

Religious Educational Institutions and Anti- Discrimination Laws

Submission to the Australian Law Reform
Commission

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About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is leading social justice law and policy centre. Established in 1982, we are an independent, non-profit organisation that works with people and communities who are marginalised and facing disadvantage.

PIAC builds a fairer, stronger society by helping to change laws, policies and practices that cause injustice and inequality. Our work combines:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change and public interest outcomes.

Our priorities include:

- Reducing homelessness, through the Homeless Persons' Legal Service
- Access for people with disability to basic services like public transport, financial services, media and digital technologies
- Justice for First Nations people
- Access to sustainable and affordable energy and water (the Energy and Water Consumers' Advocacy Program)
- Fair use of police powers
- Rights of people in detention, including equal access to health care for asylum seekers (the Asylum Seeker Health Rights Project)
- Improving outcomes for people under the National Disability Insurance Scheme
- Truth-telling and government accountability
- Climate change and social justice.

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The Public Interest Advocacy Centre office is located on the land of the Gadigal of the Eora Nation.

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Recommendations

Recommendation 1 – Do not use the term ‘religious ethos’

The term ‘religious ethos’ should be removed from all proposed reforms.

Recommendation 2 – Exempting the curriculum

Proposal 7, to exempt the curriculum from the operation of the Sex Discrimination Act, should be rejected.

Recommendation 3 – Proposals re preferencing and termination be rejected

Proposal 8, in relation to preferencing, and 9, in relation to termination, should be rejected.

Recommendation 4 – Replacement for Proposals 8 and 9

ADLEG’s submission (recommendation 6) should be adopted in replacing Proposals 8 and 9, namely that:

The Fair Work Act 2009 (Cth) should be amended to say that a religious educational institution is not permitted to rely on a term of a modern award or enterprise agreement to discriminate directly or indirectly in employment other than where:

(1) the conduct is on the ground of religion where the participation of the person in the observance or practice of a particular religion is a genuine occupational requirement in relation to the employment;

(2) the conduct does not constitute discrimination, whether direct or indirect, on any other ground prohibited by sections 153(1) or 195(01), respectively.

(3) the conduct is reasonable and proportionate in the circumstances.

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

Recommendation 5 – Replacement for Proposals 10

ADLEG’s submission (recommendation 7) should be adopted in replacing Proposal 10, namely that:

That, in developing a federal law that prohibits religious discrimination, Proposal 10 be fulfilled by including the following three standard discrimination law provisions:

(1) the prohibition on indirect discrimination not apply if the condition, requirement or practice is reasonable in the circumstances, constructed similarly to the Sex Discrimination Act 1984 (Cth) section 7B.

(2) an exception to the prohibition on discrimination in employment for genuine occupational requirements, constructed similarly to [ADLEG recommendation 6];

(3) the authorisation of lawful special measures, which are not discrimination, constructed similarly to the Sex Discrimination Act 1984 (Cth), section 7D.

A federal law that prohibits religious discrimination should also ensure that these provisions cannot be used as an alternative route to discriminate on the basis of attributes protected by other federal discrimination laws.

Recommendation 6 – Protecting associates

Proposal 6 should be extended to amend the Sex Discrimination Act to protect associates of people with protected attributes in the current package of reforms, based on the definition in s 4 of the Disability Discrimination Act 1992 (Cth).

Recommendation 7 – Allowing discrimination by religious schools against students on the basis of religion at the point of enrolment only

Any Religious Discrimination Bill introduced as part of Stage 1 reforms should only permit religious schools to discriminate against students on the ground of religion at the point of enrolment.

Recommendation 8 – Extending reform of religious exceptions to other areas

A wider review of religious exceptions in the Sex Discrimination Act and Fair Work Act should be undertaken, with a view to including protections against discrimination for:

- *LGBTQ people accessing services from, and*
- *LGBTQ people employed by (or seeking employment with)*

religious organisations operating health care, housing, disability, welfare and other community services. This should cover protecting LGBTQ workers at Government-funded aged care services, who are currently excluded from s37(2) of the Sex Discrimination Act.

Recommendation 9 – Support Proposals 1-6 and 11-14

Proposals 1-6, and 11-14, should be recommended to government.

1. Introduction

PIAC has been actively engaged in legal and policy debates and public inquiries on the subject of religious discrimination, including exceptions in anti-discrimination laws, over many years.

This includes submissions to the 2018 Religious Freedom Review,¹ multiple Commonwealth parliamentary inquiries into the treatment of lesbian, gay, bisexual, transgender and queer (LGBTQ) students in religious schools in late 2018² and early 2019,³ submissions in relation to the First⁴ and Second⁵ Exposure Drafts of the previous Government's Religious Discrimination Bill in late 2019 and early 2020 respectively, and multiple Commonwealth parliamentary inquiries into the final version of that legislation in late 2021.⁶

Throughout these processes, we have advocated according to the following principles relevant to this inquiry:

1. LGBTQ students should enjoy the right to learn free from discrimination on the basis of who they are;
2. LGBTQ teachers should be protected against discrimination on the grounds of their sexual orientation and gender identity;
3. Religious schools should be able to take into account religious belief in decisions about the enrolment of students and the employment of teachers for particular roles, while not being permitted to discriminate on the basis of other attributes, like sexual orientation or gender identity; and
4. Religious belief should be a protected attribute under Commonwealth anti-discrimination law, on an equivalent basis to laws covering existing protected attributes, and without undermining the ability of other groups, including LGBTQ people, to live their lives free from discrimination.

We welcome the Australian Law Reform Commission's Consultation Paper: 'Religious Educational Institutions and Anti-Discrimination Laws', as an important step towards the achievement of the above principles in Commonwealth anti-discrimination law.

We support the ALRC's 4 General Propositions and the majority of the 14 Technical Consultation Proposals, which we recognise seek to reconcile the right to be protected against discrimination

¹ PIAC 'Submission to the Religious Freedom Review', 14 February 2018, available here: <https://piac.asn.au/2018/02/14/submission-to-the-religious-freedom-review/>

² PIAC 'Submission to Senate Legal and Constitutional Affairs References Committee Inquiry into Anti-Discrimination Exceptions for Religious Schools', 26 November 2018, available here: <https://piac.asn.au/2018/11/26/submission-to-senate-legal-and-constitutional-affairs-references-committee-inquiry-into-anti-discrimination-exceptions-for-religious-schools/>

³ PIAC 'Submission to the Senate Inquiry into the Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018, available here: <https://piac.asn.au/2019/01/21/submission-to-the-senate-inquiry-into-the-sex-discrimination-amendment-removing-discrimination-against-students-bill-2018/>

⁴ PIAC 'Religious Freedom Bills Submission on Exposure Drafts', 1 October 2019, available here: <https://piac.asn.au/2019/10/01/religious-freedom-bills-submission-on-exposure-drafts/>

⁵ PIAC 'Submission on the 2nd Exposure Draft of the Religious Freedom Bills', 31 January 2020, available here: <https://piac.asn.au/2020/01/31/submission-on-the-2nd-exposure-draft-of-the-religious-discriminaton-bill/>

⁶ PIAC 'Submission on the Religious Discrimination Bills 2021 to the Joint Committee on Human Rights', 17 December 2021, available here: <https://piac.asn.au/2021/12/17/submission-on-the-religious-discrimination-bill-2021-to-the-joint-committee-on-human-rights/> [NB with an equivalent submission also provided to the concurrent Senate and Legal and Constitutional Affairs Committee].

with the ability to practice one's faith, individually and in community, while respecting the rights of others.

There are, however, a number of significant changes or improvements that PIAC submits should be made to these proposals to ensure that discrimination against LGBTQ students and teachers is not permitted via alternative means, and to avoid creating additional problems in Commonwealth anti-discrimination laws, including both the *Sex Discrimination Act 1984*, and the *Fair Work Act 2009*.

PIAC notes the submission made by the Australian Discrimination Law Experts Group (ADLEG) on 17 February 2023.⁷ We agree with its legal analysis and endorse its recommendations.

Our submission outlines some of our key concerns and suggestions for improvement to the Proposals, including in relation to:

- The term 'religious ethos';
- The proposal to exempt the curriculum;
- Ensuring teachers are adequately protected;
- Protecting associates; and
- Future reforms.

2. The term 'religious ethos'

PIAC does not support, and strongly cautions against, the use of the term 'religious ethos' in the proposals to amend both the *Sex Discrimination Act* and *Fair Work Act*, as well as for potential inclusion in any subsequent Religious Discrimination Bill.

As noted in the ADLEG submission, the term 'religious ethos' is novel in Australian law and not found in the international human rights instruments underpinning our Commonwealth anti-discrimination legislation. We agree that the term is inherently vague and nebulous and its use 'runs the risk of unintended consequences, particularly the possibility of creating a much broader right to preference or terminate employment than currently exists under Australian law.'⁸

Similarly, we share ADLEG's concerns that any approach tying protections – or in this case, legal rights to take action, such as termination of employment – to the religious ethos of an institution moves away from the focus of human rights, which attach to individuals, and communities of humans, rather than organisations.

In the narrow circumstances where religious exceptions in Commonwealth anti-discrimination laws may be required, using existing wording is far preferable to introducing a new, vague and potentially very broad exception. One such example is found in section 38(2) of the *Sex Discrimination Act* which structures the exemption around conducting an educational institution 'in accordance with the doctrines, tenets, beliefs or teachings of a particular religion'.

⁷ 'Submission of the Australian Discrimination Law Experts Group, in response to the Australian Law Reform Commission's Inquiry into Religious Education Institutions and Anti-Discrimination Laws', 17 February 2023, available here: <https://www.adleg.org.au/submissions/alrc-inquiry-into-religious-educational-institutions-2023>

⁸ Ibid, page 8.

Recommendation 1 – Do not use the term ‘religious ethos’

The term ‘religious ethos’ should be removed from all proposed reforms.

3. Exempting the curriculum

PIAC has serious concerns about Proposal 7, to ‘[a]mend the *Sex Discrimination Act 1984* (Cth) to clarify that the content of the curriculum is not subject to the Act.’

This proposal is couched in terms that go beyond the issue of religious schools and their teaching of doctrine. There may be significant unintended consequences from exempting something as broad as the education curriculum from the application of the SDA generally and it is not clear why this would be desirable.

In any event, this proposal seems unnecessary. As the Consultation Paper recognises, this ‘does not, in practice, appear to have been an issue in states and territories that have long-standing protection on *Sex Discrimination Act* grounds for students and staff.’

An exemption is not required for religious schools to be able to teach their doctrine about sexuality and relationships in reasonable and responsible ways, provided it is not harmful or discriminatory on the basis of attributes like sexual orientation or gender identity.

As described by ADLEG in their submission:⁹

If curriculum content with respect to sex, sexual orientation or gender roles would be in breach of a school’s duty of care to their students or in contravention of state and territory curriculum requirements, then it is likely that the content is harmful *because* the content is discriminatory on grounds protected in the SDA (such as sex and/or sexual orientation). In that context, it would seem counter-intuitive and contrary to Principle 4 that such content could be exempted under the SDA despite it being in breach of the school’s duty of care and of the curriculum standards *because it is harmful on the basis of sex*. Implementing this proposal would undermine the overall rationale of the other proposed reforms and has no logical basis.
[emphasis in original]

We also share ADLEG’s concerns that exempting the curriculum from anti-discrimination protections would require students affected by a breach of duty of care to instead initiate tort proceedings to seek a remedy. This adds unnecessary complexity and hurdles to access to justice for these students, especially when compared to the relatively more accessible forum of discrimination law.

Recommendation 2 – Exempting the curriculum

Proposal 7, to exempt the curriculum from the operation of the Sex Discrimination Act, should be rejected.

⁹ Ibid, page 12.

4. Ensuring teachers are adequately protected

PIAC has significant concerns about the Consultation paper's proposals regarding reforms to the provisions affecting teachers and other employees and contract workers at religious schools.

We agree with ADLEG's analysis that Proposals 8, 9 and 10 have the potential to undermine the intention of the Consultation Paper – which includes to protect LGBTQ teachers against discrimination on the basis of their sexual orientation – and may create serious practical problems.

This includes, for example, allowing discrimination to continue under the *Fair Work Act*, even after ss 38(2) and (3) of the *Sex Discrimination Act* are repealed. As noted by ADLEG:¹⁰

Proposals 8 and 9, as they are currently drafted, would therefore provide an alternative route in the FWA to discriminate on the basis of the attributes protected by the SDA. If Proposals 8 and 9 were implemented in these terms, the second Term of Reference to this inquiry – that amendments should be made to ensure that a religious educational institution 'must not discriminate against a member of staff on the basis of sex, sexual orientation, gender identity, marital or relationships status or pregnancy' – would not be fulfilled.

We therefore urge that Proposals 8 and 9 be rejected.

Recommendation 3 – Proposals re preferencing and termination be rejected

Proposal 8, in relation to preferencing, and 9, in relation to termination, should be rejected.

PIAC accepts that religious belief can play a legitimate role in decisions by religious schools about hiring and termination.

However, any exemption should be narrowly-defined, clearly-justifiable and closely-tied to the genuine occupational requirements of the role, and not permit discrimination on the basis of any other protected attributes, including sex, marital or relationship status or pregnancy. This is essential to ensure that the human rights of teachers are only limited when there is a 'compelling justification'.¹¹

We agree with the 'key principles' outlined in the ADLEG submission on this issue,¹² as well as their alternative proposal to replace Proposals 8 and 9, included in Recommendation 6 of their submission.¹³

A similar approach should be taken in relation to Proposal 10 of the Consultation Paper, relating to the exceptions in any future religious discrimination Bill to permit religious educational institutions to discriminate on the basis of religious belief in hiring, and to take action that is reasonably necessary to prevent an employee actively undermining the 'religious ethos' of the institution.

¹⁰ Ibid, page 18.

¹¹ Consultation Paper, page 11 [25].

¹² Above note 7, page 23

¹³ Ibid, page 24.

We share ADLEG's view that concerns about the ability of employers to deal with employees who actively undermine an organisation's values appear overblown.¹⁴ Existing contract and discrimination law is likely to provide adequate protection for religious education institutions in these situations, as it does for other employers.

Any exemptions should therefore be narrowly-defined and consistent with existing discrimination law approaches. The ADLEG submission identifies how this can be done (in recommendation 7)¹⁵ and we adopt that recommendation.

Recommendation 4 – Replacement for Proposals 8 and 9

ADLEG's submission (recommendation 6) should be adopted in replacing Proposals 8 and 9, namely that:

The Fair Work Act 2009 (Cth) should be amended to say that a religious educational institution is not permitted to rely on a term of a modern award or enterprise agreement to discriminate directly or indirectly in employment other than where:

(1) the conduct is on the ground of religion where the participation of the person in the observance or practice of a particular religion is a genuine occupational requirement in relation to the employment;

(2) the conduct does not constitute discrimination, whether direct or indirect, on any other ground prohibited by sections 153(1) or 195(01), respectively.

(3) the conduct is reasonable and proportionate in the circumstances.

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

Recommendation 5 – Replacement for Proposals 10

ADLEG's submission (recommendation 7) should be adopted in replacing Proposal 10, namely that:

That, in developing a federal law that prohibits religious discrimination, Proposal 10 be fulfilled by including the following three standard discrimination law provisions:

(1) the prohibition on indirect discrimination not apply if the condition, requirement or practice is reasonable in the circumstances, constructed similarly to the Sex Discrimination Act 1984 (Cth) section 7B.

(2) an exception to the prohibition on discrimination in employment for genuine occupational requirements, constructed similarly to [ADLEG recommendation 6];

(3) the authorisation of lawful special measures, which are not discrimination, constructed similarly to the Sex Discrimination Act 1984 (Cth), section 7D.

A federal law that prohibits religious discrimination should also ensure that these provisions cannot be used as an alternative route to discriminate on the basis of attributes protected by other federal discrimination laws.

¹⁴ Ibid, pp 28-29.

¹⁵ Ibid, page 28.

5. Protecting associates

PIAC supports extending the protections against discrimination contained in the *Sex Discrimination Act 1984* (Cth) to associates of people with protected attributes.

Proposal 6 in the Consultation Paper is to extend anti-discrimination protections to prohibit discrimination against students and prospective students on the grounds that a family member or carer of the student has a protected attribute. While this is welcome, we do not believe it goes far enough.

Significantly, it would not protect teachers and prospective teachers on the same basis.

We note that protecting associates of people with protected attributes is already a feature of Commonwealth anti-discrimination law, including in section 4 of the *Disability Discrimination Act 1992*, which provides:

associate, in relation to a person, includes:

- (a) a spouse of the person; and
- (b) another person who is living with the person on a genuine domestic basis; and
- (c) a relative of the person; and
- (d) a carer of the person; and
- (e) another person who is in a business, sporting or recreational relationship with the person.

We recommend a similar definition is inserted into the *Sex Discrimination Act*, as part of the reform proposals contained in this package. This would not only protect associates of students and teachers in religious schools, but extend protections to associates of people with all protected attributes (including sex, pregnancy and intersex status) who are covered under this legislation.

This change would bring the *Sex Discrimination Act* in line with other anti-discrimination laws. Accordingly, we do not believe this reform needs to wait to be included in 'Stage 1' reforms as recommended in Proposal 14.

Recommendation 6 – Protecting associates

Proposal 6 should be extended to amend the Sex Discrimination Act to protect associates of people with protected attributes in the current package of reforms, based on the definition in s 4 of the Disability Discrimination Act 1992 (Cth).

6. Further reforms

PIAC supports Proposal 14, namely that 'the Australian Government should consider and consult on further reforms to simplify and strengthen Commonwealth anti-discrimination law, including by addressing inconsistencies arising from reforms proposed in this Inquiry.'

6.1 Discrimination against students on the basis of religion

PIAC has consistently supported the introduction of prohibitions on discrimination on the basis of religious belief in Commonwealth law. We therefore support the enactment of a religious discrimination Act as suggested as part of Stage 1 for broader law reform.

We reiterate that this should be done consistently with laws covering existing protected attributes, and without undermining the ability of other groups, including LGBTQ people, to live their lives free from discrimination.

PIAC recognises that, in order to allow parents who are religious to educate children and young people within their own faith community, religious schools should be able to discriminate on the grounds of religious belief at the point of enrolment.

It is, however, important that this exception to apply only at enrolment, and not beyond.

This is necessary to protect the rights of children and young people, including their religious freedom. Children must be able to question, choose and develop their own faith. This includes developing a faith different to that of the school at which they were enrolled, or to have no faith. Children must have the right to do this free from the threat of punishment or other forms of discrimination.

This approach is consistent with the existing anti-discrimination laws of Tasmania,¹⁶ Queensland¹⁷ and the ACT,¹⁸ which only allow discrimination against students on the basis of religious belief at the point of enrolment.

Given one of the aims of this current process is to better protect the human rights of students, it will be important that their rights are not then eroded in any future reforms.

Recommendation 7 – Allowing discrimination by religious schools against students on the basis of religion at the point of enrolment only

Any Religious Discrimination Bill introduced as part of Stage 1 reforms should only permit religious schools to discriminate against students on the ground of religion at the point of enrolment.

6.2 Reforming religious exceptions beyond religious education institutions

The reforms to protect LGBTQ students and teachers at religious schools from discrimination contained in the ALRC Consultation Paper are an important step forward. We highlight, however, that the religious exceptions contained in the *Sex Discrimination Act* (and especially s 37(1)(d)) extend far beyond religious education institutions to cover a wide range of other essential services in the public sphere, including health care, housing, disability, welfare and other community services.

¹⁶ Section 51A *Anti-Discrimination Act 1998* (Tas).

¹⁷ Section 41 *Anti-Discrimination Act 1991* (Qld).

¹⁸ Section 46(1) *Discrimination Act 1991* (ACT).

We therefore welcome the inclusion in Proposal 14 Stage 1 reforms of 'a wider review of the protections and exceptions in the *Sex Discrimination Act* and anti-discrimination provisions in the *Fair Work Act* .

There has been limited reform to this area. The 2013 amendments which added sexual orientation, gender identity and intersex status as protected attributes to the *Sex Discrimination Act* also inserted the following provision to 37(2):

Paragraph [37](1)(d) does not apply to an act or practice of a body established for religious purposes if:

- (a) the act or practice is connected with the provision, by the body, of Commonwealth-funded aged care; and
- (b) the act or practice is not connected with the employment of persons to provide that aged care.

This provision has now been in operation for almost a decade. It has protected LGBTQ people accessing these services from discrimination, without any apparent negative consequences for the ability of Government-funded aged care facilities run by religious organisations to operate according to their faith.

These protections should be expanded, to protect from discrimination LGBTQ people who are employees/prospective employees of Government-funded aged care services.

They should also more broadly protect LGBTQ people from discrimination when accessing services from, being employed by or seeking employment with, religious organisations in the health care, housing, disability, welfare and other community services.

Recommendation 8 – Extending reform of religious exceptions to other areas

A wider review of religious exceptions in the Sex Discrimination Act and Fair Work Act should be undertaken, with a view to including protections against discrimination for:

- *LGBTQ people accessing services from, and*
- *LGBTQ people employed by (or seeking employment with)*

religious organisations operating health care, housing, disability, welfare and other community services. This should cover protecting LGBTQ workers at Government-funded aged care services, who are currently excluded from s37(2) of the Sex Discrimination Act.

6.3 Consolidation of Commonwealth anti-discrimination legislation

PIAC has consistently supported the consolidation of Commonwealth anti-discrimination legislation into one Human Rights and Anti-Discrimination Bill, including during the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012.

Such consolidation would not only help to improve consistency between the protections offered to different groups across the community, but also help to reduce the existence of special exceptions in relation to particular groups (such as those contained in s38 of the *Sex Discrimination Act 1984* (Cth)).

We therefore welcome the inclusion in the Stage 2 reforms proposed in Proposal 14 of

a review of the *Age Discrimination Act 2004* (Cth), *Disability Discrimination Act 1992* (Cth), *Racial Discrimination Act 1975* (Cth) and *Sex Discrimination Act* ('*Anti-Discrimination Acts*') for consistency in application, terminology, burdens of proof, and scope with a view to potential consolidation in a single Act.

6.4 Support for a Human Rights Act

PIAC also supports, as part of the Stage 2 review under Proposal 14, consideration of options for the enactment of a Human Rights Act to 'provide a more comprehensive and effective way of managing the interactions between individual human rights'. PIAC regards the absence of a federal Human Rights Act as a major gap in Australia's rights protection framework and one that requires action as a matter of priority.

However, a Human Rights Act should operate alongside properly-constructed anti-discrimination laws, which cover religious belief and also contain narrowly-constructed religious exceptions. Particularly in the short term, this will provide greater certainty and clarity in reconciling the right to practice faith individually and in community with others, while protecting the rights of other groups to live their lives free from discrimination.

We therefore support the approach suggested by the ALRC that reforms to religious exceptions (applying religious education institutions and more generally) and the introduction of a religious discrimination Bill, should proceed as a priority, while further work to advance a Human Rights Act takes place.

7. Conclusion

In PIAC's view, the majority of the Proposals would help achieve the four General Propositions articulated in the Consultation Paper and represent important and constructive reforms to better protect human rights.

We therefore support Proposals 1-6, and 11-14.

Recommendation 9 – Support Proposals 1-6 and 11-14

Proposals 1-6, and 11-14, should be recommended to government.

We oppose other proposals in relation to the curriculum (Proposal 7) and the employment of staff (Proposals 8, 9 and 10), because they would create additional challenges and complexity, and are ultimately not necessary. We have endorsed a number of the ADLEG recommendations that will better meet the objectives of this review.

We urge the ALRC to present the strongest possible package of reforms to the Commonwealth Government, and for the Government to act on these reforms as a matter of priority.