

To whom it may concern,

Queer Unionists in Tertiary Education (QUTE) welcomes the opportunity to comment on the Australian Law Reform Commission's (ALRC) consultation paper on religious educational institutions and anti-discrimination laws. QUTE is the LGBTQIA+ caucus of the National Tertiary Education Union (NTEU), the union representing workers in the tertiary education sector.

As such, our members have a direct interest in the issues discussed in the consultation paper as many of them work at religiously-affiliated tertiary education providers in Australia, or at religiously-affiliated residential colleges of nominally secular universities. The current religious exemptions to the Sex Discrimination Act disadvantage our members in their work, as they allow religious educational institutions to discriminate against, and even sack, our members on the basis of their sexuality or gender identity, depending on the jurisdiction.

This is brought into stark relief by cases such as that of Karen Pack, who was sacked from a religious tertiary education institution in New South Wales for being gay. This state of affairs is unacceptable in a society that likes to think of itself as modern.

Background

The background to the Australian Law Reform's inquiry dates to the Religious Discrimination Bill presented by the Morrison Government in early 2022. The then-opposition made a series of promises about how they would address the issue of anti-discrimination reform. Importantly, two of those commitments were to protect LGBTQIA+ students and teachers from discrimination. The Prime Minister, Anthony Albanese has confirmed that Labor will respect religious educational institutions' right to select staff based on faith.¹

A problem that the Law Reform Commission is currently facing is that it remains entirely lawful for staff at religious educational institutions to discriminate against their students based on gender identity. It is also entirely lawful to discriminate against teachers on the same basis (that is, gender identity). This is lawful because of religious exemptions under section 38 of the Sex Discrimination Act 1984 (Cth). This leaves Australia's LGBTQIA+ community at a significant disadvantage compared to other vulnerable groups.

The challenge for the Law Reform Commission is removing those religious discrimination exceptions in a way that allows communities of faith to form schools for the education of their young people. The proposals in the consultation paper demonstrate a positive start to addressing marginalisation in educational institutions. The reforms would go a long way to ensuring that students are free to learn without the threat of discrimination. For this reason we welcome and endorse Proposals 1-6.

¹Karp, Paul, 'PM Reaffirms Commitment to Allow Religious Schools to Hire Staff Based on Faith', the Guardian (14 February 2023) <https://www.theguardian.com/australia-news/2023/feb/14/pm-reaffirms-commitment-to-allow-religious-schools-to-hire-staff-based-on-faith?CMP=share_btn_tw>

However, there are a few key issues in the ALRC's other proposals.

Curriculum

First, the proposal to allow religious schools to be able to continue to discriminate in terms of the curriculum they deliver. Proposition A allows a religious school to teach religious doctrines or beliefs on sex or sexual orientation in a way that accords with their duty of care to students

and the requirements of the curriculum. It is important to note that this exemption does not take into account the welfare, beliefs or religious identity of the person delivering the content.

There is significant research that shows that LGBTQIA+ people who grow up in purity cultures and are told that homosexuality is a sin experience higher rates of depression and anxiety. This has been associated with stigma, prejudice and discrimination. To force them to teach a curriculum that reinforces that message is discriminatory, and should be illegal.

For this reason, we oppose Proposal 7.

Discrimination against teachers

Religious educational institutions would gain a right under the Fair Work Act 2009 (Cth) to give "more favourable treatment on the ground of religion" for hiring employees where it is "proportionate in all the circumstances" and "the teaching, observance or practice of religion is a genuine occupational requirement".

Religious schools would be allowed to terminate teacher employment where it was "necessary to prevent an employee from actively undermining the ethos of the institution" and "proportionate" to their conduct. However, before deciding to dismiss the employee, the school must consider other potential solutions, such as reassigning the teacher to tasks that align with the school's values. The proposal appears to give educational institutions the licence to sack teachers for openly contradicting religious doctrine but could make dismissal difficult in circumstances where their conduct contradicted church doctrine in their private life only. It is unclear how the Fair Work Commission would interpret these changes.

In *Corry v Australian Council of Trade Unions* [2022] FWC 288, an employee posted offensive material on his Facebook out of hours. He was dismissed and subsequently brought an unfair dismissal claim. Deputy President Masson found that the employee had acted in breach of the social media policy and that his out-of-hours conduct 'bore upon his employment relationship.'

In *Rose v Telstra* (1998), it was determined that out-of-hours conduct could only be a valid reason for dismissal if one or more of the following applied:

- the conduct is such that, viewed objectively, is likely to cause serious damage to the relationship between the employer and employee;
- the conduct damaged the employer's interests; or
- the conduct is incompatible with the employee's duty as an employee.

An employee's ability to be terminated for their conduct outside of work hours can be influenced by various elements, including the workplace policies set by their employer. If an educational organisation has a specific social media policy that mandates all employees to abide by the institution's religious principles while using social media, this could indicate a justified termination depending on an employee's conduct.

An employee of a religious educational institution who posts about their same-sex partner on Facebook outside of work hours could face termination if the institution deems it to conflict with its religious doctrine and values.

For these reasons, we oppose Proposals 8 and 9.

Context

Thirdly, as the ALRC itself concedes, it is only looking at religious exceptions in terms of educational institutions. Right now, under Commonwealth law, and in New South Wales and Western Australia, religious educational institutions continue to enjoy unfettered special privileges to discriminate against LGBTQIA+ students and teachers simply for who they are. These special privileges must be abolished.

However, there are broader issues around discrimination against staff by religious employers in industries such as the health and charity sectors. While QUTE members are education workers, we nevertheless stand in solidarity with LGBTQIA+ workers in these other sectors, and for this reason recommends that the religious exemptions to the Sex Discrimination Act be abolished across all sectors, not just education.

Signed,

Sinead Wilson and Amy Sargeant

Queer Unionists in Tertiary Education
(National Tertiary Education Union)