



public interest
ADVOCACY CENTRE

Senate Inquiry into Anti-Discrimination Exceptions for Religious Schools

20 November 2018

About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit legal centre based in Sydney.

Established in 1982, PIAC tackles barriers to justice and fairness experienced by people who are vulnerable or facing disadvantage. We ensure basic rights are enjoyed across the community through legal assistance and strategic litigation, public policy development, communication and training.

Our work addresses issues such as:

- 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 Aboriginal and Torres Strait Islander people, through our Indigenous Justice Project and Indigenous Child Protection Project
- Access to 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)
- Transitional justice
- Government accountability.

PIAC has a strong background of experience and expertise in anti-discrimination law. Over the past 12 months we have been engaged particularly in the public and policy debates around the Religious Freedom Review, including in response to the media publication of recommendations from that review and subsequent parliamentary debate.

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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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1. Introduction and summary

The issue of discrimination by ‘faith-based religious educational institutions’ (‘religious schools’ as shorthand) is a nuanced one, raising a range of competing human rights: the right to manifest religious belief, the right to non-discrimination, the right to privacy, the rights of children to an education that allows their development to their fullest potential.

But legislation that will ensure an appropriate balance need not be complex.

Unfortunately, the drafting and legal interpretation of discrimination law is notoriously complicated. This is particularly unhelpful when it comes to Australians understanding their rights and ensuring they are protected and respected.

The events of the last month are instructive. It is clear from the public debate and responses to media reports that many people have been unaware of the exemptions that exist in our law that allow religious schools to discriminate against students and teachers on the basis of sexual orientation, gender identity – and, indeed, a range of other grounds.

In PIAC’s view, it is possible to ensure a clear and simple legal framework that better protects the rights of children and teachers from discrimination on the basis of sexual orientation and gender identity while supporting the exercise of religious freedom. This submission is focused on how this can be achieved.

In short, it requires the following:

- Repeal s 38 of *the Sex Discrimination Act 1984* (Cth) (‘SDA’) which allows religious schools to discriminate against teachers, contract workers and students.
- Amend s 37 of the SDA, which provides for a general exemption for religious bodies, to exclude religious schools from its operation.
- Amend the relevant sections of the *Fair Work Act 2009* (Cth) (‘Fair Work Act’) which currently allow religious bodies to discriminate in employment on any ground, so that such bodies can only discriminate on the basis of religious belief.

Such an approach will ensure protection from discrimination against students and teachers while maintaining the ability of schools to impose reasonable conditions to protect the school’s religious character and values.

PIAC urges the Committee to recommend that these changes are made as a matter of urgency to ensure these issues are resolved for the start of the 2019 school year.

The approach PIAC proposes is not a novel one. It is the approach taken in both Tasmania where it has operated successfully for many years and now the ACT which has recently introduced similar changes to its laws. It also reflects the approach taken in other comparable international jurisdictions.

The approach also ensures a consistent approach is taken to students and staff. We see this as critical to providing a safe and healthy learning environment. We would be particularly concerned about the strong normative statement that students will receive if their teachers – often important role models and mentors – are able to be subject to discrimination because of who they are, regardless of their qualities as a teacher.

2. This inquiry

We thank the Committee for the opportunity to make this submission to its Inquiry into:

Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff, including on the basis of sexual orientation and gender identity and other attributes covered by the *Sex Discrimination Act 1984*, with particular reference to proposals for amendments to current legislation, and any related matters.

3. Imbalance between religious freedom and protection against discrimination

In PIAC's view, the law does not currently strike an appropriate balance between guaranteeing religious freedom while protecting the right to non-discrimination.

This is apparent in the framing of ss 37 and 38 of the SDA. These sections provide extremely broad exemptions to religious organisations, allowing them to discriminate in employment and service provision generally (s 37) and in relation to staff, contractors and students in religious schools specifically (s 38) on the basis of sexual orientation and gender identity, alongside other attributes such as marital or relationship status or pregnancy.

In our submission to the Religious Freedom Review (see **Attachment A**), we noted the unconditional human right to freedom of thought, conscience and religion as well as the conditional right to manifest one's religious beliefs. Article 18 of the International Covenant on Civil and Political Rights explicitly recognizes that the ability to manifest one's religious belief can be subject to limitations, provided they are prescribed by law and necessary for the protection of specific objectives, most relevantly the rights and freedoms of others.

Our submission goes on to state:

PIAC acknowledges that the right to freedom of religion under Article 18 of the ICCPR requires State Parties to 'have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions'.

In PIAC's view, this may allow for a religious school to discriminate against potential teachers and employees on the grounds of religious belief, in relation to roles that are sufficiently connected with the 'religious and moral education' of children. It may also support discrimination on the basis of religious belief against prospective students to support the religious ethos of the institution.

However, in PIAC's view, religious schools should not be able to discriminate on other grounds, including sex, marital or relationship status, pregnancy, sexual orientation, gender identity or intersex status. Discriminating in this way is not a necessary or proportionate measure for the protection of religious freedom and is accordingly an unjustifiable infringement on the right to nondiscrimination.

This is particularly the case in the context of young people who may be particularly vulnerable, including young LGBTI students.

PIAC notes that for the vast majority of students, it is the parents and not the children who determine the school of attendance, and those parents may be unaware – particularly at the time of enrolment – of their child's sexual orientation or gender identity. Particularly in those circumstances, subjecting students to discrimination simply because of their sexual orientation or gender identity is not, in PIAC's view, a measure that is reasonably necessary and proportionate for the enjoyment of the right to freedom of religion.

PIAC also notes that, in any event, the exemption granted by s 38 is excessively broad. As with s 37, it fails to require a consideration of proportionality, allowing discrimination regardless of its consequences to avoid any injury to 'religious susceptibilities'.

Importantly, the exceptions in ss 37 and 38 of the SDA are not necessary to ensure religious schools can impose reasonable conditions on students to promote the school's values. The law already allows for such conditions for religious and non-religious schools.

4. Protecting students, teachers and other staff

PIAC strongly supports addressing discrimination against LGBT students, teachers and other staff as part of one set of legislative changes.

Such consistency and clarity will help ensure the school environment as a whole is non-discriminatory, rather than endorsing discrimination in some areas.

This approach will also specifically benefit LGBT students, who will witness an environment that is accepting of LGBT adults, potentially providing them with positive role models.

On the other hand, permitting discrimination against teachers and other staff to continue, solely because of who they are, would send a strong negative message to LGBT students, irrespective of whether they themselves are directly discriminated against.

PIAC also believes that sexual orientation, gender identity and sex characteristics (intersex status) are fundamentally irrelevant to whether a person is able to fulfill the requirements of teaching or other roles, within schools – religious or otherwise.

5. Recommended approach

PIAC suggests that the following elements should form the basis of the Parliament's approach to addressing discrimination against LGBT students, teachers and other staff in religious schools:

- Repeal s 38(1) to (3) of the *Sex Discrimination Act 1984* (Cth), which provide specific exceptions for religious educational institutions to discriminate in relation to teachers, contractors and students, respectively.
- Amend s 37, to clarify that the broad religious exception in s 37(1)(d) does not allow discrimination by religious educational institutions.
- Amend ss 153(2), 195(2), 351(2) and 772(2) of the *Fair Work Act 2009* (Cth) to ensure that religious educational institutions are only allowed to discriminate on the basis of religious belief in employment, and not on the basis of other protected attributes like sexual orientation and gender identity.¹

No further amendments are required.

PIAC notes that this approach is consistent with that taken by the *Anti-Discrimination Act 1998* (Tas). That allows religious schools to discriminate on the basis of the 'religious belief or affiliation or religious activity' of a prospective student or employee, but not otherwise: see ss 51A and 51.

It is also consistent with the Discrimination Amendment Bill 2018 (ACT). As with the Tasmanian Act, the ACT Bill proposes to prohibit discrimination against LGBT students, teachers and staff on the basis of their sexual orientation or gender identity. However, it preserves the ability of religious schools to discriminate against students in terms of their admission, and teachers and other staff in terms of their employment, on the basis of 'religious conviction'.

PIAC notes that a similar approach is also taken in Queensland with respect to students, where discrimination is permitted in relation to admission on the basis of religion, but not on the basis of sexual orientation or gender identity.²

Adopting the Tasmanian approach would also bring Australia into closer alignment with comparable countries. This includes New Zealand where the *Human Rights Act 1993* does not provide specific exceptions in relation to students, and only allows discrimination against teachers on the basis of sex and religion.

In the United Kingdom, the *Equality Act 2010* allows state-funded schools with a religious character or independent religious schools to only discriminate in relation to students on the basis of religion or belief. While in Ireland, under the *Equal Status Act 2000*, religious schools are permitted to discriminate on the basis of religion in terms of admission – but

¹ Although note that, in amending those sections of the *Fair Work Act 2009* (Cth), it may be appropriate for there to be further technical amendments to ensure places of education for ministers of religion (such as seminaries) are permitted to discriminate across the full range of attributes, consistent with s 37(1)(b) of the *Sex Discrimination Act 1984* (Cth).

² S 41 *Anti-Discrimination Act 1991* (Qld).

they are not permitted to discriminate against teachers where the school is in receipt of Government funding.

The ACT Bill also adds a new safeguard to the Tasmanian approach, by only permitting discrimination on the basis of religious conviction where:

- For students ‘the educational institution has published its policy in relation to student matters’³ and ‘the policy is readily accessible by prospective and current students at the institution’,⁴ and
- For teachers ‘the educational institution has published its policy in relation to staff matters’⁵ and ‘the policy is readily accessible by prospective and current employees and contractors of the institution.’⁶

The Committee may wish to consider including these safeguards as part of any potential amendments to the SDA.

Recommendation 1

The Committee should recommend the following amendments to protect LGBT students, teachers and other staff against discrimination by religious schools:

- *Repeal s 38 of the Sex Discrimination Act 1984*
- *Amend s 37 of the Sex Discrimination Act 1984 to clarify that the general religious exception in s 37(1)(d) does not apply to religious educational institutions, and*
- *Amend ss 153(2), 195(2), 351(2) and 772(2) of the Fair Work Act 2009 so that religious educational institutions are only permitted to discriminate on the basis of religious belief in employment, and not on the basis of other protected attributes such as sexual orientation, gender identity or marital or relationship status.*

The Committee may also wish to consider including safeguards that require disclosure of any intention to discriminate by religious schools, similar to the requirements proposed under the Discrimination Amendment Bill 2018 (ACT).

6. Proposals for amendments

6.1 Government amendments

PIAC is aware from media reports of draft amendments to the SDA developed by the Government relating to the issue of discrimination against LGBT students.

This includes repeal of s 38(3) of the SDA, and the addition of the following to s 7B(2):

and (d) if the condition, requirement or practice is imposed, or proposed to be imposed, in relation to a student by an educational institution that is a primary school or a secondary school and that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed:

³ Proposed s 46(3)(a).

⁴ Proposed s 46(3)(b).

⁵ Proposed s 46(4)(a).

⁶ Proposed s 46(4)(b).

- (i) whether the condition, requirement or practice is imposed, or proposed to be imposed, in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed; and
- (ii) whether, in imposing, or proposing to impose, the condition, requirement or practice, the educational institution has regard to the best interests of the student.

PIAC, together with the Human Rights Law Centre, and anti-discrimination academics and legal practitioners, wrote an open letter to the Commonwealth Attorney-General, the Hon Christian Porter MP, on 8 November 2018 (see **Attachment B**).

In this letter, we expressed our serious concerns about the Government's proposed reforms.

Fundamentally, they would not adequately protect LGBT students against discrimination, because they fail to amend the general religious exception in s 37(1)(d) that would appear to apply to religious educational institutions. This should be amended in the way suggested above.

We also expressed significant concerns about the proposed new s 7B(2)(d) and its amendment to the existing test for indirect discrimination in relation to religious schools.

This includes because:

The existing exception in s 38(3) is limited to discrimination on the ground of a person's sexual orientation, gender identity, marital or relationship status or pregnancy, but the proposed amendment would not be so limited.

The proposed amendment to s 7B would introduce a religious consideration in respect of all attributes – sex, intersex status, and potential pregnancy as well as those covered in s 38(3). This is well beyond the announced policy intention, and at odds with what has been reported as a recommendation of the 'Ruddock' religious freedoms review.

The addition of s 7B(2)(d) is not only unnecessary, but it would also increase complexity and confusion around the operation of indirect discrimination under the SDA. As stated in the letter:

Even if the scope of the amendment was confined to the attributes covered by s 38(3), the addition of further factors to the test of reasonableness adds unnecessary complexity to defining indirect discrimination, will distort the existing test for reasonableness, and will actually fail to adequately protect LGBT students from discrimination.

The current law allows for schools to impose reasonable conditions on students to promote the school's values, through the existing definition of indirect discrimination in the Act. Under the law as it is, a religious school is able to impose a reasonable condition, requirement or practice that has, or is likely to have the effect of disadvantaging LGBT students.

The current test for reasonableness in the SDA is inclusive, and the factors that a court is required to take into account are objective:

- (a) The nature and extent of the disadvantage resulting from the actions of the respondent;
- (b) The feasibility of overcoming or mitigating the disadvantage; and
- (c) Whether the disadvantage is proportionate to the result sought by the respondent.

At odds with this approach, the proposed amendment inserts two subjective criteria, distorting and undermining the objective inquiry required by the definition and the emphasis it places on proportionality.

Australian anti-discrimination legislation is notoriously complex. It is an unfortunate feature of our jurisprudence that many court decisions have further complicated the law, rather than simplifying it. The proposed amendment will introduce further unnecessary complexity and uncertainty.

6.2 Australian Greens Discrimination Free Schools Bill 2018

PIAC notes the Discrimination Free Schools Bill 2018, as introduced by Senator Di Natale on behalf of the Australian Greens, proposes amendments to the SDA that are consistent with those we have recommended above.

We also note that the Greens' Bill would amend ss 153(2), 195(2), 351(2) and 772(2) of the Fair Work Act, similar to the position we have recommended earlier.

However, we note that, as currently drafted, these amendments would not allow discrimination by religious organisations in terms of employment based on religious belief. We believe that this is a necessary change to achieve a proper balance with the right to freedom of religion, as explained above.

We also note that the Bill's proposed amendments to the Fair Work Act, by broadly prohibiting discrimination in all religious educational institutions, may include places of education of ministers of religion.

This is inconsistent with the specific exception for the 'training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order' in s 37(1)(b) of the SDA. For consistency, it may be appropriate to make an amendment to the Bill to ensure places of education of ministers of religion are subject to an exemption on the same terms as the SDA.

Finally, we note that the Discrimination Free Schools Bill 2018 amends those sections of the Fair Work Act that create protections against unfair dismissal and adverse treatment. However, it does not also add gender identity or sex characteristics to these sections – something which PIAC believes should also be done in the interests of consistency (see below).

7. Other issues

7.1 Religious belief as a protected attribute

In our submission to the Religious Freedom Review in February 2018 (see **Attachment A**), PIAC supported improved protection for religious freedom and advocated for a national Human Rights Act as the appropriate vehicle to better protect human rights and provide a framework within which the exercise of balancing potentially competing rights can be undertaken.

Alternatively, we suggested that protection of religious freedom could be improved by the introduction of 'religious belief' as a protected attribute in anti-discrimination legislation in jurisdictions where it does not already exist. This includes the Commonwealth, New South Wales and South Australia. At the Commonwealth level, this could be achieved by the consolidation of Commonwealth anti-discrimination legislation into one act (as contemplated in the Exposure Draft Human Rights and Anti-Discrimination Bill 2012). Alternatively, it could involve the creation of a stand-alone Religious Discrimination Act.

If religious belief is introduced as a protected attribute in Commonwealth anti-discrimination legislation, it should, consistent with PIAC's position above, include exceptions providing religious schools with the ability to discriminate on the basis of religious belief regarding the admission of students and the employment of teachers and other staff.

However, we caution that the establishment of a consolidated Commonwealth anti-discrimination bill, or a stand-alone religious discrimination act, should not be used as an opportunity to create positive rights for people to discriminate against others (including LGBT people) because of the discriminator's religious beliefs. Allowing such discrimination would not be a proportionate measure for the protection of religious freedom and would constitute an unjustifiable infringement on the right to non-discrimination.

We also do not believe that the current reforms of the SDA and Fair Work Act should be delayed while broader reforms to Commonwealth anti-discrimination legislation are developed. The issue of discrimination against LGBT students, teachers and staff is a discrete one, and should be progressed as a matter of priority before the commencement of the 2019 school year.

7.2 Discrimination in areas other than religious schools

As discussed above, PIAC regards the *Anti-Discrimination Act 1998* (Tas) as an appropriate model for balancing the right to religious freedom with the protection of other groups, including LGBTI people, against discrimination.

Importantly, the Tasmanian approach is not restricted to religious schools but applies to religious organisations across a wide range of areas, including health, community and social services. Overall, religious organisations are only permitted to discriminate on the

basis of the religious belief in terms of employment, employment in religious schools, admission of students in religious schools, and participation in religious observances.⁷

The Tasmanian Act does not provide a broad-based ability to discriminate in terms of people accessing services. And it does not allow discrimination on the basis of other attributes, including sexual orientation, gender identity or sex characteristics.

While we note that the current inquiry, and potential legislation, is focused on the question of discrimination against LGBT students, teachers and other staff in religious schools, we suggest that further consideration should be given by the Committee to supporting the removal of religious exceptions across the other areas where it exists.

7.3 Protected attributes in the *Fair Work Act*

As discussed above, PIAC supports the protection of teachers and other staff against discrimination by religious schools. In addition to amending SDA, this also requires amendments to the Fair Work Act, including ss 153, 195, 351 and 772.

PIAC suggests that, if the Committee is to support amendments to the Fair Work Act to protect teachers against discrimination, it should also use this opportunity to support the addition of other protected attributes to these sections.

Specifically, trans, gender diverse and intersex people are currently not protected against adverse treatment, or unfair dismissal, in the Fair Work Act.

We therefore believe the Committee should support adding gender identity (as defined in the SDA)⁸ to the list of protected attributes in these sections.

We also call on the Committee to support adding sex characteristics (as defined in the Yogyakarta Principles plus 10)⁹ to the list of protected attributes, to ensure intersex employees are not discriminated against because of their variations in sex characteristics.¹⁰

If gender identity and sex characteristics are added to ss 153, 195, 351 and 772, then they should also be added to s 578(c) to ensure that elimination of discrimination against these groups should be an aim of the Fair Work Commission.

Recommendation 2

The Committee should recommend that the Fair Work Act 2009 (Cth) be amended to add the protected attributes of gender identity and sex characteristics to ss 153, 195, 351, 772 and 578.

⁷ Section 52.

⁸ 'Gender identity means the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth' (s 4).

⁹ Understanding 'sex characteristics as each person's physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty'.

¹⁰ Sex characteristics is preferred to intersex status, and is the protected attribute called for by intersex advocates in the March 2017 Darlington Statement, including article 9: 'We call for **effective legislative protection** from discrimination and harmful practices on grounds of **sex characteristics**' (emphasis in original).