious bodies, exceptions from discrimination law obligations is grounded in international human rights law. By allowing religious schools to discriminate in their hiring practices, enrolment and broader teaching and policies, it is argued by some that the exceptions fulfil Australia's obligations under the *International Covenant on Civil and Political Rights* ('ICCPR') by respecting an individual's right to freedom of thought, conscience, and religion.[118] In doing so, the exceptions demonstrate a commitment to pluralism, tolerance and diversity in society, which are necessary attributes of a liberal democracy.[119]

Religious school exceptions may be grounded in Article 18 of the ICCPR: in particular, the need for state parties to 'have respect for the liberty of parents … to ensure the religious and moral education of their children in conformity with their own convictions.'[120] In arguments supporting religious exceptions, the 'fundamentality' of Article 18 is often emphasised.[121] Implicit in this argument, as Poulos notes, is that Article 18 should thus 'trump' other rights – including Article 26 of the ICCPR, which guarantees a right to equality.[122]

[115]Smith, Schleiger and Elphick (2019), p. 230.
[116]See, eg, Baines (2015).
[117]South Australia, *Parliamentary Debates*, House of Assembly, 14 July 2009; Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 23 March 2023, p. 623 (Chief Minister Barr).
[118]Evans and Ujvari (2009), p. 36.
[119]Evans (2012), pp. 167–8.
[120]*International Covenant on Civil and Political Rights*, opened for signature 19 December 1996, 999 UNTS 171 (entered into force 23 March 1976).
[121]Poulos (2018), p. 122.
[122]Poulos (2018), p. 122.

Some, such as Barker, also point to the rights contained in the Convention on the Rights of the Child ('CRC') as it emphasises the rights and duties of parents to provide direction to children in exercising their right to freedom of conscience, thought and belief.[123] However, there is some tension in relying on the CRC because it also requires that direction to adapt as children age and their capacities evolve.[124] As a consequence, reliance on the CRC as an underlying basis for discrimination by religious schools can be questionable where the views of parents and teenagers diverge.

Rather than focusing on specific international human rights in this context, Evans and Ujvari emphasise the need for diversity and pluralism in society.[125] They argue that one aspect of diversity and pluralism is the *existence* of religious schools, because this helps prevent a uniform state ideology.[126] Similarly, when considering the right to education and human rights arguments surrounding the existence and funding of private schools, Fredman accepts that the existence of private schools, including religious schools, is consistent with international human rights laws and the need for social diversity.[127] In the Australian context, Harrison and Parkinson also subscribe to this particular approach, arguing that the distinct nature of religious communities, including religious schools, justifies the ability to choose staff and students on the basis of religious belief and have policies which are consistent with the religious beliefs of the community.[128]

How, though, does this broader human rights balance discourse apply to notice provisions for religious schools? McCrudden highlights that religious freedom contains both an individual and collective aspect.[129] The collective aspect includes the capacity of people who share the same religion to come together to worship and share that belief.[130] Religious schools represent this collective aspect of freedom of religion, which is thereby utilised to justify preferencing or discrimination in hiring and in practices and policies related to staff and students to ensure compliance with religious values.[131] The need to comply with religious values is, in this way, used to justify preferencing or discrimination on the basis of other attributes in addition to religious belief – notably including sexual orientation and gender identity.[132] Underlying this justification is the concern that if a religion teaches that certain behaviour is wrongful, it is incongruent for a religious organisation or a religious school to be seen as supporting such behaviour.[133]

In this conception of balancing a right to equality with a right to freedom of religion, discrimination is therefore justified by some on the basis that the collective rights of the school community to express their religious beliefs outweigh the discriminatory effects on the individual.[134] The individual who is ineligible for employment in a religious school due to attributes that they hold can easily find employment in the many other

[123]Barker (2020), pp. 159–60.
[124]Evans and Ujvari (2009), p. 36.
[125]Evans and Ujvari (2009), pp. 32–4.
[126]Evans and Ujvari (2009), p. 33.
[127]Fredman (2021), p. 104.
[128]Harrison and Parkinson (2014), pp. 438–9.
[129]McCrudden (2011), p. 217; cf Khaitan and Norton (2019).
[130]McCrudden (2011), p. 217.
[131]Evans and Gaze (2010), p. 408.
[132]Evans and Ujvari (2009), pp. 35–7.
[133]Evans and Gaze (2010), pp. 413–4.
[134]Deagon (2019), p. 47.

(often presumed to be public) schools that are available.[135] That individual also presumably rationally understands the reasons why the religious school determined that they were ineligible for employment and suffers no dignitary loss as a consequence.[136] Advocates for exceptions to discrimination laws for religious schools argue that parents choose to send their children to such schools for the moral education that such school provides.[137] To ensure the school community keeps to those values, advocates for religious school exceptions to discrimination laws argue that all members of that school community, including staff and students, must live those values and that some attributes, such as particular sexualities or gender identities, are inconsistent with those values.[138]

However, even if one were to accept this collectivist approach to the right to religious freedom, notice provisions do none of the work. Rather, the right to religious freedom is simply being preferred to the right to equality within particular contexts. The transparency provided by public notice, in the form of a written policy produced by religious schools, does nothing to resolve, or change, the underlying balance being struck between the two rights. Instead, it provides a veneer of accountability that only masks its inability to resolve this balance. This is why notice provisions should not be seen as a middle-ground, 'pragmatic' option for religious school exceptions, in comparing them to either religious school exceptions that do not require any such notice or to an absence of any religious school exceptions at all. Simply adding a notice requirement to existing religious school exceptions does not resolve the rights balancing exercise that is required. Nor do they 'narrow' existing exceptions: as we established above in Part 4, the requirement for notice may actually exacerbate dignitary and expressive harms caused to those excluded from religious schools. Rather, notice provisions simply choose the religious freedom of the school over the right to equality of the individual staff member or student, while avoiding any balancing or weighing of competing rights. This is the case whether staff or students are being excluded on the basis of their sexual orientation or gender identity, or even if their exclusion is based on differing religious beliefs or faith. In either instance, notice is the façade to the substantive decision being made.

By contrast, Fredman,[139] Nejaime and Siegel,[140] and McColgan[141] emphasise the fundamentality of the right of equality, focusing on harms done to both the individual, and to the protected group of which they are a member. First, on the individual level, being ineligible for certain opportunities creates socioeconomic and dignitary harms. In terms of a person's socio-economic position, it is not clear that an individual will necessarily be able to easily find employment elsewhere given that a large proportion of students in Australia attend independent or Catholic schools, particularly for secondary education.[142] Secondly, the understanding that one can not necessarily find 'good' jobs in a particular field due to certain attributes has been shown to encourage groups to 'self-select' out of certain professions.[143] Dignitary damage is done both to the individual

[135]Walsh (2014), p. 135.
[136]Walsh (2014), p. 131.
[137]Commonwealth Joint Parliamentary Committee on Human Rights (2022), pp. 114–5.
[138]Commonwealth Joint Parliamentary Committee on Human Rights (2022), pp. 114–5.
[139]Fredman (2020).
[140]Nejaime and Siegel (2014).
[141]McColgan (2009).
[142]Maddox (2014), pp. 104–5.
[143]Sunstein (1991), p. 29.

and also more broadly to the group of persons who share the attribute, by indicating that they are not worthy of certain jobs.[144] But even for scholars who prioritise the fundamentality of equality, any decision being made on the balance to be struck between these two rights is done well outside the matrix of notice and transparency; the exceptions would not apply at all under their approach, let alone via public notice. This is a near-identical process to scholars who prioritise religious freedom over equality, just with a different outcome: the exceptions *would* apply.

Fredman provides the most helpful consideration of a nuanced balance that should be struck between religious freedoms and substantive equality at a conceptual level – while still arguing that equality should ultimately be the anchor value. In doing so, Fredman advocates for the use of a proportionality analysis which makes explicit the hierarchy of values being considered and *how* competing rights are being balanced, while expressly locating itself in substantive equality.[145] She considers the example of 'religious complicity' claims, where a duty-bearer refuses goods, services or employment to a person on the basis that the duty-bearer's involvement in behaviour or conduct that they consider 'sinful' will interfere with the religious beliefs and, in turn, their right to religious freedom.[146] Fredman argues that the ideas of 'tolerance' and 'neutrality' that arise in such circumstances lack sufficient content to be useful in determining claims and instead hide the hierarchy of values that is being applied to determine the rights and interests of the parties in religious complicity claims.[147] This is also the case in notice provisions: the hierarchy is not being decided or justified through the requirement to provide public notice, but rather by the substance of the exception and the discriminatory conduct it permits. Notice provisions are not proportionality tests where the weighing up and balancing of rights is transparent and the articulation of the relevant hierarchy of values is clear and upfront, of the kind Fredman advocates.[148] Indeed, notice provisions serve only to *mask* this type of proportionality analysis.

The balance between religious freedom and the right to equality is particularly challenging in the context of notice provisions because that balance is not being struck within a broader human rights document, but instead on an incremental basis in various discrimination statutes, many of which explicitly list their goal or 'purpose' as substantive equality. Within the construction of an anti-discrimination statute, it is not clear that the collectivist nature of religious freedom should 'trump' the rights of those being discriminated against. Even were it to, the use of notice provisions does not provide an answer to this balance; it neither expressly recognises a positive right to discriminate as part of the freedom of religion, nor does it clearly articulate the need for substantive equal treatment. Instead, as we argued in Part 4, it treats transparency as the end, not the means. As such, when placed in this broader human rights context, notice provisions do not balance the competing rights of equality and religious freedom but rather *avoid* the balancing of different rights and interests by obfuscating the underlying value judgments that are being made.

[144]Hellman (2008); Moreau (2020).
[145]Fredman (2020), p. 314.
[146]Fredman (2020), p. 306.
[147]Fredman (2020), pp. 308–9.
[148]Fredman (2020), p. 315.

6. Conclusion

This article has traced the history, rationale and justification for allowing religious schools to discriminate where they provide prior and public notice of such discrimination. We started by tracing the legislative history of notice provisions, in SA, Tasmania, the ACT, and at the Commonwealth level through the Ruddock Review and the debates surrounding the Religious Discrimination Bill. We concluded that, particularly in the state and territory debates relating to the inclusion of notice provisions, these were not based upon any underlying conceptional framework or rationale but were simply a result of the political process. In contrast, the more recent ACT notice provision in relation to religious *bodies* and the debates on notice provisions proposed in federal law reform processes do seem to be based, at least in part, on the conceptual justification of transparency.

We then turned to the merits of transparency in the context of notice provisions, and whether it is consistent with the overarching aims of discrimination law. We considered the benefits of transparency and the capacity for notice provisions to support 'market-based' solutions to discrimination by allowing prospective parents, students, and employees to 'walk with their feet'. We argued that the long and historical weight of evidence establishes that market-based solutions are not an effective tool in resolving discriminatory conduct, and that notice provisions perpetuate the expressive and dignitary harms to disadvantaged groups that discrimination law should ostensibly be used to combat and which significantly outweigh any potential benefits of transparency. As such, while transparency is in general a useful tool in discrimination law, it is not an aim in and of itself and cannot be used to justify notice provisions.

Finally, we turned to international human rights law to consider the need to balance the rights of religious freedom and of equality. We argued that notice provisions did not offer a 'balance' but instead offered the chimera of neutrality. While notice provisions may seem to be a reasonable and neutral solution to the tensions between religious freedoms and non-discrimination, that neutrality masks the truth: that in allowing such discrimination, the state is adopting a clear position on how these two ideals should be expressed, without having to confront the harms this does to already marginalised individuals. The weight of law, theory, and policy points in only one direction: prior notice does not justify discrimination.

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