Maximising or Determining Rights? On Using (and Discarding) Statutory Exceptions

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This article argues that the framework of 'maximising' or, equally, 'balancing' rights (a) transforms groups into vehicles for individual interests, against understanding the group as having a 'real life'; (b) requires a hierarchy of goods or claims beyond the abstraction of maximising in principle equal rights in order to be comprehensible; and (c) precipitates an increasing shift to the courts or commissions as decision-makers in contrast to the people determining the scope of a rights claim through legislative enactment. These arguments are developed through an analysis of the Australian Law Reform Commission's December 2023 report into exceptions to anti-discrimination laws for religious educational institutions, arguing against its adoption of a 'maximisation' framework and its scepticism towards using statutory exceptions.

INTRODUCTION

In its report, *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws* ('the Report'), the Australian Law Reform Commission ('ALRC') recommended removing sections in the *Sex Discrimination Act 1984* (Cth) ('*SDA*') that provide for the liberty of religious educational institutions to select staff and treat existing and prospective students in a manner designed to 'avoid injury to the religious susceptibilities of adherents of that religion or creed'.[1] The relevant sections are exceptions to the general duty not to discriminate on the ground of a person's sex, sexual orientation, gender identity, marital or relationship status, or pregnancy. The ALRC's recommendation was coupled with others. It concluded that a religious educational institution should be permitted to give preference to a person of the same faith, but only when selecting staff for employment[2] and only where this is 'reasonably necessary to build or maintain a community of faith', is proportionate to that aim and in light of any disadvantage or harm caused to persons not preferred, and 'does not amount to conduct that is unlawful' under the *SDA*.[3] Combined, these core recommendations were seen as implementing the Australian Government's terms of reference for the ALRC's inquiry. The Government considered that religious educational institutions 'must not discriminate' against both students and staff 'on the basis of sex, sexual orientation, gender identity, marital or relationship status or pregnancy' *and* must be able to 'continue to build a community of faith by giving preference, in good faith, to persons of the same religion as the educational institution in the selection of staff'.[4]

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[1] Australian Law Reform Commission, *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws* (Report No 142, December 2023) 13 ('*Maximising the Realisation of Human Rights*'). The central exception is found in the *Sex Discrimination Act 1984* (Cth) s 38 ('*SDA*').

[2] The ALRC recommended maintaining existing provisions in the *Fair Work Act 2009* (Cth) permitting discrimination when consistent with inherent requirements of a role. See *Maximising the Realisation of Human Rights* (n 1) 15.

[3] Ibid.

[4] Ibid [1.1].

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The ALRC is Australia's peak legislative reform body, typically led by a judge, retired judge, a senior civil servant, or senior member of the legal community and undertaking independent reviews into areas of law in Australia at the request of the Commonwealth Attorney-General. Its recommendations, while not binding on the legislature, are frequently implemented. This article analyses the goal the ALRC adopts in its Report: maximising human rights. The Report assumes that disputes over the scope of rights entail the need to maximise different interests, principles, or values, or more typically different claims of personal autonomy, that compete with one another. Such maximisation is then very often to be undertaken by a court, against the idea of a statutory provision that would specify the rights in question and generally preclude the need for case-by-case adjudication. This 'maximising' approach is commonly assumed to be natural to rights disputes and matters involving the freedom of religion, but it contrasts with what has been a significant Australian approach — Parliament specifying the right in question by enacting a provision (the exceptions) that gives effect to a collective judgment.

This article examines how maximisation in the ALRC's Report is linked with 'balancing', a core component of proportionality analysis, and how balancing is then deployed at two levels within the Report. First, balancing as a method is central to justifying the recommendations the ALRC proposes. Second, balancing is central to the ALRC's preference for case-by-case analysis, a preference that justifies a movement away from statutory exceptions towards an increased role for a human rights commission or court. The article argues that the ALRC's approach transforms the religious group into a vehicle for individual interests, participates in a method of deliberation that encourages obfuscation in legal and political reasoning, and detracts from maintaining legislative enactments as the site for determining what is needed for the common good or what is due to persons.

The ALRC's Report is the latest in a long line of reports, inquiries, and debates concerning exceptions to anti-discrimination laws for religious bodies.[5] Its immediate origin lies in the extension of marriage to same-sex couples, after which the Commonwealth Government instituted a review into religious freedom in Australia, colloquially known as the '*Ruddock Review*'.[6] The *Ruddock Review* brought to public attention the exceptions afforded to religious educational institutions. This precipitated further reviews and reform debates: the Senate Legal and Constitutional Affairs Committee inquired into whether religious schools should continue to be afforded an exemption from elements of the *SDA* when selecting students, a predecessor referral to the ALRC on the same question was made, and finally multiple exposure drafts of a now-shelved Religious Discrimination Bill were circulated.[7]

The ALRC's Report may not be the last word on the matter. Following the release of the Report, the Hon Stephen Rothman, the Supreme Court of New South Wales justice that led the ALRC's inquiry, suggested that some of its recommendations should be nuanced. He argued publicly that religious schools should be granted a 'positive right' permitting them to hire staff based on their religious ethos and permitting them to require staff to teach the tradition's beliefs, enacted in a future *Religious Discrimination Act*. He considered that the ALRC was 'constrained' in

[5] See Joel Harrison and Patrick Parkinson, 'Freedom Beyond the Commons: Managing the Tension between Faith and Equality in a Multicultural Society' (2014) 40 *Monash University Law Review* 413.
[6] *Religious Freedom Review: Report of the Expert Panel* (Final Report, 18 May 2018) ('*Ruddock Review*').
[7] See Patrick Parkinson, 'Adolescent Gender Identity and the *Sex Discrimination Act*: The Case for Religious Exemptions' (2022) 1 *Australian Journal of Law and Religion* 76, 79-81 (discussing the *Ruddock Review*, the Senate Committee Review, and the Religious Discrimination Bill exposure drafts).

what recommendations it could make by the terms of reference given.[8] The Commonwealth Government has not yet acted on any of these recommendations, and media reports indicate that the Prime Minister has expressed support for something like Rothman J's view.[9] Nevertheless, examining the ALRC's Report is important. The Report crystallises not only how objections to including exceptions within the *SDA* are commonly framed but also the methodology of analysis that such objections assume is necessary in contrast. It is this default setting that this article questions. In this way, the article does not propose what the precise boundaries of any exception for a religious educational institution should be (although it does advocate for the use of exceptions); instead, it is principally concerned with the mode and venue of argument.

WHAT DOES IT MEAN TO 'MAXIMISE' RIGHTS?

The ALRC contends that when faced with competing rights, the goal is to 'best … maximise the realisation of all human rights'.[10] This is further elaborated as maximising the 'ability of all people to live in accordance with their convictions'.[11] Such maximisation is to take place *within* the vehicle of a religious educational institution. The ALRC's core proposal — removing the exception in s 38 of the *SDA* — is justified as the result that best maximises the rights raised in this context.

What does it mean to maximise rights? The ALRC argues that 'maximisation' as the frame of reference adheres to international law criteria, especially the adoption of proportionality analysis.[12] Proportionality analysis is, as Grégoire Webber puts it, the 'received approach' for human rights adjudication and human rights deliberation more generally.[13] Courts initially examine whether the measure in question has interfered with a right. This is ordinarily a low hurdle, with almost any interest seen to be associated with a right forming the basis for a finding that the right has been interfered with.[14] The bulk of the analysis focuses on whether the interference is justifiable. To answer this, courts and decision-makers may move through a series of structured questions. Is the measure pursuing a legitimate aim? Is the measure rationally connected to the aim being pursued? Is the measure necessary, or are there any compelling alternatives? And does the measure strike the right or appropriate balance between the benefits gained by the measure and the harms caused to the right that has been interfered with? Maximisation as the goal of deliberation could be viewed as the result of the entire proportionality exercise. If the limitation on rights is in the end found to be proportional and therefore justified, then the right in question remains 'maximised' in relation to the legitimate aim that is being pursued (even if only in the sense that it has reached the point where it is buttressed by a competing interest). But maximising as a paradigm is more specifically concerned with the central feature of proportionality analysis, as illustrated in the ALRC's own

[8] Greg Brown and Rhiannon Down, 'NSW Supreme Court Judge Stephen Rothman Urges Anthony Albanese to Grant "Positive Rights" to Faith Schools', *The Australian* (online, 12 April 2024) <https://www.theaustralian.com.au/nation/politics/nsw-supreme-court-judge-stephen-rothman-urges-anthony-albanese-to-grant-positive-rights-to-faith-schools/news-story/05ea33192eeb1f78f82c1a29ce262152>.
[9] Ibid.
[10] *Maximising the Realisation of Human Rights* (n 1) [1.52].
[11] Ibid [2.7].
[12] Ibid [4.28], [4.47], [4.114]–[4.115], [8.51]. See the ALRC's general discussion of proportionality under international law: at ch 10.
[13] Grégoire Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge University Press, 2009) 55–6.
[14] See John Tasioulas, 'Saving Human Rights from Human Rights Law' (2019) 52 *Vanderbilt Journal of Transnational Law* 1167, 1186–87.

reasoning in its Report. This is proportionality's final step: balancing. It is this that fits with the goal to 'maximise … the realisation of all human rights'.

Quoting its 1992 report *Multiculturalism and the Law*, the ALRC elaborates that maximisation demands ensuring 'the greatest possible freedom to express individual cultural values in a way which is compatible with respect for the same freedom of others'.[15] In the context of a religious educational institution, the conflict is principally between the right to religious freedom being asserted by a religious community, or at least its members, and the right to non-discrimination or equality being asserted by students and staff who are not aligned with the religious community's doctrine or practices on matters of gender and sexuality in particular. Both rights are said to be recognised, both rights are said to raise distinct interests, and both rights must accordingly be assessed for their 'weight' in this context to reach a conclusion as to how far each may extend — what the correct or appropriate balance is. Within proportionality analysis, each right, recognised as engaged or infringed, is cast as representing a value, interest, or principle that must be realised in some degree.[16] Each principle or value is one amongst potentially many. Each of the rights at stake — religious liberty and equality in this case — are 'principles aspiring for maximum realization', as formally in-principle equal claims.[17] Rights analysis consequently becomes both an assessment of the degree to which we can infringe upon each other, and an attempt on the part of decision-makers to reach some kind of balanced equilibrium or détente between the 'respective spheres of liberty between equal right-bearers'.[18]

The ALRC states that the language of balancing should be avoided because it invokes a notion of trade-offs rather than the maximal realisation of rights.[19] But the methodological steps that the ALRC takes are essentially the same, being within the discourse of proportionality analysis with the central feature of balancing. Trade-offs is another way of expressing the necessary result of proportionality analysis: a recognised interest, value, or principle collides with another and the task of the decision-maker is to determine the degree to which the diminishing of this value is a justifiable response to realising the other value at stake, ie balancing. Indeed, alongside alluding to Robert Alexy's concept of optimisation (an elaboration on balancing),[20] the ALRC refers to reaching a 'practical concordance'.[21] The very idea of a practical concordance entails each party, whose interests are now recognised as necessarily engaged, striving to end a conflict by *not* pressing their own interest to its logical limit.[22]

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[15] *Maximising the Realisation of Human Rights* (n 1) [1.20], quoting Australian Law Reform Commission, *Multiculturalism and the Law* (Report No 57, April 1992) [1.23].

[16] See, eg, Kai Möller, 'Proportionality and Rights Inflation' in Grant Huscroft, Bradley W Miller, and Grégoire Webber (eds), *Proportionality, and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014) 155 (writing of rights as autonomy interests). See generally Francisco J Urbina, *A Critique of Proportionality and Balancing* (Cambridge University Press, 2017) 19.

[17] Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press, 2012) 88.

[18] Matthias Kumm, 'Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement' in George Pavlalos (ed), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Bloomsbury, 2007) 131, 144.

[19] *Maximising the Realisation of Human Rights* (n 1) 36 Figure 1.1.

[20] Ibid [4.47]. See Robert Alexy, *Theory of Constitutional Rights*, tr Julian Rivers (Oxford University Press, 2002) 47–8.

[21] *Maximising the Realisation of Human Rights* (n 1) 36 [10.21], Appendix I.7.

[22] See Christopher McCrudden, 'Dignity and Religion' in Robin Griffith-Jones (ed), *Islam and English Law* (Cambridge University Press, 2013) 94, 104.

What then are the consequences of the ALRC adopting 'maximisation' as its paradigm? Here I want to focus on two consequences that are evident from the ALRC's Report. First, how adopting maximisation as the lens leads the ALRC to see the religious educational institution as the site for such maximisation: rights must be recognised in each context and accordingly balanced (values maximised when in a collision) within that context. Second, how the language of balancing and maximisation results in a kind of obfuscation. The competing values are in principle equal: each is to be recognised and in that sense equally valued within the balancing rubric. However, faced with such a clash, what is needed in reality is substantive valuing and assessment — a hierarchy of value.

The Group as a Vehicle for Balancing

Underlying the arguments of religious groups is a claim that they are pursuing and protecting the capacity to pursue a shared purpose. The group has a 'real life', as John Neville Figgis said. This lies in its 'unity of life and action' or 'permanent end'.[23] A group may be made of individual parts but it is nevertheless characterisable as a unit ordered towards a common goal. The religious school may welcome and contain a diverse array of persons in its midst, but it is nevertheless defined by its ends (the purposes for which it exists). Even the argument for parental choice — prominent in the ALRC's Report[24] – only makes sense as a choice to opt-in to *something*. It is a choice for this purpose or end pursued by this school and not another. On this basis, the school can be said to be a 'body'. Typically, though, this characterisation of a 'body' is treated with some scepticism or else seen as merely a metaphor for what is the more fundamental reality of a group — individuals exercising a right of association or a right to develop their own personality, albeit collectively. When the then Liberal Government released its exposure draft for a Religious Discrimination Bill in 2019, the Australian Human Rights Commission ('AHRC') objected to including religious corporations (institutions, schools, charities, businesses) as potential victims of religious discrimination. The AHRC considered that human rights laws should 'protect only the rights of natural persons'.[25] It made the same point to the ALRC, which the ALRC seemed to accept (or at least relay without question): 'freedom of religion or belief is a right held by individuals, not a right held by institutions'.[26] Of course, such a view could be questioned. For example, it does not sit easily with the jurisprudence of the European Court of Human Rights, which at least holds that a religious body is capable of exercising the rights guaranteed under art 9 of the *European Convention on Human Rights*.[27] As Redlich JA in the Victorian Court of Appeal noted, 'Corporations have a long history of association with religious activity'.[28] But the AHRC's claim continues a common argument found often in writers wedded to liberalism's methodological individualism: groups are simply the sum of individual interests. For example, Cécile Laborde

[23] John Neville Figgis, 'Ultramontanism' in John Neville Figgis, *Churches in the Modern State* (Longmans, Green and Co, 1913) 135, 146–7; John Neville Figgis, 'The Great Leviathan' in John Neville Figgis, *Churches in the Modern State* (Longmans, Green and Co, 1913) 54, 64.

[24] See, eg, *Maximising the Realisation of Human Rights* (n 1) [2.20].

[25] Australian Human Rights Commission, Submission to Attorney-General's Department, Parliament of Australia, *Religious Discrimination Bills – First Exposure Drafts Consultation* (27 September 2019) [12]. See also Australian Discrimination Law Experts Group, Submission No 14926 to Department of the Prime Minister and Cabinet, *Religious Freedom Review* (14 February 2018) at [11] ('[h]uman rights are vested in human beings, not in corporations').

[26] *Maximising the Realisation of Human Rights* (n 1) [4.105].

[27] See, eg, *X & Church of Scientology v Sweden* (1976) 16 DR 68 (Commission Decision); *Svyato-Mykhaylviska Parafin v Ukraine* (European Court of Human Rights, Fifth Section, App No 77703/01, 14 June 2007) [150].

[28] *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256, [481]. See also Mark Fowler and Alex Deagon, 'Recognising Religious Groups as Litigants: An International Law Perspective' (2024) 13(2) *Laws* Article 16.

argues that freedom of association for religious groups concerns individuals and their capacity to join a group that pursues a conception of the good central to the individual's identity.[29] On this basis, it becomes much easier to argue that a religious school is simply the vehicle for expressing and balancing individual interests.

For the ALRC then, the task of maximising rights must take place where individual interests are expressed — presumably any context, given the almost nominalistic understanding of groups, but certainly the school, where a significant proportion of an individual's time and energy is spent. Article 18 of the *International Covenant on Political and Civil Rights* ('*ICCPR*') refers to the freedom to manifest religion or belief 'individually or in community' and through 'worship, observance, practice and teaching'. But the communal component on the ALRC's account is framed as a matter of respecting individual choices to opt-in to an association with other individuals, while remaining in significant ways unchanged by that election or capable of choosing to remain unchanged. It is a communal context, but one that exists for the sake of recognising and furthering instances of individual authenticity, identity, or personal conviction. This makes sense of the ALRC's frequent emphasis on the individual person being able to express dissenting views or 'an alternative view' within a religious educational institution as a central act of religious freedom.[30] Removing the exception in s 38 would support 'intra-religious pluralism … and subsequently, freedom of religion or belief for all students and staff, as well as promoting respect for diversity and pluralism as a central aim of education'.[31] It would 'require staff, students, and families involved in religious educational institutions to tolerate the expression of alternative perspectives'.[32] No doubt teaching toleration is a good thing, and something that religious schools are keen to impart to their students; indeed, toleration presupposes that the institution has a prior commitment from which to base its subsequent need to tolerate any differences. But the framing is in reality based on the assumption that the purpose of an institution is to be a vehicle for realising an individual's interest, characterised as pursuing his or her own convictions or authenticity.[33] This extends not only to the member of the school who, while identifying with the faith tradition, does so alongside expressing views or practices inconsistent with the school's stated ethos. It also extends to facilitating the interests of those parents who the ALRC says send their child to a religious school for reasons other than the stated religious ethos.[34] Some religious schools in Australia adopt an all-comers approach, seeking to educate any person that comes through its doors and potentially expanding its employment opportunities to many persons. But this is done on the premise that any person walking through the school's gates has committed to operating within and being educated within *this tradition*, according to the purposes of the institution. For the ALRC, such a commitment must always be subject to the priority of remaining open to individual choice and consequently individual construal of the tradition.

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[29] Cécile Laborde, *Liberalism's Religion* (Harvard University Press, 2017) 174.
[30] See, eg, *Maximising the Realisation of Human Rights* (n 1) [1.42], [4.65].
[31] Ibid [4.94].
[32] Ibid.
[33] See also ibid [4.103], [4.125]. On removing s 38(1) of the *SDA* covering the treatment of staff and prospective staff, the ALRC equally states, '[S]ome staff members, including prospective employees, may feel less pressured to commit to religious beliefs or interpretations that they do not hold, or no longer hold, to retain their employment. This outcome could be characterised as an enhancement of the right to freedom of religion or belief for those staff members': at [8.116].
[34] Ibid [2.20]. See Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Legislative Exemptions that Allow Faith-Based Educational Institutions to Discriminate Against Students, Teachers, and Staff* (Report, November 2018), quoting the former Anti-Discrimination Commissioner for Tasmania, Robin Banks' evidence to that committee, that '[religious liberty] is a highly personal right. The idea that an institution has a right that overrides the individual's rights seems to me somewhat problematic, because parents do want to be able to choose the school children go to': at [2.20].

On this basis, the Report de-emphasises a right of exit — that those incapable of committing to the religious school's ethos or requirements can exercise their liberty by not joining or by leaving.[35] The boundaries of any right of exit could certainly be debated. But as a possible principle that may at times be applicable, a right of exit is contrary to what the ALRC sees as the reality of the group: a context or vehicle for the balancing of individual interests that are carried by the individual and consequently needing to be recognised wherever he or she goes. In an appendix on institutional autonomy, the ALRC quotes the former Special Rapporteur on Freedom of Religion or Belief, Ahmed Shaheed, who considers that the right to equality and non-discrimination can never be said to have been 'waived … even by voluntarily joining an organization'.[36] The comment surely relies on significant ambiguity surrounding 'waived'. One could say that the right remains inalienable (and so cannot be lost) consistent with the language of 'waiving', but that does not determine when the right is in fact applicable. The boundaries of an unalienable right can still be specified. How else can we explain a provision like s 37(1)(a) of the *SDA*, which creates an exception to the duty not to discriminate on the ground of sex, for example, with respect to ordination? The Roman Catholic woman seeking ordination in the Catholic Church simply does not have a claim of non-discrimination when she is denied entry on the basis of sex. Some advocates do share Shaheed's view, of course. The Discrimination Law Experts Group reaches the logical, if for now minority view, that an exception for ordination should be removed because it defers to 'self-declared principles' that are 'inconsistent with Australia's commitment to equality'.[37] As it stands, however, s 37(1)(a) indicates not so much that a right is waived as that its boundary does not extend to this context. The reason for this is that the legislature understands here at least that the group is not simply a venue for the individual carrying and exercising a bundle of liberty rights.

Balancing as Obfuscation

Typically, then, as leading advocates of balancing argue, the interest at stake in a balancing exercise is the value an individual has in leading an autonomous life.[38] Again, the ALRC frames this as maximising the 'ability of all people to live in accordance with their convictions'. The group then becomes an aggregation — a set of competing instances of persons exercising or pursuing an autonomous life to then be weighed in the midst of inevitable conflict. It is the context where claims of recognition are to be advanced, because the argument is fundamentally individualistic as a matter of commitment (what matters is individual autonomy) and this commitment must be advanced in the spaces that the individual rights-bearer is at least principally located or moves through.

Framed in such a way, there is at least the impression that the claims raised by individuals or collectives of individuals are of equal value. They are in principle equally recognised and they at least appear to be rooted in the same normative value. Some argue that for this reason deliberating between claims of religious liberty and equality or non-discrimination, to take a prominent conflict from the past 15 years at least, is so difficult. The conceptual similarity between a right to religious liberty, framed typically as furthering individual autonomy or

[35] For an example of a case emphasising exit as a solution, see *Sindicatul "Păstorul Cel Bun" v Romania* (2014) 58 EHRR 10.
[36] *Maximising the Realisation of Human Rights* (n 1) Appendix I [1.7], quoting Ahmed Shaheed, Special Rapporteur, *Gender-Based Violence and Discrimination in the Name of Religion or Belief*, 43rd Sess, UN Doc A/HRC/43/48 (24 August 2020) [50]–[51].
[37] Australian Discrimination Law Experts Group (n 25) 8.
[38] See, eg, Möller (n 16) 155.

'ethical freedom' as Ronald Dworkin put it,[39] and a right to equality framed often as facilitating the 'deliberative freedoms' of individuals,[40] gives rise to a distinct aporia — what is to be valued more, or indeed how are each to be valued, when both are apparently of the same quality but clash? Kept at this abstract level, the goal is to 'maximise' the value at stake. But such a goal is incomprehensible. If the task of the decision-maker is to maximise conceptually similar instances of autonomy, identity, convictions, or authentic expression, how does one determine what the optimal scope of each instance is that results in a maximal fulfilment of the value? Would allowing a religious school to enforce codes of conduct that discriminate (directly or indirectly) maximise autonomy more than prohibiting such codes of conduct? It is akin to calculating the 'harm' of different possible decisions as an abstract category. What is more harmful, diminishing the school's capacity to instil a way of life through a more complete exploration of its tradition, or the restraint imposed upon a person who cannot express their convictions completely in this setting?[41] This is the second issue with the ALRC's Report and use of maximising as a frame: the language of balancing and maximisation results in a kind of obfuscation of the substantive valuing that necessarily takes place.

To answer such a question demands more than an invocation of maximisation. It demands moving from abstraction to narrating in some way a hierarchy of claims and arguments. Such a hierarchy then allows the possibility of detailing that it is not simply an abstract value that is being maximised, or abstract harm that is being contained, but rather a goal. Claims and arguments are incorporated into and given boundaries and scope within this goal. If the goal is harm prevention, then it is not simply harm that we are then interested in preventing, but harm of a certain kind; or, equally, if the goal is maximising authentic expression, then it is not simply everyone's autonomous pursuit of convictions that we are interested in supporting, but autonomy itself as an end unrestrained by the commitments of a tradition or group, for example. Remaining at the level of abstraction — harm, autonomy — is simply impossible (the concepts must be nested within a context and purpose), and so narrating a real hierarchy as between claims is needed. For the ALRC, what results is what Steven Smith calls 'smuggling'.[42] Invoking an abstract value or framing the argument in abstract terms (like maximisation) is in reality shaped by substantive or comprehensive claims as to what is really important. Indeed, we might also say it smuggles in a claim as to what is metaphysically real or true to the nature of persons in community with one another.[43] 'Smuggling' may give the impression that the act is conscious. The reality may be much less nefarious. In adopting the apparatus of proportionality, and the linked goals of balancing or maximisation, the impression given is that this is a distinctly legal argument shaped by the norms of a legal system.[44] In this way, the claim can be made that something other than moral and political argument is taking place.[45] Proportionality analysis becomes perhaps less conscious smuggling and more default legal

[39] Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press, 2006) 61, 73.
[40] Sophie Moreau, 'What Is Discrimination?' (2010) 38 *Philosophy & Public Affairs* 143, 147.
[41] See further, Timothy Endicott, 'Proportionality and Incommensurability' in Grant Huscroft, Bradley W Miller, and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014) 311.
[42] Steven D Smith, *The Disenchantment of Secular Discourse* (Harvard University Press, 2010) 35.
[43] See Joel Harrison and Lukas Opacic, 'Challenging the Unreal: The Future of Australian Law and Religion' in Jonathan Crowe, Joshua Neoh, and Constance Lee (eds), *Jurisprudence and Theology: The Australian School* (Routledge, forthcoming).
[44] See Barak (n 17) 349 arguing proportionality is disciplined by the 'normative structure' of the legal system.
[45] See similarly Jeremy Waldron's contention, in the context of judicial review, that framing deliberation as a legal, analytical exercise 'distracts [judges'] attention from direct consideration of moral arguments': Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal* 1346, 1359.

obfuscation: what is really at stake, what is really valued, what is the hierarchy of claims is obscured by a default analysis that asserts in-principle equal values are simply being balanced.

Understanding the ALRC's Report requires then going beyond the abstraction of maximisation and with it the impression of equally poised values or equal assertions of a liberty. In itself, the idea that the ALRC's recommendations are shaped by an implicit hierarchy of value that shapes the respective claims is not a criticism. I am contending that this is always necessary. But what is adopted as the shaping narrative of value (or what we should assess different claims in light of) and how the respective claims are then characterised *is* contestable.

The ALRC affirms that the right to religious liberty is fundamental but characterises it as fundamentally individual. Of course, religious liberty does have a distinctly personal component. Comparative jurisprudence affirms that one of the core components of the right to religious liberty is to protect against coercing persons into belief.[46] Equally, Christian thought has frequently affirmed that for faith to be real a person must come to accept God as the subject of one's own commitment and love.[47] But for the ALRC, religious liberty protects a conception of religion that is fundamentally individual in its ends. Not much detail or argument is given to the nature and ends of religion in the Report. Instead, the ALRC relies briefly on a common conception: religion concerns the pursuit of individual autonomy. This is seen in how the group is characterised, discussed above. It is also expressed at the level of general principle. The Report states that religious freedom protects the importance of religion 'in the lives of religious believers or people who are culturally religious'.[48] Immediately, this frames religious liberty as a matter of individual interest — a concern for the individual persons who pursue religion as a matter of personal autonomy, rather than a concern for how religious liberty might further societal ends. Religious liberty concerns instead facilitating 'competing lifestyles' and the ability of persons 'to live in accordance with their convictions'.[49] Religion here is not a distinct good, an end that may be integral to personhood and the life of the community. Rather, it is, as some contend, fundamental to cultivating pluralism in the sense that choices and convictions as such are in general a good thing to have.[50] The specific weight that should be given to religion, so characterised, is diminished. Characterised in this way, why should it not be subject to the law in precisely the same way as any other choice or conviction that might equally make up a pluralistic civil society and set of individual options?

In the specific context of religious educational institutions, the ALRC's emphasis on personal autonomy as the end served by religious liberty is coupled with a surprising reticence to recognise forming a religious community through education as a central act of religious expression. The ALRC first critically queries the extent to which 'teaching' under art 18(1) of the *ICCPR* extends to the provision of education generally within a religious school in contrast to specific religious instruction. It then continues with a seemingly reluctant allowance: 'The ALRC has proceeded on the basis that, *in some institutions*, religious worship, observance,

[46] See, eg, *Ivanova v Bulgaria* (2008) 47 EHHR 54.
[47] See, eg, Pope Paul VI, '*Dignitatis Humanae*: On the Right of the Person and of Communities to Social and Civil Freedom in Matters Religious' (Declaration on Religious Freedom, Vatican, 7 December 1965) [3] <www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html>. See also Joel Harrison, 'Christian Accounts of Religious Liberty: Two Views of Conscience' (2021) 46 *Brigham Young University Law Review* 1273, 1277-1279.
[48] *Maximising the Realisation of Human Rights* (n 1) [2.6].
[49] Ibid [2.7].
[50] For an account of religious liberty serving the need for pluralism, see Myriam Hunter-Henin, *Why Religious Freedom Matters for Democracy: Comparative Reflections from Britain and France for a Democratic "Vivre Ensemble"* (Hart, 2020).

practice, and teaching is sufficiently infused into the provision of education to warrant the conclusion that *some level of protection* under art 18(1) applies.'[51]

In contrast, the ALRC's Report gives a much more extended and detailed account of the other rights that it says are at stake in this debate. It characterises the right to non-discrimination as also concerning the capacity to live according to one's convictions or 'personal autonomy and development'.[52] But this is further coupled with discussion of its centrality to personhood and dignity,[53] citing Victorian equality and *Charter* jurisprudence and statements from Bell J in a case where the judge went on to describe equality and non-discrimination as 'the keystone in the protective arch of the *Charter*'.[54] The ALRC consequently frames equality and non-discrimination more as a 'hyper-good', a good that, as Charles Taylor explains, 'has an incomparable place in their lives … this above all others provides the landmarks for what they judge to be the direction of their lives'.[55] The ALRC couples this with extensive arguments as to how the well-being of different persons is affected by discrimination or the existence of an exemption.[56] The pre-eminence given to equality and non-discrimination is then followed by the ALRC listing and elaborating upon various supporting rights (almost close synonyms in many cases, aimed at the same end) that it identifies as affected by any exception — children's rights, the right to education, the rights to health and life, the right to privacy, the right to work, freedom of expression, and, as discussed, the religious liberty of both dissenting members of a faith and non-adherents who want nevertheless to attend the school for non-religious reasons.[57] The Report consequently combines hierarchy (which good at stake is of greater significance or how does the good in question integrate into a vision of shared life) with an argument from aggregate weight (listing the multitude of interests arrayed against the competing claim).

Preferring Courts and Commissions?

In the previous section, I considered the conceptual problems with the ALRC's 'maximisation' or balancing framework: how it characterises the group as a vehicle for furthering individual interests, and how it is obfuscatory — it masks the substantive (and hierarchical) assessment of 'value' that must take place within a vision of a shared life. In themselves, these are reasons to question the framework adopted. What is needed instead is a method of deliberation that can take seriously the real life of the group and deliberate upon not simply a balance of interests but what is in fact the 'right answer', in which the goods in question are composed in line with a vision of our shared life. In this Part of the article, I do not propose to develop such an account in full. Rather, I make a step towards it by considering an *institutional* question: where should such deliberation take place? I will suggest that the ALRC's reliance on maximising or balancing reflects a tendency to understand the court or a commission as the main actor in considering claims of right, against a different view that has been central to Australian practice: the legislature specifying rights.

This movement towards focusing on a court assessing claims of right can be seen, first, in the ALRC's appeal to religious schools being able to justify indirect discrimination. Before

[51] *Maximising the Realisation of Human Rights* (n 1) [4.100] (emphasis added).
[52] Ibid [2.13].
[53] Ibid.
[54] *Lifestyle Communities Ltd Case (No 3) (Anti-Discrimination)* [2009] VCAT 1869 [277].
[55] Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Harvard University Press, 1989) 62, 63.
[56] *Maximising the Realisation of Human Rights* (n 1) [3.55]–[3.69].
[57] Ibid [11.53]–[11.136].

considering this, however, it is useful to explore the ambiguity of such an appeal — namely, whether matters like school conduct rules would in fact be capable of being assessed as instances of indirect discrimination.

An Aside: Does Indirect Discrimination Analysis Even Apply?

Section 38(3) of the *SDA* provides religious schools with an exception to the duty not to discriminate 'in connection with the provision of education or training'. This is broad enough to include a liberty to admit students and expel them on the basis solely of, for example, a student's stated sexual or gender identity. However, generally speaking, religious schools are not interested in protecting such a bare liberty.[58] In its response to the ALRC's initial consultation paper, the National Catholic Education Commission referred to adopting an all-comers approach: many of its schools will accept anyone through their doors, so long as the student is willing to be educated in a Catholic setting.[59] Instead, the core concern of religious education providers has been maintaining the capacity to teach the doctrines of the religion and instilling conduct rules to reflect their beliefs and practices.[60] For example, a religious tradition may hold that the differentiation and relationship between the sexes is a matter of created order, an order that is to be confirmed and creatively participated in within the lives of persons born into sexed bodies. On this basis, the religious school might require that student leaders support the school's understanding of morally permissible sexual relations. It might want to evidence sex differentiation and the important given status of persons' bodies through a uniform policy. It undoubtedly wants to explore the tradition's understanding of sex and relationships through education.[61] Or, to take an example from the ALRC's Report, a religious school might refuse a student request to establish an LGBTQ+ student club that advocates for change within the school or policies in the wider community at odds with the religious tradition's own understanding.[62]

If s 38(3) of the *SDA* were removed, the school would no longer be able to point to a positively enacted liberty in Commonwealth law as a response to a claim of discrimination. If conduct requirements or actions on the part of the school like those above amounted to direct discrimination on a protected ground, they would be unlawful. There is no legal capacity to justify an act of direct discrimination.

The ALRC rejected proposals to craft a narrower exception, one dealing with conduct and behavioural requirements. It generally considered that an exception, even a narrow exception, 'prefers one right over another and precludes any consideration of where the balance between rights should be'.[63] Instead, it considered that general limitations clauses allowing for case-by-case determinations on the justifiability of the discrimination are preferable.[64] To this end, it

[58] See, eg, Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018* (Report, February 2019) quoting the then Anglican Archbishop of Sydney, Glenn Davies: at [3.75].
[59] National Catholic Education Commission, Submission No 409 to Australian Law Reform Commission, *Religious Educational Institutions and Anti-Discrimination Laws: Consultation Paper* (23 February 2023) 15.
[60] See, eg, ibid 16; Freedom for Faith, Submission No 203 to Australian Law Reform Commission, *Religious Educational Institutions and Anti-Discrimination Laws* (Consultation Paper, February 2023) 5–6 ('ALRC Submission').
[61] See, eg, 'ALRC Submission' (n 60) 6.
[62] *Maximising the Realisation of Human Rights* (n 1) [5.22]–[5.25].
[63] Ibid [1.21], quoting Australian Law Reform Commission, *Equality before the Law: Justice for Women* (Report No 69, July 1994) [3.78].
[64] *Maximising the Realisation of Human Rights* (n 1) [1.24].

identified a continuing capacity (with some ambiguity, discussed below) to justify indirect discrimination and proposed introducing a new provision in the *Fair Work Act 2009* (Cth) that would permit a religious educational institution to give preference to a co-religionist in limited circumstances.[65] In both cases, a form of proportionality analysis is advocated. Whereas the proposal to remove the exceptions in the *SDA* followed for the ALRC from a proportionality analysis balancing the interests at stake, here the claim is that a proportionality analysis should be undertaken on a case-by-case basis. In this way, the ALRC advances moving away from the legislature specifying the boundaries of a right to religious liberty (and specifying then the scope of anti-discrimination duties), towards religious liberty being considered as part of a balancing exercise undertaken by a commission or a court.

The ALRC's references to indirect discrimination in the context of potential school conduct rules do not appear always to say the same thing. At times the Report seems to intimate that such rules may no longer be lawful because in the absence of an exception they will amount to direct discrimination, which is not capable of being justified.[66] Elsewhere, the Report appears to punt for ambiguity, simply restating the legal alternatives that a rule may be direct discrimination or else indirect discrimination that will be justifiable if reasonable.[67] However, in direct response to religious bodies' emphasising a desire to maintain behavioural rules or the capacity to require staff to affirm a religious belief, the ALRC points to the capacity to justify indirect discrimination.[68]

There appears then to be a potential assumption that conduct rules might amount to indirect discrimination only (raising justifiability). As an initial point, this assumption can be questioned. Whether an indirect discrimination jurisdiction would apply or has significant application to the types of rules that religious bodies are raising is, I suggest, unclear. For example, the ALRC discusses *Gay Rights Coalition v Georgetown University*,[69] a United States case in which a Catholic university originally denied official recognition for a gay and lesbian student support society. It cites the case as a good example of proportionality analysis in action, with the end result in the case being an ongoing agreement that the group would be granted access to practical resources (like room bookings), without the university being compelled to endorse its message. However, it is not at all clear that under Australian law any proportionality — or similar 'reasonableness' — assessment could be made. If a religious school in Australia denied official recognition to a gay and lesbian student support society in the absence of an exception to the *SDA*, this would have a significant chance of simply being direct discrimination.

Direct discrimination entails different treatment between an aggrieved person and a relevant comparator '*because of* a protected attribute'.[70] It requires asking 'why was the aggrieved person treated as he or she was?'[71] In this scenario, it is possible to say that the school is applying a general policy facially neutral with respect to the protected characteristic. Any student group that wants to develop a student society contrary to the teachings of that tradition is excluded. To take again a Catholic institution, the rule would apply equally to a group

[65] Ibid 15.
[66] Ibid [5.6], [5.20], [5.23].
[67] Ibid [4.20], [5.24].
[68] Ibid [4.157]–[4.158].
[69] *Gay Rights Coalition of Georgetown University Law Center v Georgetown University*, 536 A 2d 1 (DC Cir, 1987). See *Maximising the Realisation of Human Rights* (n 1) [5.25].
[70] See generally Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2016) 105. See *Sex Discrimination Act 1984* (Cth) s 5.
[71] See *Purvis v New South Wales* (2003) 217 CLR 92 [236] (Gummow, Hayne and Heydon JJ).

exploring the liberalisation of abortion laws. In this way, the rule arguably gives rise to indirect discrimination. The neutral rule has a disparate effect on some groups (the LGBT students) attempting to manifest their identity because they are more likely to be affected by the rule. Such indirect discrimination could then be assessed for its reasonableness.[72]

But is the selection criterion here itself in fact neutral? The school is arguably not simply applying the criterion that the group's aims must not be contrary to doctrine; rather, in applying what the doctrine itself demands, it is required to engage in different treatment for the lesbian and gay support group. In this case, that criterion of exclusion (consistency with doctrine) becomes indistinguishable from the protected characteristic (sexual orientation).[73] Put another way, a comparator — say, a group supporting relationship-building consistent with the religion's teaching — is not disadvantaged because it is at one with the doctrine, whereas the gay and lesbian support group is treated differently because the protected characteristic (as manifested in this context at least) is specifically identified as contrary to doctrine.

The legal position of schools in this scenario seems at least to be uncertain. Potentially, the ALRC's suggested reform would in effect create more of a bright-line rule: if direct discrimination, these acts are unlawful as not saved by any exception. One of the proffered salves — that the justifiability for indirect discrimination remains — is of uncertain status in at least many flashpoint cases. Nevertheless, the ALRC rejected crafting narrowing exceptions to determine such cases as a matter of legislative drafting.

The Turn to Courts and Commissions

For present purposes, assuming there can be an added reliance on the indirect discrimination jurisdiction, relying on this illustrates the ALRC's preference for case-based proportionality analysis.

Indirect discrimination analysis in effect requires assessing the balance of interests: the court must 'weigh the nature and extent of the discriminatory effect, on the one hand, against the reasons advanced in favour of the requirement or condition on the other.'[74] The ALRC frames this as 'facilitat[ing] a fact-specific analysis of the proportionality of any disadvantage in light of the legitimate aims of the institution'.[75] It fits with the ALRC's other major proposal: enacting a narrow provision in the *Fair Work Act 2009* (Cth) to permit religious educational institutions to preference new hires on the basis of religion. The proposed provision is narrow for several reasons. First, it would only apply to hiring new staff rather than, say, a promotion. Second, the preferencing must be 'reasonably necessary to build or maintain a community of faith'. Third, the preferencing must be proportionate to that aim, having assessed (balanced) the disadvantage or harm to persons not preferred. Fourth, the preferencing cannot amount to conduct that is unlawful under the *SDA*.[76] In its scope then, the provision would amount to something like this: a conservative evangelical Chistian school could potentially preference for hire a person who ascribes to the Nicene Creed and accepts the soteriology of penal substitutionary atonement but could not then preference commitment to the tradition's ethic on sexual relations or its understanding of sex differentiation as created and embodied as male and

[72] *Sex Discrimination Act 1989* (Cth) s 7B.
[73] See *Bull v Hall* [2013] 1 WLR 3741, [30] (Lady Hale) (UKSC).
[74] *Secretary, Department of Foreign Affairs & Trade v Styles* (1989) 23 FCR 251, 263 (Bowen CJ and Gummow J).
[75] *Maximising the Realisation of Human Rights* (n 1) [5.59].
[76] Ibid 15.

female. The latter would need to be an inherent requirement (under the *Fair Work Act*) or else fall within the exception in s 37 of the *SDA* for performance of religious observances. Anti-discrimination law separates out grounds of discrimination, meaning the holistic and complete way of life that goes under the name 'religion' becomes at law one ground separable from others ('sex', 'gender', 'sexual orientation', etc). Importantly, the preferencing under this proposal would remain *potentially* legal only. Once again, it would be subject to an assessment from a commission or court as to whether the preferencing was proportional, including whether it adequately balanced the interests at stake.

Removing the exceptions from the *SDA* is of course a significant proposal for the boundaries of a religious educational institution's liberty. But the ALRC's proposals are also jurisprudentially and politically significant: they reflect an increasing confidence that courts or commissions should be the site for deliberating upon rights disputes by applying a distinct proportionality methodology. Here, in the context of exceptions to anti-discrimination law, the ALRC's approach is a shift away from what is the current approach — the legislature specifying the boundaries of anti-discrimination and the liberty of religious groups.

The ALRC is not alone in this shift. The AHRC agrees that courts (and itself) should be assessing limitations upon rights through the 'proportionality test'.[77] On this basis, it has recently recapitulated the proposal of a *Human Rights Act* for Australia, much like those statutory charters of rights found in Victoria, Queensland, and the ACT.[78] The AHRC's model has found favour with a majority of the current Parliamentary Joint Committee on Human Rights, although no bill seems to be on the horizon.[79]

Many commentators agree. Harry Hobbs and George Williams argue that a *Human Rights Act* will allow a 'framework that enables' increasingly complex issues of religious liberty conflicting with other rights 'to be resolved as they arise.'[80] A *Human Rights Act* would allow religious liberty to be considered, but within a 'level playing field' that balances all rights and interests.[81] For some, there is a general scepticism against legislative enactments that focus on the particular concerns of religious liberty, contrasting this 'special status' with the 'equal standing' found under *Charter* or *Human Rights Act* analysis.[82]

But the movement away from the legislature specifying the scope of a liberty or the reach of anti-discrimination law through exceptions should be questioned as a matter of principle. The legislative act can be understood as 'the community deliberating about how it should order itself'.[83] Persons deliberate together, through representative structures and the legislative process, to reach a view as to what the common good demands in this context. In Australia, the

[77] Australian Human Rights Commission, *Free & Equal: Revitalising Australia's Commitment to Human Rights* (Final Report, 8 November 2023) 62.
[78] Ibid. See *Human Rights Act 2004* (ACT); *Human Rights Act 2019* (Qld); *Charter of Rights and Responsibilities Act 2006* (Vic).
[79] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Inquiry into Australia's Human Rights Framework* (Report, May 2024).
[80] Harry Hobbs and George Williams, 'Protecting Religious Freedom in a Human Rights Act' (2019) 93 *Australian Law Journal* 721, 732.
[81] Ibid.
[82] Carolyn Evans and Cate Read, 'Religious Freedom as an Element of the Human Rights Framework' in Paul T Babie, Neville G Rochow, and Brett G Scharffs (eds), *Freedom of Religion or Belief: Creating the Constitutional Space for Fundamental Freedoms* (Edward Elgar, 2020) 20, 39.
[83] Richard Ekins, 'Legislation as Reasoned Action' in Grégoire Webber et al, *Legislated Rights: Securing Human Rights through Legislation* (Cambridge University Press, 2018) 86, 114.

debate over non-discrimination norms and the liberty of religious institutions garners significant public participation. The Ruddock Review received over 15,000 submissions.[84] The Morrison Government's Religious Discrimination Bill received over 6,000 submissions for its first exposure draft and over 7,000 submissions for its second exposure draft.[85] The ALRC's own Report included speaking with 131 consultees, receiving 428 formal submissions, and examining over 41,000 survey results.[86] Proportionality analysis as it is currently embedded in courts frames persons within the political community as pursuing distinct interests that collide with one another and must, as distinct, be optimised. It focuses on a single case that often takes on elevated importance for the parties and for interested NGOs.[87] In contrast, the legislature has a better capacity to hear from different communities. This then supports its capacity to constitute and reflect 'a people', understood as a complex body that is aimed at some common good or sense of right action.[88]

This is to say that the legislature can, where possible, specify what is just or what is due to persons in a particular context. Religious groups responding to the ALRC's interim report understandably emphasised legal certainty. In asking that a narrower exception be crafted, they were wanting to avoid the dilemma of whether a rule of conduct is direct or indirect discrimination, the legal contests that would ensue, and the need to undertake a case-by-case analysis with a commission or court. The ALRC offered a partial response. It opted for the possibility that extrinsic materials could offer guidance on how the indirect discrimination jurisdiction should be exercised and how the proportionality standard with respect to preferring prospective employees on the basis of religion should be applied.[89] How such guidance would be promulgated is unclear. The ALRC refers first to an explanatory memorandum. With respect to guidance on how 'reasonableness' is determined in the indirect discrimination jurisdiction, this is strange — if we are discussing an explanatory memorandum to an Act removing the exceptions, why would this offer guidance on an unamended indirect discrimination clause? The ALRC then suggests that a non-legislative body — the AHRC —could develop guidance.[90] Leaving aside that religious groups of late appear openly to be expressing distrust towards the AHRC,[91] they were also no doubt hoping for a public commitment represented in a public enactment.

To craft a specific exception entails reaching a clear conclusion on the liberty that is owed, in this case, to religious education institutions. Proportionality demands balancing competing interests in every instance of apparent clash. The court invariably recognises that a right is engaged and then proceeds to assess the detriment to it in relation to competing interest(s) advanced. What this means is that the right itself is open and capacious, capable of always giving rise to new claims that must be settled through the same methodology. In contrast, to

[84] *Ruddock Review* (n 6) 104.
[85] Attorney-General's Department, 'Religious Discrimination Bill – First Exposure Drafts: Consultation' (2 October 2019) <https://www.ag.gov.au/rights-and-protections/consultations/religious-discrimination-bills-first-exposure-drafts>; Attorney-General's Department, 'Religious Discrimination Bill – Second Exposure Drafts: Consultation' (3 March 2020) <https://www.ag.gov.au/rights-and-protections/publications/submissions-received-religious-discrimination-bills-second-exposure-drafts-consultation>.
[86] *Maximising the Realisation of Human Rights* (n 1) [1.36].
[87] See Christopher McCrudden, 'Transnational Culture Wars' (2015) 13 *International Journal of Constitutional Law* 434.
[88] See also Richard Ekins, 'How to Be a Free People' (2013) 58 *American Journal of Jurisprudence* 163, 170.
[89] *Maximising the Realisation of Human Rights* (n 1) [8.75].
[90] Ibid [4.161]–[4.162], [8.75], [9.11]–[9.12].
[91] See, eg, Freedom for Faith, Submission No 119 to Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Inquiry into Australia's Human Rights Framework* (30 June 2023) [68].

specify a right is to determine its boundary or application in light of a claim of justice.[92] It is making a determination that, for example, a person's right to freedom of expression simply does not extend to producing and disseminating pornography because such a right would be contrary to what is owed as a matter of right relationship especially between men and women. Similarly in this case, the legislature would be reaching the conclusion that the liberty of a religious school entails, as one possible example, the capacity to preference members of the faith for any staff position. (Or it could, of course, reach different conclusions.) The flipside is that the right to non-discrimination is then specified also — it simply does not apply where the exception is active. Reaching these conclusions, whatever they are, relies on formulating an argument as to what is just in this scenario based on deliberating upon what is required in our shared life or what is demanded for our common good. As it stands, such deliberation has within the Australian system been significantly a matter for the legislature.

CONCLUSION

How such a conclusion or determination is reached is of course difficult, but that should not prevent the attempt, an attempt which I am arguing is a familiar one common to legislative acts.[93] The goal should be a 'unity in plurality'.[94] I think a more social pluralist vision is needed, in which different attempts to pursue a vision of our common good (the end persons seek and enact, right relationship between persons and with God) that co-constitute our public life can be recognised and supported.[95] Such a vision undoubtedly demands a much more detailed account of the role and importance of religion as a good in our common life.[96] It is also a vision that, I think, should be explored and enacted together.

The ALRC's Report proposes a different vision and a different deliberative methodology. It frames the group as the site for balancing the interests of individuals. One could say that the ALRC simply does not give enough weight to the communal interest of the religious group, but this does not quite capture what is at issue. The very goal proposed by the ALRC is maximising interests, or the capacity to pursue one's own convictions. That goal leads to a failure to characterise the group as anything other than the set of individual interests to be aggregated. It is not then that the group is not given enough weight, it is that the framework is at root individualistic. In keeping with the maximisation goal, the ALRC also continues a common move: centring courts (or commissions) as the site for case-by-case decision-making applying a proportionality analysis. I have argued that there are good reasons for adopting a model of exceptions, which instead centres the legislature as the site for a common deliberation on what is just.

[92] See, eg, John Oberdiek, 'Specifying Rights Out of Necessity' (2008) 28 *Oxford Journal of Legal Studies* 127; Urbina (n 16) 215–52.
[93] Urbina (n 16) focusing on specifying what is just in the circumstances, deliberation on human rights is 'more like the rest of law': at 217.
[94] Augustine, *Concerning the City of God against the Pagans*, tr Henry Battenson (Penguin, 2003) Bk 12.23 503.
[95] See Joel Harrison, *Post-Liberal Religious Liberty: Forming Communities of Charity* (Cambridge University Press, 2020) 142–82.
[96] Ibid.