Submission to The Australian Law Reform Commission

on the

Religious Educational Institutions and Anti-Discrimination Laws

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The Queer Department of the National Union of Students (NUS) and the Queer Office of the University of Technology Sydney Student Association (UTSSA) welcome the recommendations from the Australian Law Reform Commission (ALRC) on ending exceptions to anti-discrimination law in religious educational institutions. Upon reviewing, we find many of the proposals and changes to be unsatisfactory. We have provided recommendations for revisions of each of the proposals that we deem insufficient.

Foremost, a recurring issue seen within these proposals surrounds the categorisation of youth on the basis of sex, rather than gender. As supported by research, there lies a crucial distinction between the two terms, and the use of language greatly impacts the repercussions created from these proposals. By neglecting this distinction, trans youth will be categorised on the basis of sex, forcing trans girls to be enrolled in all boys schools, or vice versa. As a result of current policy, trans youth are forced to either remain closeted at school in fears of ostracization, or exist as outliers in their communities.

Furthermore, we believe that single-sex schools are founded on a perceived value in the discrimination of people on the basis of sex. In these institutions, bullying, transphobia, and toxic masculinity culture are further cultivated and unaddressed. More broadly, these environments not only allow a growing culture of sex discrimination in students, but unfairly stigmatizes the existence of students whose gender identity deviate from societal expectation.

Additionally, systemic misogyny - sexist systems that prevent women, intersex people, and gender nonconforming people from engaging in the economy - are not challenged through a reinforcement of gender divides.

Moreover, we propose that the Sex Discrimination Act and the Fair Work Act be amended so that sex workers, as well as those with a history of sex work, are included underneath these acts. The sex work industry is made up of a significant amount trans people and migrants. This is due to systemic discrimination of these marginalised communities, preventing them from engaging in the formal economy. Thus, it is extremely important that we address the range of discrimination that sex workers face.

Finally, this submission affirms other submissions made by Pride in Protest, and University of Sydney SRC and University of Sydney Queer Action Collective.

<u>Proposal 1</u>: Subsection 38(3) of the Sex Discrimination Act 1984 (Cth) should be repealed.

While we generally welcome this proposal, we ask for revisions to be made to the area that asks for the categorisation of students on the basis of sex, not gender. As it stands, this proposal's categorization of sex would allow for the discrimination of students, staff, and others on the basis of their gender identity. As such, we recommend that references to "sex" within the proposal be changed to "gender".

<u>Proposal 4:</u> The Sex Discrimination Act 1984 (Cth) should be amended to specify that the exception for religious bodies in s 23(3)(b) does not apply to accommodation provided by an educational institution.

Consistent with our concerns with Proposal 1, we generally welcome this proposal. The references to "sex" within the proposal should be changed to refer to "gender". As mentioned previously, this would ensure that the identities of trans and intersex people are recognised under this law. The act's focus on sex would mean that any person whose gender does not align with that assigned to them at birth is not guaranteed protected under the law.

<u>Proposal 5:</u> The Fair Work Act 2009 (Cth) should be amended to specify that the exceptions for religious bodies in ss 153(2)(b), 195(2)(b), 351(2)(c) and 772(1)(f) do not apply to educational institutions except as otherwise provided in the Sex Discrimination Act 1984 (Cth) and Age Discrimination Act 2004 (Cth).

We generally welcome proposal 5, however the proposal does not remove exemption for discrimination on the basis of sex work history. Paragraph 87 lists the grounds on which religious education institutions can no longer discriminate against students, including "race, colour, age, physical or mental disability, political opinion, national extraction or social origin". We believe that this list omits sex work history as grounds on which a religious education institution cannot discriminate against.

<u>Proposal 7:</u> Amend the Sex Discrimination Act 1984 (Cth) to clarify that the content of the curriculum is not subject to the Act.

We believe that this proposal is insufficient. Schools should not be allowed to teach religious doctrine that is not in compliance with the Sex Discrimination Act 1984. We recognise that the proposed amendment would allow for anti-LGBTQIA+ beliefs to be taught to students under the guise of religious education. Further, we reason that other discriminatory beliefs, particularly ableism, misogyny, and racism, could also be included in school curriculums under the same logic. Finally, we assert that the protection of religion should never overrule the protection of LGBTQIA+ people. Therefore, while religious education institutes should be free to teach doctrine to students, this cannot be done without a duty of care, especially for queer students.

<u>Proposal 8:</u> The Fair Work Act 2009 (Cth) should be amended such that modern awards or enterprise agreements (as applicable) do not provide favourable treatment on the grounds of religion, to an employee of an educational institution. This is may be accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed where:

- ***the treatment relates to the selection of employees;***
- ***participation of the employee in the teaching, observance or practice of religion is a genuine occupational requirement, having regard to the nature and ethos of the institution;***
- ***the treatment does not constitute discrimination on any other ground prohibited by ss 153(1) or 195(1), respectively; and***
- ***the treatment is proportionate in all the circumstances.***

We believe that this proposal is insufficient, and subjective in its nature. The proposal leaves room for loopholes within individual interpretations and familiarity with religious doctrine, and allows for institutions to suggest LGBTQIA+ individuals do not subscribe to religion in an acceptable manner due to their sexual orientation or gender. Such loopholes would enable preferential discriminatory hiring and workplace discrimination, furthering occupational barriers faced by Queer people. We recognise the need for religious participants in religious institutions, but assert that intersections between queer and religious demographics exist and must be catered for.

<u>Proposal 9:</u> The Fair Work Act 2009 (Cth) should be amended such that modern awards or enterprise agreements (as applicable) do not discriminate merely because it allows an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed to terminate an employee's employment where:

- ***the termination is necessary to prevent an employee from actively undermining the ethos of the institution;***
- ***the treatment does not constitute discrimination on any other ground prohibited by ss 153(1) or 195(1), respectively; and***
- ***the termination is proportionate to the conduct of the employee — including by reference to:***
    - ***the damage caused to the ethos of the educational institution;***
    - ***the genuine occupational requirements of the role, having regard to the nature and ethos of the educational institution;***
    - ***alternative action the employer could instead reasonably take in the circumstances;***
    - ***the consequences of termination for the employee; and***
    - ***the employee's right to privacy.***

The Fair Work Act 2009 (Cth) should be further amended such that religion is a permissible ground of termination, despite s 772(1)(f), in the circumstances set out above.

We believe that the Sex Discrimination Act and the Fair Work Act should be amended so that sex workers, as well as those with a history of sex work, are included underneath their protection. Denial of accommodation, discrimination from banks, and termination of employment without recourse are a few of the ways in which sex workers experience discrimination.

Discrimination impacts staff ability to work efficiently in an uncomfortable environment, and hinders their quality of life. Therefore, we believe staff reserve their right to initiate industrial action, and strike if faced with any discrimination in the workplace. These actions should be further protected under the Fair Work Act.

<u>Proposal 14:</u> Following implementation of Proposals 1 to 11, the Australian Government should consider and consult on further reforms to simplify and strengthen Commonwealth anti discrimination laws, including by addressing inconsistencies arising from reforms proposed in this Inquiry

We believe that these proposals are matters separate from the evaluation of religious freedom. Any legislative proposals arising from this process should be dealt with as separate matters, irrelevant to the pursuit of religious freedom. We believe that these issues of religious discrimination would be more appropriately reviewed in the context of creating a Human Rights Act, as was alluded to in Proposal 14. Underlying the association of these proposals with religious rights under the Morrison government, and in the resulting legislative package, is the belief that people of faith must be protected against LGBTQIA+ rights. This is a position in .