



**Australian Government**

**Australian Law Reform Commission**

# **CROSS-JURISDICTIONAL SUMMARY OF EXCEPTIONS FOR RELIGIOUS EDUCATIONAL INSTITUTIONS**

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# CROSS-JURISDICTIONAL COMPARISON – STUDENTS

No exceptions
  Narrow exceptions
  Broad exceptions
  No prohibition

\* Indicates that law reform proposals are currently under consideration by the relevant state or territory government in relation to this exception.

EXCEPTIONS FOR STUDENTS						
	Sex	Gender Identity	Marital/ Relationship Status	Pregnancy	Sexual Orientation	Religion and Belief
ACT						
Cth						
NT						
NSW						
Qld						*
SA						
Tas						
Vic						
WA	*	*	*	*	*	*

This table sets out key exceptions to anti-discrimination law for religious educational institutions in relation to students and prospective students available under Commonwealth, state, and territory laws.

General exceptions on the basis of sex for single-sex educational institutions have not been included in the comparison, nor have specific exceptions in relation to the provision of accommodation.

The exceptions compared are those specific to religious educational institutions only (or, in the absence of a specific exception for religious educational institutions, exceptions available to religious bodies, or private schools). For the Northern Territory, the table represents the law as enacted in November 2022, but not yet in force.<sup>1</sup>

An asterisk indicates where reform recommended by law reform or human rights agencies are currently under consideration by the relevant government.

<sup>1</sup> *Anti-Discrimination Amendment Act 2022 (NT)*. This received assent on 9 December 2022, but has not yet come into force.

## CROSS-JURISDICTIONAL COMPARISON – STAFF

No exceptions
  Narrow exceptions
  Broad exceptions
  No prohibition

\* Indicates that law reform proposals are currently under consideration by the relevant state or territory government in relation to this exception.

EXCEPTIONS FOR STAFF						
	Sex	Gender Identity	Marital/ Relationship Status	Pregnancy	Sexual Orientation	Religion and Belief
ACT						
Cth						
NT						
NSW						
Qld	*	*	*	*	*	*
SA						
Tas						
Vic						
WA	*	*	*	*	*	*

This table sets out key exceptions to anti-discrimination law for religious educational institutions in relation to staff and prospective staff available under Commonwealth, state, and territory laws.

General exceptions in relation to the provision of accommodation have not been included.

The exceptions compared are those specific to religious educational institutions only (or, in the absence of a specific exception for religious educational institutions, exceptions available to religious bodies or private schools). For the Northern Territory, the table represents the law as enacted in November 2022, but not yet in force.<sup>2</sup>

An asterisk indicates where reform recommended by law reform or human rights agencies are currently under consideration by the relevant government.

<sup>2</sup> Ibid. This received assent on 9 December 2022, but has not yet come into force.

# SUMMARY OF RELEVANT PROVISIONS

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1. The below summary gives a high-level summary of the relevant legislation in each jurisdiction, and relevant law reform proposals.

## Australian Capital Territory

### Students

2. Under Australian Capital Territory law, it is unlawful to discriminate against students and prospective students on the grounds of (among others) sex, sexual orientation, gender identity, relationship status, pregnancy, and religious conviction.<sup>3</sup>

3. An exception exists for a religious educational institution conducted solely for students of one religious conviction. Such an institution may discriminate against students who do not have that religious conviction in relation to enrolment,<sup>4</sup> as long as it has a published policy that is readily accessible by prospective and current students at the institution.<sup>5</sup>

4. Other more limited exceptions exist in relation to single sex schools,<sup>6</sup> and the provision of accommodation for students of one sex.<sup>7</sup>

### Staff

5. Under Australian Capital Territory law, it is unlawful to discriminate against staff and prospective staff on the grounds of (among others) sex, sexual orientation, gender identity, relationship status, pregnancy, and religious conviction.<sup>8</sup>

6. Two separate exceptions exist for religious educational institutions in relation to discrimination on the grounds of religious conviction:

- (i) in relation to selection and appointment, where the duties of employment involve, or would involve, the participation by the employee or worker in the teaching, observance or practice of the relevant religion;<sup>9</sup> or
- (ii) where the discrimination is intended to enable, or better enable, the institution to be conducted in accordance with its doctrines, tenets, beliefs or teachings,<sup>10</sup> as long as it has a published policy that is readily accessible by prospective and current employees and contractors at the institution.<sup>11</sup>

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3 *Discrimination Act 1991* (ACT) ss 7, 18.

4 *Ibid* s 46(1).

5 *Ibid* s 46(3).

6 *Ibid* s 36.

7 *Ibid* s 39(2).

8 *Ibid* ss 7, 10.

9 *Ibid* s 44.

10 *Ibid* s 46(2).

11 *Ibid* s 46(4).

## Commonwealth

### Students

7. Under Commonwealth law, it is unlawful to discriminate against students and prospective students on the grounds of (among others) sex, sexual orientation, gender identity, marital or relationship status, and pregnancy.<sup>12</sup> There are no prohibitions on discrimination on the grounds of religion.

8. An exception exists for religious educational institutions in relation to sexual orientation, gender identity, marital or relationship status and pregnancy, where discrimination is conducted in 'good faith in order to avoid injury to the religious susceptibilities of the adherents of that religion or creed'.<sup>13</sup>

9. Other more limited exceptions exist in relation to single sex schools,<sup>14</sup> and the provision of accommodation for students of one sex.<sup>15</sup>

### Staff

10. Under Commonwealth law, it is unlawful to discriminate against staff and prospective staff on the grounds of (among others) sex, sexual orientation, gender identity, marital or relationship status, and pregnancy.<sup>16</sup> The *Fair Work Act 2009* (Cth) ('*Fair Work Act*') also includes some limited protections from discrimination in the context of employment, including in relation to termination on the grounds of religion.<sup>17</sup>

11. An exception exists for religious educational institutions in relation to sexual orientation, gender identity, marital or relationship status and pregnancy, where discrimination is conducted in 'good faith in order to avoid injury to the religious susceptibilities of the adherents of that religion or creed'.<sup>18</sup> A similar exception exists for religious educational institutions to the relevant provisions in the *Fair Work Act*, in relation to all protected characteristics.<sup>19</sup>

## Northern Territory

### Students

12. Under Northern Territory law, amendments passed in November 2022 mean that it will be unlawful to discriminate against students on the grounds of (among others) sex, sexual orientation, gender identity, relationship status, pregnancy, or religious belief or activity.<sup>20</sup>

13. Although an exception for religious educational institutions currently exists in relation to religion,<sup>21</sup> this will be removed by the operation of the new laws passed in November 2022.

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12 *Sex Discrimination Act 1984* (Cth) s 21.

13 *Ibid* s 38(3).

14 *Ibid* s 21(3).

15 *Ibid* s 34(2).

16 *Ibid* s 14. In relation to contract workers see *ibid* s 16.

17 *Fair Work Act 2009* (Cth) s 772(1)(f).

18 *Sex Discrimination Act 1984* (Cth) s 38(1)–(2).

19 See, eg, *Fair Work Act 2009* (Cth) s 772(2)(b).

20 *Anti-Discrimination Act 1992* (NT) ss 19, 29, as amended by *Anti-Discrimination Amendment Act 2022* (NT) (not yet in force).

21 *Anti-Discrimination Act 1992* (NT) s 30(2).

14. Under the new law, religious bodies retain exceptions in relation to the training, selection and ordination of priests, ministers, and religious leaders similar to those contained in s 37(1)(a)-(c) of the *Sex Discrimination Act 1984* (Cth).

## Staff

15. Under Northern Territory law, amendments passed in November 2022 mean that it will be unlawful to discriminate against staff and prospective staff on the grounds of (among others) sex, sexual orientation, gender identity, relationship status, pregnancy, or religious belief or activity.<sup>22</sup>

16. Although exceptions for religious educational institutions currently exist in relation to religious belief or activity, and 'sexuality',<sup>23</sup> these will be removed by the operation of the new laws passed in November 2022.

17. Under the new law, religious bodies retain exceptions concerning the training, selection and ordination of priests, ministers, and religious leaders similar to those contained in s 37(1)(a)-(c) of the *Sex Discrimination Act 1984* (Cth).<sup>24</sup>

## New South Wales

### Students

18. Under New South Wales law, it is unlawful to discriminate against students or prospective students on the grounds of (among others) sex,<sup>25</sup> homosexuality,<sup>26</sup> 'transgender grounds',<sup>27</sup> marital or domestic status,<sup>28</sup> and pregnancy.<sup>29</sup> There is no prohibition on discrimination on the grounds of religion.

19. Unqualified exceptions apply to 'private educational authorities' in relation to all of the protected grounds.<sup>30</sup> The definition of 'private educational authorities' captures authorities of both religious and non-religious private educational institutions.<sup>31</sup>

### Staff

20. Under New South Wales law, it is unlawful to discriminate against staff or prospective staff on the grounds of (among others) sex,<sup>32</sup> homosexuality,<sup>33</sup> 'transgender grounds',<sup>34</sup> marital or domestic status,<sup>35</sup> and pregnancy.<sup>36</sup> There is no prohibition on discrimination on the grounds of religion.

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22 *Anti-Discrimination Act 1992* (NT) ss 19, 31, as amended by *Anti-Discrimination Amendment Act 2022* (NT) (not yet in force).

23 *Anti-Discrimination Act 1992* (NT) s 37A.

24 *Ibid* s 51, as amended by the *Anti-Discrimination Amendment Act 2022* (NT) (not yet in force).

25 *Anti-Discrimination Act 1977* (NSW) s 31A.

26 *Ibid* s 49ZO.

27 *Ibid* s 38K.

28 *Ibid* s 46A.

29 'Pregnancy' is treated as a characteristic of sex and the law states that pregnancy 'is a characteristic that appertains generally to women': *Ibid* s 24(1A)-(1B).

30 *Ibid* ss 31A(3)(a), 49ZO(3), 38K(3), 46A(3).

31 *Ibid* s 4.

32 *Ibid* s 25.

33 *Ibid* s 49ZH.

34 *Ibid* s 38C.

35 *Ibid* s 40.

36 'Pregnancy' is treated as a characteristic of sex and the law states that pregnancy 'is a characteristic that appertains generally to women': *Ibid* s 24(1A)-(1B).

21. Unqualified exceptions apply to ‘private educational authorities’ in relation to all of the protected grounds.<sup>37</sup>

## Queensland

### Students

22. Under Queensland law, it is unlawful to discriminate against students or prospective students on the grounds of (among others) sex, sexuality, gender identity, relationship status, pregnancy, and religious belief or religious activity.<sup>38</sup>

23. An exception applies for an educational authority operating wholly or mainly for students of a particular religion, which may preference students of the same religion as the institution.<sup>39</sup> A 2022 review by the Queensland Human Rights Commission recommended retaining this exception, but clarifying that the exception applies only applies to initial enrolment, and to ‘religion’ and not ‘religious belief or religious activity’.<sup>40</sup>

24. Other more limited exceptions exist in relation to single sex schools,<sup>41</sup> and the provision of accommodation for students of one sex or religion.<sup>42</sup>

### Staff

25. Under Queensland law, it is unlawful to discriminate against staff or prospective staff on the grounds of (among others) sex, sexuality, gender identity, relationship status, pregnancy, and religious belief or religious activity.<sup>43</sup>

26. An exception applies so that it will not be discrimination where the attribute is a ‘genuine occupational requirement’, with a note giving an example of a genuine occupational requirement as ‘employing persons of a particular religion to teach in a school established for students of the particular religion’.<sup>44</sup> The Queensland Human Rights Commission recommended that this note be removed.<sup>45</sup>

27. Another exception exists specifically in relation to ‘work for an educational institution (an employer) under the direction or control of a body established for religious purposes’.<sup>46</sup> This provides that it is not unlawful for an employer to discriminate in a way that is not unreasonable, if the employee or prospective employee openly acts in a way that they know or ought reasonably know is contrary to the employer’s religious beliefs, in the course of the person’s work, or in the course of doing something connected with the work, where it is a genuine occupational requirement that the person act consistently with the employer’s religious beliefs in connection with their work.<sup>47</sup> To determine whether the action taken was reasonable, the court is directed to consider ‘whether the action taken or proposed to be taken by the employer is harsh or unjust

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37 Ibid ss 25(3)(c), 49ZH(3)(c), 38C(3)(b), 40(3)(c).

38 *Anti-Discrimination Act 1991* (Qld) ss 7, 38–9.

39 Ibid s 41.

40 Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (July 2022) rec 40.

41 *Anti-Discrimination Act 1991* (Qld) s 41.

42 Ibid s 89.

43 Ibid ss 7, 14–5.

44 Ibid s 25(1).

45 Queensland Human Rights Commission (n 40) rec 39.1.

46 *Anti-Discrimination Act 1991* (Qld) s 25(2)(a).

47 Ibid s 25(3).

or disproportionate to the person's actions' and 'the consequences for both the person and the employer should the discrimination happen or not happen'.<sup>48</sup>

28. The Queensland Human Rights Commission also recommended removing this exception, and replacing it with an exception that allows 'discrimination on the ground of religious belief or religious activity in relation to work for an organisation or related entity established for religious purposes ('religious organisation') if reasonable and proportionate in the circumstances and the participation of the person in the teaching, observance or practice of a particular religion is a genuine occupational requirement'.<sup>49</sup> The Commission recommends that the legislation include a non-exhaustive list of factors to guide whether it is reasonable and proportionate.<sup>50</sup>

## South Australia

### Students

29. Under South Australian law, it is unlawful to discriminate against students or prospective students on the grounds of (among others) sex, sexual orientation, gender identity,<sup>51</sup> marital or domestic partnership status, and pregnancy.<sup>52</sup> It is also unlawful to discriminate against students on the grounds of religious appearance or dress.<sup>53</sup>

30. An exception exists for a religious educational institution to discriminate against a current or prospective student who dresses or wishes to dress 'in manner required by, or symbolic of, a different religion'.<sup>54</sup>

31. Other more limited exceptions exist in relation to single sex schools or boarding facilities.<sup>55</sup>

### Staff

32. Under South Australian law, it is unlawful to discriminate against staff or prospective staff on the grounds of (among others) sex, sexual orientation, gender identity,<sup>56</sup> marital or domestic partnership status, and pregnancy.<sup>57</sup> It is also unlawful to discriminate against staff or prospective staff on the grounds of religious appearance or dress.<sup>58</sup>

33. An exception exists for religious educational institutions to discriminate against staff or prospective staff on the grounds of sexual orientation, gender identity, and domestic partnership status (in relation to same sex domestic partners).<sup>59</sup> This exception is subject to the conditions that the discrimination is founded on the precepts of the educational institution's religion, that the institution has a written policy stating its position, and the educational authority has met requirements to provide, upon request and free of charge, a written policy stating its position to

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48 Ibid s 25(5).

49 Queensland Human Rights Commission (n 40) rec 39.2.

50 Ibid rec 39.3.

51 *Equal Opportunity Act 1984 (SA)* s 37.

52 Ibid ss 85T, 85ZE.

53 Ibid.

54 Ibid s 85ZE(5).

55 Ibid s 37(3).

56 Ibid s 30.

57 Ibid s 85V.

58 Ibid.

59 Ibid s 85Z(2).



applicants, employees, students, prospective students and parents and other members of the public.<sup>60</sup>

34. An exception also exists for an employer to discriminate against a current or prospective staff member on the grounds of religious appearance or dress 'if the discrimination is for the purposes of enforcing a standard of appearance or dress reasonably required for the employment or engagement'.<sup>61</sup>

35. In 2016 the South Australian Law Reform Institute ('SALRI') recommended that the exception available to religious educational authorities in s 34(3) of the Act be 'replaced with an exemption that permits discrimination by religious educational authorities in the area of employment on the basis of religious belief'.<sup>62</sup> The SARLI further recommended that the replacement exception

be based on s 51 of the *Anti-Discrimination Act 1998* (Tas) but should preserve the requirement in the current South Australian provision for the religious educational authority to have a written policy outlining the basis on which it seeks to rely upon the exemption, and that this policy be made publicly available.

The replacement exemption should also include a requirement that the discrimination on the grounds of religious belief be not unreasonable in the circumstances. Guidance should be provided as to what is reasonable in the circumstances, as in s 25(5) of the *Anti-Discrimination Act 1991* (Qld) which requires consideration of: (a) whether the action taken or proposed to be taken by the employer is harsh or unjust or disproportionate to the person's actions; and (b) the consequences for both the person and the employer should the discrimination happen or not happen.<sup>63</sup>

## Tasmania

### Students

36. Under Tasmanian law, it is unlawful to discriminate against students or prospective students on the grounds of (among others) gender, sexual orientation, gender identity, marital status, relationship status, pregnancy, religious belief or affiliation, and religious activity.<sup>64</sup>

37. An exception applies for a religious educational institution to discriminate against a prospective student at first enrolment on the grounds of religious belief or affiliation or religious activity, if those criteria are in accordance with the institution's policy on admission.<sup>65</sup> The exception extends to the religious belief or affiliation, and religious activity, of the prospective student's parents or grandparents.<sup>66</sup> The legislation states that this exception does not permit discrimination on any grounds other than religious belief or affiliation or religious activity.<sup>67</sup>

38. A separate general exception exists in relation to single gender schools.<sup>68</sup>

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60 Ibid s 34(3)(a)–(d).

61 Ibid s 85Z(5).

62 South Australian Law Reform Institute, *'Lawful Discrimination': Exceptions under the Equal Opportunity Act 1984 (SA) to Unlawful Discrimination on the Grounds of Gender Identity, Sexual Orientation and Intersex Status* (2016) rec 3.

63 Ibid.

64 *Anti-Discrimination Act 1998* (Tas) ss 16, 22(1)(b).

65 Ibid s 51A(1)–(2), (4).

66 Ibid s 51A(4).

67 Ibid s 51A(3).

68 Ibid s 27(1)(b).

## Staff

39. Under Tasmanian law, it is unlawful to discriminate against staff or prospective staff on the grounds of (among others) gender, sexual orientation, gender identity, marital status, relationship status, pregnancy, religious belief or affiliation, and religious activity.<sup>69</sup>

40. An exception applies for a religious educational institution to discriminate against a staff member or prospective staff member on the grounds of religious belief or affiliation or religious activity 'if the discrimination is in order to enable, or better enable, the educational institution to be conducted in accordance with those tenets, beliefs, teachings, principles or practice'.<sup>70</sup>

## Victoria

### Students

41. Under Victorian law, it is unlawful to discriminate against students or prospective students on the grounds of (among others) sex, sexual orientation, gender identity, marital status, pregnancy, and religious belief or activity.<sup>71</sup>

42. Victorian law has two main exceptions relating to students and prospective students of religious educational institutions. The first provides that an educational institution wholly or mainly for students of a particular religious belief may exclude people who are not of the particular religious belief.<sup>72</sup>

43. The second permits a religious educational institution to discriminate on the basis of a person's religious belief or activity where this is reasonable and proportionate in the circumstances and (a) conforms with the doctrines, beliefs or principles of the religious educational institution, or (b) is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.<sup>73</sup> The section provides that this does not permit discrimination on the basis of any attribute other than religious belief or activity.<sup>74</sup>

44. A separate exception exists to allow single sex schools.<sup>75</sup>

### Staff

45. Under Victorian law, it is unlawful to discriminate against employees or prospective employees on the grounds of (among others) sex, sexual orientation, gender identity, marital status, pregnancy, and religious belief or activity.<sup>76</sup>

46. An exception applies in relation to religious belief or activity. A religious educational institution may discriminate in relation to an employee's or prospective employee's religious belief or activity where:

- (a) conformity with the doctrines, beliefs or principles of the religion in accordance with which the educational institution is to be conducted is an inherent requirement of the position; and

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69 Ibid ss 16, 22(1)(a).

70 Ibid s 51(2).

71 *Equal Opportunity Act 2010 (Vic)* ss 6, 38.

72 Ibid s 39. There is a similar provision in relation to accommodation (s 61).

73 Ibid s 83. This does not apply to employment.

74 Ibid s 83(3).

75 Ibid s 39.

76 Ibid ss 6, 16, 18.

- (b) the other person cannot meet that inherent requirement because of their religious belief or activity; and
- (c) the discrimination is reasonable and proportionate in the circumstances.<sup>77</sup>

47. The Act provides that the ‘nature of the educational institution and the religious doctrines, beliefs or principles in accordance with which it is to be conducted must be taken into account in determining the inherent requirements of a position’.<sup>78</sup> It also clarifies that this does not permit discrimination on the basis of any attribute other than religious belief or activity.<sup>79</sup>

## Western Australia

### Students

48. Under Western Australian law, it is unlawful to discriminate against students or prospective students on the grounds of (among others) sex, marital status, pregnancy,<sup>80</sup> gender history,<sup>81</sup> sexual orientation<sup>82</sup> and religious conviction.<sup>83</sup>

49. An exception applies so that religious educational institutions may discriminate against students and prospective students on all protected grounds, other than race, impairment or age, in connection with the provision or education and training where it is done in ‘good faith in favour of adherents of that religion or creed generally, but not in a manner that discriminates against a particular class or group of persons who are not adherents of that religion or creed’.<sup>84</sup>

50. A separate exception exists to allow single sex schools.<sup>85</sup>

51. In 2022, the Law Reform Commission of Western Australia recommended reform so that the exception in relation to students applies only in respect of religious conviction and only at the time of enrolment. Further it would be limited to where discrimination conformed ‘to the doctrines, beliefs or principles of the religion’, was ‘reasonably necessary to avoid injury to the religious susceptibility of adherents of the religion’ and was ‘reasonable and proportionate in the circumstances’.<sup>86</sup>

### Staff

52. Under Western Australian law, it is unlawful to discriminate against staff or prospective staff on the grounds of (among others) sex, marital status, pregnancy,<sup>87</sup> gender history,<sup>88</sup> sexual orientation<sup>89</sup> and religious conviction.<sup>90</sup>

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77 Ibid s 83A(1).

78 Ibid s 83A(2).

79 Ibid s 83A(3).

80 *Equal Opportunity Act 1984 (WA)* s 18.

81 Ibid s 35AJ.

82 Ibid s 35W.

83 Ibid s 61.

84 Ibid s 73(3).

85 Ibid s 18(3).

86 Law Reform Commission of Western Australia, *Project 111: Review of the Equal Opportunity Act 1984 (WA)* (August 2022) rec 81.

87 *Equal Opportunity Act 1984 (WA)* ss 11, 13.

88 Ibid s 35AC.

89 Ibid ss 35WP, 35R.

90 Ibid ss 54, 56.

53. An exception applies so that religious educational institutions may discriminate against staff and prospective staff on all protected grounds, other than race, impairment or age, where it is done in 'in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed'.<sup>91</sup> A separate exception also applies in relation to private schools, where the duties of the employment or work are connected with the participation of the employee in any religious observance or practice.<sup>92</sup>

54. In July 2022, the Law Reform Commission of Western Australia recommended reforming the exception to make it similar to s 83A of the *Equal Opportunity Act 2010* (Vic). This would mean that the exception was limited to where:

- conformity with the doctrines, beliefs or principles of the religion is an inherent requirement of the job;
- the person cannot meet that inherent requirement because of their religious conviction; and
- the discrimination is reasonable and proportionate in the circumstances.<sup>93</sup>

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91 Ibid s 73(1)–(2).

92 Ibid s 66(1).

93 Law Reform Commission of Western Australia (n 86) rec 79.